

# The best interests of the child in cultural and religious practices in respect of child marriages

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Last but most importantly, My Father, for the strength and endless mercies.

## **Dedication**

For Tapfuma

I carry you in my heart always.

## **Abstract**

Child marriage has become a widely spread practice across the globe especially in some parts of Asia and in Africa. It involves the marriage of young children below the age of eighteen years. In most cases the marriages are arranged by the families of the bride and the groom or the child is forced into entering the marriage. A number of children's rights are violated by the practise of child marriage. These include rights such as the rights to education, the right to equality, the right to dignity are infringed upon. Child marriage deprives a child of enjoying her childhood and has a number of other negative effects on the health of that child. It seems that parents as guardians of children, seem to be responsible for marrying off their children. They abuse their parental responsibilities and rights over their child when they marry off their girl child.

A number of international instruments addresses the need to protect children's rights which include the need to protect children from harmful cultural practices such as child marriage. The Convention on the Rights of the Child is one of the most significant treaties in respect of rights. It provides for the consideration of the best interests of the child in all matters affecting the child. South Africa and Zimbabwe have ratified a number of international instruments which advocate for the protection of children's rights. The two countries are amongst the African countries that have cultural groups that practise child marriage. The constitutions of both jurisdictions afford everyone the right to practise his or her culture and religion for as long as such practices do not violate other constitutional rights. Further, they also require the best interests of the child to be considered paramount in all matters affecting the child. Nevertheless, although both countries provide a legislative framework for the prohibition of child marriage, children's rights are constantly violated by parents and guardians who use culture and tradition as a reason for marrying off their children.

## **Keywords**

Best interests of the child, parental responsibilities and rights, child marriage, child rights, customary law, traditional practices, culture.

## **Opsomming**

Kinderhuwelike is wêreldwyd 'n algemene praktyk, veral in sommige dele van Asië en Afrika. Dit behels 'n huwelik van jong kinders onder die ouderdom van agtien jaar. In die meeste gevalle word die huwelike deur die families van die bruid en bruidegom gereël of word die kind in 'n huwelik gedwing. 'n Hele aantal kinderregte word deur die praktyk van kinderhuwelike geskend. Dit sluit in regte soos die reg op onderwys, die reg op gelykheid en die reg op waardigheid. 'n Kinderhuwelik ontnem 'n kind van die genieting van haar kindertyd en het 'n aantal ander negatiewe gevolge op die gesondheid van daardie kind. Dit wil voorkom asof ouers, as die beskermers van kinders, verantwoordelik is vir die uithuwelik van hul kinders. Hulle misbruik hulle ouerlike verantwoordelikhede en regte teenoor hul kind wanneer hulle hul minderjarige dogter uit-huwelik?

Daar is 'n aantal internasionale instrumente wat die nodigheid daarvan om kinders se regte te beskerm hanteer. Dit sluit in die nodigheid om kinders te beskerm teen skadelike kulturele praktyke soos kinderhuwelike. Die Konvensie oor die Regte van die Kind (*Convention on the Rights of the Child*) is een van die belangrikste verdrae ten opsigte van regte. Dit maak voorsiening vir die inagneming van die beste belang van die kind in alle kwessies wat die kind raak. Suid-Afrika en Zimbabwe het 'n aantal internasionale instrumente bekragtig wat die beskerming van kinders se regte bepleit. Dié twee lande is van die lande in Afrika met kulturele groepe waar kinderhuwelike die gebruik is. Albei regsgebiede se grondwte bied elkeen die reg om sy of haar kultuur en godsdienste te beoefen mits sodanige praktyke nie ander konstitusionele regte skend nie. Voorts vereis hulle ook dat die beste belang van die kind as belangrikste geag word in alle kwessies wat die kind raak. Hoewel albei lande oor'n wetgewende raamwerk vir die verbod op kinderhuwelike beskik, word kinders se regte voortdurend geskend deur ouers en voogde wat kultuur en tradisie as rede gebruik vir die uithuwelik van hul kinders.

## **Slutelwoorde**

Beste belang van die kind, ouerlike regte en verantwoordelikhede, minderjarige huwelik, kinderregte, gewoontereg, tradisionele praktyke, kultuur.

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## Chapter 1

### 1.1 Background

The need to protect children, a vulnerable group in the human populace has become a matter of particular importance and an array of global deliberations which have led to the emergence of various international instruments.<sup>1</sup> Such instruments are centred on the need to protect children's rights, including *inter alia* the protection of children from harmful cultural practices. Some of these instruments include the Convention on the Elimination of All Forms of Discrimination against Women, 1981 (hereafter CEDAW),<sup>2</sup> the African Charter on the Rights and Welfare of the Child, 1990 (hereafter the ACRWC),<sup>3</sup> and the Convention of the Rights of the Child, 1989 (hereafter the CRC).

While these instruments create an elaborate rights framework there can also create potential conflict with other rights that exist also in relation to cultural practices. Such practices are diverse in Africa and include the practice of child marriage which involves the formal or informal marriage of children that are below the age of 18 years<sup>4</sup>, while at times such marriages could be arranged by the families.<sup>5</sup> There are also instances where such marriages are forced upon children with the result that the voice of the child cannot be heard.<sup>6</sup> In these circumstances parents or guardians of the child make the decision on behalf of the child and this could potentially violate a number of children's rights. Writers have defined child marriage differently but the underlying ideologies remain the same. Armstrong defines child marriage as "a practice of coercing or deceiving or forcibly giving out a child into a marriage at an age when she is incapable of understanding the nature of marriage".<sup>7</sup> Vogelstein submits that child marriage is "a formal customary union in which both parties are under the age of

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<sup>1</sup> Anon date unknown <http://www.loc.org>

<sup>2</sup> United Nations, Treaty Series, vol. 1249 13.

<sup>3</sup> OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>4</sup> Anon date unknown <http://www.girlsnotbrides.org>.

<sup>5</sup> Armstrong *Child marriage in Nigeria: the health hazards and socio-legal implications* 10

<sup>6</sup> Children do not give their consent and yet the requirement of a valid marriage is free and full consent by both parties.

<sup>7</sup> Armstrong *Child marriage in Nigeria: the health hazards and socio-legal implications* 10.

eighteen”.<sup>8</sup> UNICEF also defines child marriage as marriage before eighteen years of age.<sup>9</sup>

### **1.2 The right to practise one’s culture in South Africa and Zimbabwe**

The right to practise and participate in cultural practises is a fundamental right in South Africa and Zimbabwe. Section 30 of the Constitution of the Republic of South Africa<sup>10</sup> (hereafter the South African Constitution) provides that “everyone has the right to use their language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”. Similarly, section 63 (b) of the Constitution of Zimbabwe <sup>11</sup> (hereafter the Zimbabwe Constitution) states that “everyone has the right to participate in the cultural life of their choice; but no person exercising these rights may do so in a way that is inconsistent with this section.” These provisions clearly allow people to participate in their cultural practices, yet as with all other rights, such practices may not be in conflict with any provisions of the other rights in the constitutions. Such enjoyment and participation is subject to the limitations inherent in the constitutions. Section 31 of South African Constitution further stipulates that people belonging to any cultural group may not be denied the right, with other members of their community, to enjoy their culture and to maintain cultural groups.

### **1.3 An overview of children’s rights that may be potentially violated by the practice of child marriage**

South Africa’s Bill of Rights and Zimbabwe’s Declaration of Rights have specific measures to protect the rights of children. For example, children have the right to education,<sup>12</sup> the right to freedom of expression (the Zimbabwean provision goes further and explicitly says that children have a right to be heard),<sup>13</sup> the right to be

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<sup>8</sup> Vogelstein *Ending child marriage* 3.

<sup>9</sup> UNICEF <http://www.unicef.org>.

<sup>10</sup> Constitution of the Republic of South Africa, 1996.

<sup>11</sup> Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

<sup>12</sup> S 29(1) (a) of the Constitution of South Africa and s 81(1) (f) Constitution of Zimbabwe Africa respectively.

<sup>13</sup> S 16 of the Constitution of South Africa and s 81 (1) (b) of the Constitution of Zimbabwe.

protected from maltreatment, neglect, abuse and degradation<sup>14</sup> and the right to respect of the dignity of the child.<sup>15</sup> The right to practise one's culture may not infringe fundamental rights of other bearers of rights. The fact that the above rights may be violated when child marriage is practised could imply that the practice is unconstitutional. This implication leads to the constitutional situation in South Africa where conflicting constitutional rights need to be balanced by applying sections of the constitution.<sup>16</sup> It may further be argued that forced and arranged marriages do not take into consideration the most vital provision in the Bill of Rights and the Declaration of Rights pertaining to children which is the best interests of the child.<sup>17</sup>

Furthermore the South African Children's Act<sup>18</sup> recognises and promotes the importance of the best interests of the child.<sup>19</sup> Additionally, in *Jooste v Botha*<sup>20</sup> the South African court held that section 7(1) of the Children's Act which discusses the best interests of the child should be read together with section 28(2) of the South African Constitution. The emphasis on the best interests of the child in the Constitution and in the Children's Act demonstrates the importance of protecting the rights of children. The Zimbabwean Children's Act<sup>21</sup> does not discuss the best interests of the child, but the Constitution of Zimbabwe addresses its importance in section 19(1).<sup>22</sup>

#### ***1.4 Parental duties and the potential clash between culture and children's rights***

Parents and guardians have control over their children and they have the obligation and responsibility to provide their children with a safe and conducive environment in

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<sup>14</sup> S 28 of the Constitution of South Africa and s 81 (1) (e) Constitution of Zimbabwe.

<sup>15</sup> S 10 Constitution of South Africa and s 51 Constitution of Zimbabwe.

<sup>16</sup> Currie and de Waal *The Bill of Rights Handbook* 150, Constitutional rights have boundaries set by the rights of others and by important social concerns such as democratic values. In South Africa s 36 sets out a specific criteria for the justifications of restrictions of the rights in the Bill of Rights.

<sup>17</sup> Both constitutions specify that the best interests of the child are paramount in every matter concerning the child s 28(2) of the Constitution of South Africa and s 81 (2) of the constitution of Zimbabwe.

<sup>18</sup> Children's Act 38 of 2005.

<sup>19</sup> S 7(1) of the Children's Act.

<sup>20</sup> *Jooste v Botha* 2000 2 SA 199 (T).

<sup>21</sup> Zimbabwe's Children's Act of 2002.

<sup>22</sup> It provides that "the state must adopt reasonable policies and measures to ensure that in matters relating to children, the best interest of the children concerned are paramount.

which to grow up.<sup>23</sup> As guardians of children parents and guardians are required by law to protect their children from harm, including harm that emanates from child marriage.<sup>24</sup> However, it appears that some parents do not take into consideration their child's best interests where in some cultures the parents marry off their young girl children to older men as part of their cultural practices. There are two main reasons why this state of affairs is unfortunate and unfair.

- i. Although in other parts of the world, for example in India, both boys and girls are affected by child marriage,<sup>25</sup> statistics show that it is predominantly girl children who are subjected to forced marriages. In Africa, where some cultures take pride in having a male child over a female child boys are afforded the opportunity to enjoy their childhood while denying girls the chance to enjoy their childhood innocence.<sup>26</sup>
- ii. Girls do not have the capacity to decide whether they want to become part of a particular cultural practice or not. Arguably, they are not afforded the opportunity to choose which culture they will follow.

For the reason that economic burdens are inherent in many traditional African societies, poverty is one of the driving forces marrying off a child.<sup>27</sup> In Zimbabwe, for instance, where the currency being used is the American dollar, *lobola* and dowry prices charged in that currency could be seen as a means to sustain a livelihood.

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<sup>23</sup> S 28 (1)(b) of the Constitution of South Africa which states that children have a right to family life further places a duty on parents and family to provide care.

<sup>24</sup> In *Christian Lawyers South Africa v Minister of Education* 2000(4) SA 757 (CC) the Constitutional court dealt with the banishment of corporal punishment in schools. The court referred to the states duty arising from the CRC to take all appropriate measures to protect the child from violence, injury or abuse. Child marriage includes harm on the child and involves sexual and psychological abuse.

<sup>25</sup> UNICEF date unknown <http://www.unicef.org>.

<sup>26</sup> This can be substantiated through the case of *Bhe v Magistrate Khayelitsha & Others* 2005 (1) BCLR 1 (CC). The applicants and public interest organisations challenged inheritance laws that favoured males and disadvantaged girl children to inherit from their deceased' father's estate.

<sup>27</sup> Gaffney-Rhys 2011 *The International Journal of Human Rights* 359.

This study seeks to determine how parents and guardians abuse their parental responsibilities and rights by following the cultural practice of child marriage and how this practice infringes the constitutional rights of children, particularly the girl child.

### ***1.5 Aims of the study***

The aims of the study are as follows:

- i. to analyse the practice of child marriage in South Africa and Zimbabwe and to demonstrate how this practice could violate the rights of children;
- ii. to evaluate the principle of the best interest of the child from an international and regional instruments perspective; and
- iii. to contextualise parental responsibilities and rights and the duties of parents and guardians in relation to minors.

### ***1.6 Research methodology***

This study will employ a desktop based methodological approach. Various books, journal articles, legislation, cases and internet based sources are qualitatively analysed in order to examine the nature of child marriage and how the law addresses or fails to address it. While Zimbabwe is the main focus of the discussion, the study will engage in a comparative analysis that is intended to demonstrate any commonalities in relation to law and the practice of child marriage between South Africa and Zimbabwe. In the end, any commonalities and or divergences on the practice of child marriage are critiqued against the national and international legal frameworks to determine if the cultural practice of child marriage is consistent with requirements to promote the best interests of the child.

### ***1.7 Chapter outline***

The study consists of four chapters. Chapter one is an introductory chapter which includes the introduction and background of the study. A broad and general discussion of child marriage is explored in chapter two where an assessment of the practice of child marriage in South Africa and Zimbabwe is discussed. The South African cultural

practice of *ukuthwala* is discussed in detail in this chapter. The chapter then narrows down the discussion to an analysis of the different marriage laws in Zimbabwe, particularly the Customary Marriages Act, which recognises unregistered marriages while not providing proper regulation of the marriages. The various rights of children that are violated through child marriage are also outlined in this chapter.

Chapter three provides a brief overview of the legal frameworks that inform the study. In particular, international and regional instruments will be qualitatively reviewed for the purpose of distilling the minimum core attributes that inform the principle of the best interests of the child. In order to determine the extent to which parents and guardians are required to promote the best interests of the child, this chapter also discusses the responsibilities and rights of parents and guardians and the national legal frameworks in South Africa and Zimbabwe that relate to children's rights.

The last chapter will draw parallels from the main findings of the study. A synthesis of the law and the customary practice of child marriage is undertaken for the purposes of answering the question of whether the practice can still be tolerated and considered acceptable within the precincts of the requirement to promote the best interests of the child.

## Chapter 2

### Child marriage in South Africa and Zimbabwe

#### 2.1 Culture and the practice of child marriage

There are a number of African countries that practise child marriage. This chapter will focus on South Africa and Zimbabwe respectively. It addresses the incidence of child marriage which grossly affects a number of rights of children. For instance, while it is in the best interests of every child to attain an education (which is a fundamental human right), child marriage infringes upon this right of a girl child as there are typical conjugal duties that come with marriage for a woman.<sup>28</sup> The chapter will first contextualise the role of culture in respect of child marriage. This is followed by a brief discussion of child marriage in South Africa with reference to the cultural practice of *ukuthwala*. Child marriage in Zimbabwe will thereafter be discussed. The practices that will be discussed are *chimutsamapfihwa* (sororate marriage), *kuzvarira* (betrothal) and *kuripa Ngozi* (virgin pledging).

#### 2.2 Introduction

Culture can typically be described as a people's store of knowledge, beliefs, morals, laws, arts and customs.<sup>29</sup> Currie and de Waal define culture as the means of expression of a common sense of identity, values and traditions.<sup>30</sup> As noted in Chapter 1, both the South African and Zimbabwean constitutions provide for the right of persons to participate and practise a culture of their choice.<sup>31</sup> A core value of culture, especially in African societies, is that a recognition of the fact that a person is viewed primarily in his or her relation to his family and his community, in other words, the practising of one's culture could be tied to that of the entire community's culture.<sup>32</sup> As a result, most children are born into one or more cultures. The result is that children born of

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<sup>28</sup> See discussion under para 1.3 on rights that may be potentially violated. Once a woman is married, child bearing is what is expected from her and there is no way that she can be able to go to school while pregnant or with a baby.

<sup>29</sup> Bennett 2007 *Customary law in South Africa* 78.

<sup>30</sup> Currie and de Waal 2005 *The Bill of Rights Handbook* 624.

<sup>31</sup> S 30 of the Constitution of South Africa and s 63 (b) of the Constitution of Zimbabwe.

<sup>32</sup> Bennett 2007 *Customary law in South Africa* 87.

or from different cultures experience cultural practices within those cultures differently. For example, Bennett notes that children in western society enjoy their childhood better because that society appreciates the need for children to play and to be treated as children.<sup>33</sup>

The contrast is evident in some African societies. Instead of girls being afforded the opportunity to enjoy childhood, child marriage “speeds up their growth” and forces them into the role of grown-up married people.<sup>34</sup> For instance, once married, conjugal rights from his young wife will come into play, giving rise to physical abuse and rape in situations of resistance.<sup>35</sup> In some cases, culture and religion are tied and overlap.<sup>36</sup> There are for instance Christian groups which also adopt child marriage as part of their religion. In Zimbabwe there is the Johane Marange sect which is well known to practise child marriage.<sup>37</sup> The following is a quotation from a testimony of a 15 year old Zimbabwean girl who was a victim of child marriage which was influenced by religious beliefs:

My father, a respected member of the Johane Marange sect, forced me into an early and arranged marriage to alleviate poverty and sustain our family. My husband already had four other wives and several children, and he frequently abused me physically and psychologically. Sadly, my mother always said I had to get used to that pain because that is what marriage means.<sup>38</sup>

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<sup>33</sup> Bennet 2007 *Customary law in South Africa* 296.

<sup>34</sup> UNICEF 2013 <http://www.unicef.org>.

<sup>35</sup> Tangri date unknown <http://www.breakthrough.tv>

<sup>36</sup> Nigeria may serve as an illustration of how religion influences child marriage. Islam is a religion widely followed by a large number of the Nigerian population and follows its own distinctive legal system Sharia law. Sharia law is guided by fixed and immutable sources such as the *Quran*, *Sunna*, *Ijma*, *Qiyas* and the ideologies of Prophet Mohammed. In relation to child marriage, Iyabode conveys that Islamic jurists have dealt with the issue of age of marriage based on the interpretations of the Quran. According to these jurists, a child “experiencing [a] wet dream” or “experiencing [a] monthly course,” as stated in the Quran in relation to the age of marriage, indicates the age of maturity for males and females. On the other hand, it is also permissible for a girl who has not reached puberty to be married. This was the case with Prophet Mohammed who married his wife Aisha when she was only 12 years old. In some cases, however, there are glimmers of hope that courts might intervene. A Nigerian court recently struck out a case against a 15-year-old girl accused of killing her 35-year-old husband with rat poison. The young girl had been forced by her father, who is a strong Muslim, to enter into a marriage when she was 14 years old. Needless to say, it is essential that children are protected from negative/harmful social, cultural and religious practices in order for them to realise their full potential.

<sup>37</sup> Sauti 2014 <http://www.lazarussauti.wordpress.com>.

<sup>38</sup> Sauti 2014 <http://www.lazarussauti.wordpress.com>.

There are quite a number of apostolic churches in Zimbabwe that practise child marriage in the guise of exercising their rights to religion.<sup>39</sup>

Harm is typically persistent in practices and behaviour that are based on discrimination on the basis of sex, gender, age and such harm often involves violence and causes physical and or psychological harm or suffering.<sup>40</sup> The consequences of these practices causes immediate physical and mental harm on the child and often have the effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children.<sup>41</sup> There are also negative impacts on their dignity, physical, psychosocial and moral integrity and development, participation, health, educational, economic and social status.<sup>42</sup>

Harmful cultural and religious practices are not only an issue in South Africa and Zimbabwe but also regionally and internationally.<sup>43</sup> Several studies indicate that accurate data on the true extent of child marriage are challenging to acquire because most of such marriages are not registered or reported.<sup>44</sup> This notwithstanding, there is evidence that some African countries recognise the vulnerability of children and importantly, the potential clash that could emerge between the right to practise culture and other constitutional rights.<sup>45</sup> For this reason some countries including South Africa and Zimbabwe, have constitutionalised the right to practise culture within constitutional limits.<sup>46</sup> Although the right to culture is recognised some communities still practise child marriage regardless of the fact that it violates children's rights. To

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<sup>39</sup> Swarayi 2013. Arranged child marriages in Christian churches defy Zimbabwe's new Constitution <http://www.globalpressjournal.com>. Johanne Masowe apostolic church, Johanne yekwa Marange apostolic church are some of the Apostolic churches well known to practise child marriage.

<sup>40</sup> WHO 1996 <http://www.advocatesforyouth.org>. Practices such as female genital mutilation, forced male traditional circumcision and child marriage are examples of harmful practices.

<sup>41</sup> See discussion under par 2.6.

<sup>42</sup> Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, par 14.

<sup>43</sup> United Nations Children's Fund, Ending Child Marriage: Progress and prospects, UNICEF, New York, 2014. It is estimated that globally, about 64 million young women (aged 20-24) were married before the age of 18.

<sup>44</sup> Sibanda 2011 "Married too soon: Child marriage in Zimbabwe" 2.

<sup>45</sup> Himonga 2008 African customary law and children's rights 73.

<sup>46</sup> See s 30 and 63(b) of the constitutions of South Africa and Zimbabwe respectively. See further 1.2 above.

understand this, a brief overview of the practise of child marriage in South Africa and Zimbabwe will be provided.

### **2.3 A South African cultural practice: Ukuthwala**

The South African Constitution recognises customary law as part of the South African law and provides for the enactment of legislation that recognises marriages concluded traditionally or under a system of religious laws.<sup>47</sup> There is however a qualification to that provision and it indicates that the recognition of such marriages should be consistent with other constitutional provisions.<sup>48</sup> In South Africa a common old traditional practice of child marriage, *ukuthwala*, is still prevalent in parts of the country. *Ukuthwala* is a Xhosa word that literally means to carry.<sup>49</sup> Although the word *ukuthwala* originated from the Xhosa tribe, this cultural practice also exists in other tribes and cultures such as the Zulu and the Sotho. It refers to the practice of marriage by abduction, which involves the ambushing or capturing of a girl and taking her to a man's home in a bid to marry her.<sup>50</sup> The capturing is usually done by a group of people, one of whom is the future husband. Sometimes the girl would be caught unaware, but in other instances she is taken after a plan and agreement has been reached between her parents and the groom's parents.<sup>51</sup> On the same day of *ukuthwala*, those who abduct the girl are required to report to the girl's home so that the parents are aware of the girl's well-being.<sup>52</sup>

#### *2.3.1 Forms of ukuthwala*

Mwambene and Sloth-Nielsen distinguish between three forms of *ukuthwala*.<sup>53</sup> Firstly, *ukuthwala* can occur where a girl is aware of the planned abduction and there is approval between the parties where the girl or woman being abducted conspires with her suitor. The force used that is used in the act of abduction is therefore for the sake

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<sup>47</sup> Ngidi "Upholding the best interest of the child in South African customary law" 226.

<sup>48</sup> S 15(3) (a).

<sup>49</sup> Koyana 1980 *Customary law in a changing society* 1.

<sup>50</sup> Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice* 5.

<sup>51</sup> Department of Justice and Constitutional development date unknown <http://www.justice.gov.za>.

<sup>52</sup> Thornberry 2013 <http://www.customcontested.co.za>.

<sup>53</sup> Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice* 7.

of performance only.<sup>54</sup> Therefore in such instances the practice is equated to elopement since there is agreement between the participating parties and the girl consents to the whole idea and process. The issue of consent is additionally important because *ukuthwala* is a preliminary procedure to a customary marriage hence where there is no consent there cannot be a valid customary marriage.<sup>55</sup> Secondly, *ukuthwala* can occur where the families would agree on the anticipated marriage, but the girl is unaware of such an agreement.<sup>56</sup> This usually happens where the girl does not agree with the suitor that her family or parents would have chosen for her. There girl in this type of *ukuthwala* does not consent to the marriage but she is however forced to marry and watched closely until she gets used to the idea of marriage.<sup>57</sup> The issue of consent is difficult to argue in this instance because the girl eventually gets accustomed to the idea of marriage and therefore this can be viewed to be a tacit agreement or consent. This form hence is an agreement between the parents and families and not the bride or the groomsman.

The third form is the form that will be mainly discussed in this study. This is where the custom occurs against the will of the bride. Under this form, a girl is taken to the family home of the young man by force. Emissaries are then sent to her family to open marriage negotiations.<sup>58</sup> In this form of *ukuthwala*, there is no initial consent from either the girl or her parents or guardian. In addition, in its most abusive form, the forced abduction can expose the girl to rape by her 'husband' and to actual or threatened violence in order to keep her in the relationship.<sup>59</sup> Because the girl does not consent at all to this marriage, this form of *ukuthwala* can be regarded as a forced marriage and it violates a number of human fundamental rights.

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<sup>54</sup> Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice* 7.

<sup>55</sup> Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice* 7.

<sup>56</sup> Van der Watt & Ovens Contextualizing the practice of *Ukuthwala* within South Africa <https://www.researchgate.net/publication>

<sup>57</sup> Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice* 8.

<sup>58</sup> Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice* 9.

<sup>59</sup> Sloth-Nielsen and Mwambene 2011 *Journal of Family Law and Practice* 9.

### 2.3.2 *Ukuthwala as a violation of children's rights*

The potentially disturbing aspect of this practice is that girls as young as 12 years may be victims and are made to marry older men.<sup>60</sup> *Ukuthwala* violates a number of children's rights, including the right to dignity, equality, bodily integrity and the right to education.<sup>61</sup> The parents of the abducted child are major role players in the process by accepting the *lobolo* payment and by marrying-off their child. Such marriage arrangements deprive the child of her right to enjoy her childhood and burdens her with the responsibility of being a wife, sometimes with a husband old enough to be her father, and in most instances to look after and serve other children and in-laws.<sup>62</sup> The loss of opportunity to experience adolescence, the forced sexual relations and the denial of personal development resulting from early marriage have a profound psychological and emotional impact on the child.<sup>63</sup>

In a recent case of *Jezile v The State and Others*<sup>64</sup> (hereafter the *Jezile* case) the first *ukuthwala* based conviction was handed down by a Western Cape court. The victim was only 14 years old when she was abducted from her home in the Eastern Cape. She was forced into a marriage with a man named Jezile during which he held her captive and beat and raped her.<sup>65</sup> A small amount of money (R8000) was paid to the girl's uncles as *lobola* and she was handed over to her new husband. While at her husband's house the child was ill-treated and she was unhappy, forcing her to escape and return to her home.<sup>66</sup> Nonetheless, her uncle and grandmother who participated in the negotiations for Jezile's bride, took her back to him. She later managed to escape again and this time she went to the police, leading to the arrest of Jezile. He was convicted of rape, human trafficking and assault in 2013 and sentenced to 22 years in jail.

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<sup>60</sup> Mubangizi 2012 *Journal of International Woman's Studies* 40.

<sup>61</sup> See discussion under section 2.6.

<sup>62</sup> Maluleke 2012 *PELJ* (15)1 11.

<sup>63</sup> Tiwari 2004 *Child abuse and Human rights* 41.

<sup>64</sup> *Jezile v The State and Others* 2015 A127/2014 ZAWCHC 31.

<sup>65</sup> Rickard 2015 <http://www.tradingplaces2night.co.za>.

<sup>66</sup> Par 10.

The Court was directed by a number of international instruments and legal prescripts in South Africa in reaching its decision to convict the accused.<sup>67</sup> The Court emphasised that the practice of *ukuthwala* cannot be protected under the law as it violates children's rights.<sup>68</sup> The Court further indicated that the practice of *ukuthwala* included some acts which are prohibited under the Sexual Offences Act.<sup>69</sup> The defence of the accused that he did not rape the child because he was married to her was found to be in contravention of section 56(1) of the Sexual Offences Act, which stipulates that a reliance on the existence of a marital or other relationship is not a valid defence for a charge of rape.<sup>70</sup> Furthermore it was put forward that *ukuthwala* is not a recognised customary marriage as it does not meet the requirements of a valid customary marriage.<sup>71</sup> The Recognition of Customary Marriages Act<sup>72</sup> was enacted to recognise customary marriages in accordance with South Africa's constitutional obligation and contains mandatory requirements for a valid customary marriage. Section 3(1) lists these three requirements as follows:

- the prospective spouses must both be over the age of 18 years;
- the prospective spouses must both consent to be married to each other under customary law; and
- The marriage must be negotiated and entered into, or celebrated, in accordance with customary law.

South Africa recognises international law and it has ratified a number of conventions which also advocate for the prohibition of child marriage. Conventions such as the CRC, the ACRWC and CEDAW are some of the instruments that were pointed out in the judgement.<sup>73</sup> The court held that:

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<sup>67</sup> Par 57-69 of the *Jezile* case.

<sup>68</sup> Section 12(1) of the Children's Act which stipulates that every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

<sup>69</sup> Sexual Offences Act 32 of 2007.

<sup>70</sup> Par 63 of the *Jezile* Case.

<sup>71</sup> Par 65.

<sup>72</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>73</sup> Par 68-69 highlights the international instruments at which the courts looked into.

However, in our view, it cannot be countenanced that the practices associated with the aberrant form of *ukuthwala* could secure protection under our law. We cannot therefore, even on the rather precarious ground of the assertion by the appellant of a belief in the aberrant form of *ukuthwala* as constituting the “traditional” customs of his community, which led to a “putative customary marriage,” find that he had neither trafficked the complainant for sexual purposes (as defined) nor committed the rapes without the necessary intention.<sup>74</sup> We can furthermore find no fault with the trial court’s credibility findings, nor with its reasoning and conclusions in respect of the convictions on both the trafficking and rape counts.<sup>75</sup>

It is submitted that *ukuthwala*, although a long standing cultural tradition, is harmful to children. For example, in the *Jezile* case the child did not want to get married and wanted to continue going to school but was coerced by her guardians.<sup>76</sup> The girl’s cries and pleas with her uncles not to be sent away with this man were ignored. Guardians and parents are legally obliged to protect their children. Such protection extends to sexual exploitation of the child.<sup>77</sup> However, in some African traditions culture supersedes and undermines the wishes and rights of children.<sup>78</sup> The Sunday Times spoke to dozens of young girls who became victims of *ukuthwala*. Some of these experiences were reported as follows:

“I screamed and told them to let me go, but they told me to shut up as my husband was waiting for me”

“I screamed until my voice went faint...my mother did not do a thing”

“It feels like I was sold like a slave and that my mother doesn’t love me”

“Elders shoved us (her and the man) into a hut and told me how this man was now going to make me his wife...It was painful. I cried for days”

“I cried; this man could have been my father and he was so frail and sickly”

“I didn’t want to marry a madala; I just wanted to go to school”

The above statements show that this form of practice is prejudicial and infringes on the freedom and security of young girls. It violates children’s rights and human rights

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<sup>74</sup> Par 95.

<sup>75</sup> Par 96.

<sup>76</sup> Par 8 explains how the child resisted to remove her uniform but was forcefully undressed and taken to the husband’s house.

<sup>77</sup> See 2.4 above.

<sup>78</sup> Kaime 2005 *AHRLJ* 221.

too and hence such a practice should be abolished and any persons involved should be punishable under the law.

As noted earlier, once a woman is married she has a duty to have sexual relations with her husband despite her age.<sup>79</sup> This obligation flows from the payment of *lobola* for her.<sup>80</sup> Sex with a minor constitutes rape while sex with a minor below the age of 16 is statutory rape.<sup>81</sup> Children forced into such kind of marriages suffer a great deal and they are continuously raped<sup>82</sup> and abused by perpetrators who use culture and tradition as an argument.<sup>83</sup> The relevance of section 28(2) of the South African Constitution on the (best interests of the child) was highlighted in the *Jezile* judgement in explaining the right to culture and human rights in relation to children's rights.<sup>84</sup> The case also elaborated on a number of rights which are provided by South African legislation dealing with customary law, *ukuthwala* and children's rights. For instance, the nature of *ukuthwala* has been associated with trafficking and kidnaping because it involves unlawful capturing of the child. Such acts are crimes punishable by a court of law. The Children's Act defines trafficking in section 1 as:

(a) the transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –

(i) by any means, including the use of threat, force or other forms of coercion, abduction, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

(ii) due to a position of vulnerability, for the purpose of exploitation

The Act further provides in section 284(1) that child trafficking is prohibited and any contravention is punishable under the law. *Ukuthwala* does not constitute a valid

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<sup>79</sup> See fn 36.

<sup>80</sup> Par 23 of the *Jezile case*.

<sup>81</sup> S 3 of the Sexual offences Act, *ukuthwala* promotes rape because it involves having sexual relations with a minor.

<sup>82</sup> It becomes rape the moment it is forced upon someone who does not consent. Children, as shown in the *Jezile case*, rarely consent to the sexual relations.

<sup>83</sup> In par 54 of the *Jezile case*, his counsel submitted that "We were of the view that, given the nature and the importance of the customary law issue raised in the appeal and the constitutional implications thereof, it was appropriate that relevant state institutions, organizations and/or experts on the practice of *ukuthwala* in customary law be invited to apply to assist the court as *amicus curiae* on the specific issues of customary marriages and the practice of *ukuthwala*".

<sup>84</sup> Par 59.

marriage and it also involves punishable crimes such as child trafficking, kidnapping and rape.

## **2.4 Child Marriage in Zimbabwe**

### *2.4.1 Background*

Child marriage is common in Zimbabwe. Statistics show that 21% of children (mostly girls) are married before the age of 18.<sup>85</sup> The majority of such child marriages in Zimbabwe continues to be predominant in the rural parts of the country.<sup>86</sup> A 2015 United Nations Children's Fund (UNICEF) report provided statistics which indicated that the area most affected by child marriage in Zimbabwe is Mashonaland Central which leads with 50%. Other provinces in Zimbabwe are also affected, with Mashonaland West having a 42% incidence of child marriage. Masvingo has 39%, Mashonaland East 36%, Midlands 31%, Manicaland 30%, Matabeleland North 27%, Harare 19% and Matabeleland South 18%. Bulawayo has the lowest prevalence with about 10%.<sup>87</sup> Yet, Zimbabwe has ratified a number of international instruments that advocate and promote the protection of the rights of the girl child as well as those that condemn child marriages.<sup>88</sup>

The most prominent reason for the high incidence of child marriage is poverty, and with the current economic strains in Zimbabwe the girl child has become a means of survival for poor families.<sup>89</sup> Parents usually agree to child marriage so as to get a means of survival that they will acquire from the payment of *lobola* (dowry) in exchange for their daughter. In fact most parents believe that by marrying off their daughter, her position will become better and eventually support the rest of her family.<sup>90</sup> In other cases marrying off the child is a way of disposing another mouth to

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<sup>85</sup> Langa 2014 <https://www.newsday.co.zw> according to a 2012 report based on data collected by the United Nations Population Fund (UNFPA) during the years 2000 to 2011.

<sup>86</sup> Girls not Brides date unknown <https://www.grilsnotbrides.org>.

<sup>87</sup> United Nations Children's Fund (UNICEF) "State of the World's Children" Report (2015).

<sup>88</sup> Zimbabwe is party to CRC and ACRWC. It ratified the CRC on 11 September 1990 with no reservations and ACRWC on 1 January 1995 with no reservations.

<sup>89</sup> Masinire 2015 <http://herzimbabwe.co.zw>.

<sup>90</sup> Masinire 2015 <http://herzimbabwe.co.zw>.

feed from the little there is to survive on.<sup>91</sup> Religious factors also play a major role in child marriage in Zimbabwe. For instance, the apostolic churches (*mapostori*) have a strong reverence for a child.<sup>92</sup> Moreover most of these apostolic churches practise polygamous marriages with the majority of the marriages unregistered.<sup>93</sup>

#### 2.4.2 Marriage laws in Zimbabwe

Zimbabwe does not have as elaborate a legal framework regulating culture and child marriage as South Africa. The Constitution of Zimbabwe<sup>94</sup> states that every person who has attained the age of 18 years has the right to found a family.<sup>95</sup> This provision indicates that children below the age of 18 years are not legally competent to enter into any marriage because they are too young. This means that the state must adopt policies and measures, within the limits of the resources available to it, to ensure that children are not placed under circumstances that will risk their health, education, growth and social development.<sup>96</sup> Furthermore, the Constitution states that no person shall be forced into a marriage without her consent.<sup>97</sup> Because child marriage is typically concluded with a minor below the age of 18 years such a marriage would *prima facie* be unconstitutional.

In terms of the classification of marriages there are three main types of marriages in Zimbabwe. These are civil marriages, registered customary law marriages and unregistered customary marriages.<sup>98</sup> The civil marriage prohibits the parties from entering into other marriages during the existence of their civil marriage. Such marriages are by the Marriages Act.<sup>99</sup> The registered customary marriage is regulated

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<sup>91</sup> Masinire 2015 <http://herzimbabwe.co.zw>.

<sup>92</sup> Sibanda 2011 "Married too soon: Child marriage in Zimbabwe" 2.

<sup>93</sup> Mutangi T 2008 *African Human Rights Law Journal* 538.

<sup>94</sup> Constitution of Zimbabwe Amendment 2013.

<sup>95</sup> S 78(1).

<sup>96</sup> S 19(3) (b) (ii) of the Constitution of Zimbabwe.

<sup>97</sup> S 78(2).

<sup>98</sup> Mutangi *AHRJ* 538.

<sup>99</sup> Marriages Act Chapter 5: 11 s 20 gives guardians the responsibility to consent for a marriage involving a minor. Further, s 21 states that "where a marriage of a minor which requires the consent of his legal guardian or legal guardians or the consent of a judge under section twenty is contracted without such consent, the marriage shall not by reason of that fact be void". Such provisions conflict with the constitutional provisions which specifically prohibits the marriage of children below 18 years.

by the Customary Marriages Act,<sup>100</sup> while unregistered customary marriages remain unregistered. However, in cases of inheritance, divorce and custody of children the Customary Marriages Act does provide guidelines for unregistered customary marriages.<sup>101</sup> Most customary marriages are polygamous in nature and in some cases younger wives are victims of abuse from the older wives.<sup>102</sup> For minors that have just been married off, this is an obvious burden.

## **2.5 Types of child marriage existing in Zimbabwe**

### *2.5.1 Kuripa ngozi or virgin pledging*

One type of child marriage that is commonly practised in Zimbabwe is *kuripa ngozi* or virgin pledging. The practice involves a young girl being sent off by her parents or family to get married to an older man in the name of appeasing dead spirits.<sup>103</sup> It is seen as a compensatory way of resolving family disputes in traditional families, especially amongst the Shona people. The compensation happens when, for instance, one commits murder and the family of the deceased demands a young girl (a virgin) from the offender's family, to be married into the deceased's family as compensation.<sup>104</sup> It is believed amongst the Shona people that failure to appease the spirit of the dead will bring misfortune to the accused and his clan.<sup>105</sup> It is through this practice that young girls are married into polygamous marriages and girls as young as 14 years fall victim to these practices.<sup>106</sup> In 1999 there was a reported case of *kuripa ngozi*. Felicitas Nyakama, Nesta Maromo, Juliet Muranganwa, Precious Maboreke and Perseverance Ndarangwa who were then between the ages of seven and 15 were offered by their parents to Gibson Kupemba's family as compensation for his murder

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<sup>100</sup> Customary Marriages Act Chapter 5:07 in s 15 states that "any person who by force, intimidation or other improper means compels or attempts to compel any African female to enter into a marriage against her will shall be guilty of an offence and liable to a fine not exceeding one hundred dollars or, in default of payment, to imprisonment for a period not exceeding twelve months".

<sup>101</sup> S 3 of the Customary Marriages Act stipulates that "marriages contracted under customary law on or after the 1st February, 1918, and before the 1st January, 1951, which was not registered under the Native Marriages Act (Chapter 79 of 1939) shall, subject to subsection (2) of section seven, be regarded as a valid marriage".

<sup>102</sup> Anon 2014 <http://www.zwla.co.zw>.

<sup>103</sup> Dete 2008 <http://www.zimbablog.com>.

<sup>104</sup> Dete 2008 <http://www.zimbablog.com>.

<sup>105</sup> Anon 2015 <http://www.herald.co.zw>.

<sup>106</sup> Hanzi 2006 *Sexual abuse and exploitation of the girl child through cultural practices* 32.

(hereafter the *Kupemba* case).<sup>107</sup> The girls' relatives killed Kupemba to prepare *muti*, a traditional medicine which is sometimes made from body parts.<sup>108</sup>

The practice of *kuripa ngozi* is widespread throughout the country even though it is a punishable offence under Zimbabwe's Domestic Violence Act.<sup>109</sup> Section 3 of the Act provides in detail the meaning and scope of domestic violence;

For the purposes of this Act, domestic violence means any unlawful act, omission or behaviour which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes the following:

- (l) Abuse derived from the following cultural or customary rites or practices that discriminate against or degrade women –
  - (i) Forced virginity testing; or
  - (ii) Female genital mutilation; or
  - (iii) Pledging of women or girls for purposes of appeasing spirits; or
  - (iv) Forced marriage; or
  - (v) Child marriage; or
  - (vi) Forced wife inheritance.

The Act further states that any person who contravenes the provisions given in section 3 will be found guilty of an offence.<sup>110</sup> However, to date, no perpetrator has ever been prosecuted. In relation to the *Kupemba* case, despite the confessions by the killers no arrests were made and Kupemba's relatives allege that there was foul play and bribery to silence the police.<sup>111</sup> A Zimbabwean girl child organisation, the Girl Child Network (GCN), tried to rescue the girls by compelling the police and the Department of Social Welfare to investigate the matter and return the girls to their families.<sup>112</sup> However, the girls seemed to refuse to return home and the parents of one of the girls alleged that

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<sup>107</sup> Kachere 2009 <http://www.ipsnews.net>.

<sup>108</sup> Kachere 2009 <http://www.ipsnews.net>.

<sup>109</sup> Domestic Violence Act 24 of 2006.

<sup>110</sup> S 4 of the Domestic Violence Act.

<sup>111</sup> Kachere 2009 <http://www.ipsnews.net>.

<sup>112</sup> Kachere N 2009 <http://www.ipsnews.net>.

the girls had been brainwashed to believe that something would happen to them if they ever fled the Kupemba family.<sup>113</sup>

### 2.5.2 *Kuzvarira or betrothal*

*Kuzvarira* is a type of pledging where the girl child is given away with or without her consent in exchange for food, grains or any form of commodities.<sup>114</sup> In such cases children are sometimes pledged before they are born or just when they reach puberty and are believed to be able to do house chores and other wifely duties. *Kuzvarira* was widely practised a long time ago during food shortage days where elder men would pledge grain in exchange for young girls.<sup>115</sup> In Zimbabwe the Ndaou speaking people, who are originally from Mozambique but migrated to Zimbabwe, are commonly known to practise the *kuzvarira* marriage system.<sup>116</sup> For the reason that such decisions (and the finality of such decisions) are made by the elders, children's rights are not taken into consideration in the practice of *kuzvarira*. Further, because men are not often challenged, women rarely fight for their daughters' freedom as they are expected to be submissive.<sup>117</sup> This practice is in contravention with the Customary Marriages Act which stipulates that:

Any person who by force, intimidation or other improper means compels or attempts to compel any African female to enter into a marriage against her will shall be guilty of an offence and liable to a fine not exceeding one hundred dollars or, in default of payment, to imprisonment for a period not exceeding twelve months.<sup>118</sup>

### 2.5.3 *Chimutsamapfihwa or sororate marriage*

This is a practice common to many Shona cultures in Zimbabwe and it is a marriage custom whereby a girl is compelled to take over the position of a wife in place of her relative (in many cases the aunt or sister) where the latter has died or where she fails

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<sup>113</sup> Kachere N 2009 <http://www.ipsnews.net>.

<sup>114</sup> Hanzi 2006 *Sexual abuse and exploitation of the girl child through cultural practices* 33.

<sup>115</sup> Hanzi 2006 *Sexual abuse and exploitation of the girl child through cultural practices* 33.

<sup>116</sup> Rambe 2012 *International Journal of Politics and Good Governance* 4.

<sup>117</sup> As was the case in *Jezile*, the girl's mother could not really do much to rescue her daughter.

<sup>118</sup> S 15 of the Customary Marriages Act.

to bear children.<sup>119</sup> This state of affairs promotes incest, with children being married off to their uncles. Hlupo and Tsikira argue that:

The general belief is that the in-laws have accepted bride price and in return the son-in-law should get a wife from the in-laws as a symbol of appreciation for the *lobola*. The death of the wife does not refute the transaction between the two families. In the event of one's wife dying, the man is entitled to a *chimutsamapfihwa* (replacement of his dead wife). This is when the minor is taken against her wishes or without understanding of what is actually occurring and made a wife to her sister's husband.<sup>120</sup>

As in all the other cases of child marriage, *chimutsamapfihwa* as a cultural practice could constitute child sexual abuse and a violation of children's rights.<sup>121</sup> While there are various organisations which seek to curb such practices and advocate for the rights of the girl child in Zimbabwe,<sup>122</sup> they have not been able to effectively prevent the incidence of child marriage.<sup>123</sup>

The above demonstrates that some cultural practices in South Africa and Zimbabwe perpetuate a high degree of prejudice towards the girl child. Reference has been made to the fact that child marriage impacts on or could potentially violate a number of children's rights. The following section discusses the constitutional rights which could be affected by the practice of child marriage.

## **2.6 Child marriage as a violation of children's constitutional rights**

The next chapter will discuss a number of international instruments which provide prohibitions to child marriage. It will be explained in Chapter 3 that both Zimbabwe and South Africa have ratified international and regional instruments. These include the CRC and the ACRWC which focus on the protection of children in Africa. Article 1

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<sup>119</sup> Mapuranga 2010 *A phenomenological investigation into the effects of traditional beliefs and practices of women* 70.

<sup>120</sup> Hlupo and Tsikira 2012 *Journal of Emerging Trends in Educational Research and Policy Studies* 234.

<sup>121</sup> Hlupo and Tsikira 2012 *Journal of Emerging Trends in Educational Research and Policy Studies* 234.

<sup>122</sup> Girl Child Network Worldwide Organisation, Girls are Us Organisation and Plan Organisation are some of the renowned Organisations advocating for girl child rights.

<sup>123</sup> Girl Child Network Worldwide Organisation, Girls are Us Organisation and Plan Organisation are the organisations that are still trying to prevent child marriage in Zimbabwe.

of the ACRWC provides that states “shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”. It is therefore the duty and responsibility of African states to see to it that the girl child is protected from all forms of torture and cruel, inhuman or degrading treatment (which includes physical or mental injury, abuse, neglect, maltreatment or sexual abuse while in the care of a parent, legal guardian or school authority or any other person who has care of the child).<sup>124</sup>

### *2.6.1 Constitutional rights violated by child marriage*

Despite past and proscriptive norms and values in the constitutions of South Africa and Zimbabwe, some customary law practices continue to negatively affect the personal lives and rights of women and children. Men *de facto* continue to be treated by various cultural groups as the heads of the family with guardianship rights over women and children.<sup>125</sup> The constitutions of both Zimbabwe and South Africa explicitly state that all children must be protected from maltreatment, neglect, abuse or degradation.<sup>126</sup> The practices that have been discussed in this chapter validate the assertion that children are at times neglected by their parents or guardians and are abused physically and sexually in these forced marriages.

As mentioned in Chapter one, every child has a right to education and the state has a duty to fulfil this right.<sup>127</sup> Child marriage typically prevents the girl child from continuing with her education as she is forced to drop out of school. It violates her fundamental human right to education. The right to dignity is one of the core rights in both constitutions and children are not excluded from this right.<sup>128</sup> Currie and de Waal submit that human dignity is a central value of the objective, normative value system established by the Constitution.<sup>129</sup> Human dignity can be defined as [t]he source of a person’s innate rights to freedom and to physical integrity, from which a

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<sup>124</sup> A 16(1) of the ACRWC.

<sup>125</sup> Nthlokwana Date unknown “Submissions the SA law commission on *Ukuthwala*”6.

<sup>126</sup> S 28(1)(d) of the Constitution of South Africa and s 19 (2)(c) of the Constitution of Zimbabwe.

<sup>127</sup> S 29 (1)(a) and s 19 (1)(d).

<sup>128</sup> S 10 of the Constitution of South African and s 51 of the Constitution of Zimbabwe. According to s 1 of the Constitution of South Africa is founded on the values of human dignity.

<sup>129</sup> Currie and de Waal *The Bill of Rights Handbook* 250,

number of other rights flow.<sup>130</sup> The depth of the importance of the right to dignity was discussed in *S v Makwanyane* where the Constitutional Court described the rights to dignity and life as the most important human rights.<sup>131</sup> Currie and de Waal further submit that human dignity is not only a justiciable and enforceable right that must be protected and respected, but that it is a value that informs the interpretation of all other fundamental rights.<sup>132</sup> The abusive nature of child marriage and the disrespect of the child's decisions are a gross violation of her dignity.<sup>133</sup> With reference to *ukuthwala*, the struggle of the girl to escape from her abductors bears testimony of the experience she goes through. To add to her misery her refusal to sleep with her husband may result in forced sexual relations which per definition constitutes rape.<sup>134</sup> Such experiences leave the child psychologically and physically drained and moreover violates her rights to dignity and security.

The right to freedom and security of a person is also violated through child marriage.<sup>135</sup> The custom of *ukuthwala* as discussed in the *Jezile* case, violates a number of provisions laid down in section 12 of the Constitution of South Africa. It is probable that the incidents of violence could be endemic and that children could be abused throughout the marriage as demonstrated in the *Jezile* case. The Constitution requires the state to protect individuals by discouraging other individuals from invading the personal security of others.<sup>136</sup> The Constitution of Zimbabwe also provides for the

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<sup>130</sup> According to Currie and de Waal *The Bill of Rights Handbook* rights 251 included are rights such as the right not to be subjected to slavery and the right to bodily integrity.

<sup>131</sup> *S v Makwanyane* 1995 (3) SA 391 CC par 144. According to O' Regan J "recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern". This right therefore is the foundation of many of the other rights that are entrenched in the Bill of Rights. Chaskalson P reiterated what was submitted by O' Regan J and stated that "the rights to life and dignity are the most important of all human rights, and the source of other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to view these two rights above all others" para 144. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) was another case in which the right to dignity was emphasised.

<sup>132</sup> Currie and de Waal *The Bill of Rights Handbook* 253.

<sup>133</sup> Nthlokwana Date unknown "Submissions the SA Law Commission on *Ukuthwala*" 9.

<sup>134</sup> See *Jezile* case.

<sup>135</sup> S 12(2) Everyone has the right to bodily and psychological integrity, which includes the right-

- a. to make decisions concerning reproduction;
- b. to security in and control over their body; and
- c. not to be subjected to medical or scientific experiments without their informed consent.

<sup>136</sup> S 12 (1)(c) of the Constitution of South Africa.

protection of the right to security of the person.<sup>137</sup> Children have the right not to be forced into sexual relations with anyone and to have their bodily integrity respected. Practices such as virgin pledging leave the child with no choice as children are pledged without them having the capacity to contribute to the decision. As such, it is submitted that the sexual relations that come out of such arrangements may constitute a violation of the children's bodily integrity. It furthermore constitutes a criminal act in both jurisdictions.<sup>138</sup>

Arguably, child marriage could violate children's right to the health of the children involved,<sup>139</sup> especially with regards to health pandemics such as HIV and AIDS.<sup>140</sup> Mapuranga comments on the Zimbabwean practice of betrothal and argues that for the reason that girl wives may not deny the sexual advances made to them by their new husbands, they are at a greater risk of suffering from sexually transmitted diseases in cases where the man is infected.<sup>141</sup> Inadvertently this affects or could infringe on her right to life.<sup>142</sup> Further because the girl's body is not fully developed and equipped for child birth young girls often have difficulties during labour. As Tangri notes, young mothers usually experience labour complications and in some cases the baby and the mother die during labour.<sup>143</sup>

The Constitution of Zimbabwe states that "every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, culture, sex, gender".<sup>144</sup> The South African Constitution states the same on equality under section 9. Arguably child marriage is gender biased and discriminates against women and the girl child. It is the girl child who is mostly a victim of such practices

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<sup>137</sup> S 52.

<sup>138</sup> Legislation such as the South African Sexual Offences Act 32 of 2007 and Zimbabwean Domestic Violence Act 24 of 2006 provide criminal sanctions for violation of a child's bodily integrity.

<sup>139</sup> S 27 of the Constitution on South Africa and s 19 (2) (b) of the Constitution of Zimbabwe.

<sup>140</sup> Mapuranga 2010 *A phenomenological investigation into the effects of traditional beliefs and practices of women* 69.

<sup>141</sup> Mapuranga 2010 *A phenomenological investigation into the effects of traditional beliefs and practices of women* 69.

<sup>142</sup> S 11 of the Constitution of South Africa and s 48(1) of the Constitution of Zimbabwe state that everyone has the right to life.

<sup>143</sup> Tangri <http://www.breakthrough.tv> "Young girls who are less than 15 years are five times more likely to die during child birth than those in the 20s. The infant mortality rate is very high because the young body of a woman is biologically not capable of maternity".

<sup>144</sup> S 56 (3) of the Constitution.

and while she is sent off to an older husband, the male child is sent to school. Furthermore, discrimination against women can also be observed in the decision-making process of family matters and the *lobola* negotiation process. Men have the final say on the amount of *lobola* that have to be paid, and conclude the agreement with the man who intends to marry the child. Women are not permitted to dispute these decisions and are left with a sense of oppression.

The practice of child marriage ignores the best interests of the child as parents and guardians put their interests first before those of the child. Sections 28 of the Constitution of South Africa and 19 of the Constitution of Zimbabwe oblige parents and guardians to put the child's best interests first because children are vulnerable in society and need increased special care and protection. This duty is also extended to the state to take care of children and ensure a better life for them.<sup>145</sup> Clearly, the best interests of the child are not considered in practices like *ukuthwala*, virgin pledging and betrothal of young girls.

## **2.7 Conclusion**

Cultural, traditional and religious practices are the forces behind child marriage. Those who engage in child marriage believe that it is within their rights to freely follow their culture or religion. However, child marriage is harmful to children, especially girls, as it deprives them of their right to enjoy a normal childhood while also violating a number of rights as discussed above. There is a number of child marriage practices that are common in Zimbabwe and some are influenced by religious beliefs and others by cultural beliefs. Nonetheless, the pledging of young girls and the marriage of children below the age of 18 years are prohibited by law. For South Africa, the practice of *ukuthwala* is likened to kidnapping and abduction of a child. *Ukuthwala* also violates a number of children's rights as illustrated by the judgement in *Jezile*. Both countries have legislation which prohibit marriage of children below the age of 18 years. While both Zimbabwe and South Africa respect the right of individuals to practise their

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<sup>145</sup> Nthlokwana Date unknown "Submissions the SA Law commission on Ukuthwala" 10.

culture, it has been shown that child marriage practices violate a number of children's rights, and their existence is not in line with the laws of the countries.

## Chapter 3

### The legal framework protecting children and the parent-child relationship

#### 3.1 Introduction

It has been indicated in Chapter one that individuals and even groups of people in South Africa and Zimbabwe are afforded the constitutional right to practise their culture provided their practices are in line with the norms and values of the respective constitutions. While many African cultures treat child marriage as part of their cultural practice and tradition,<sup>146</sup> contemporary developments in constitutionalism reveal that the constitutionality of such practices is questionable given the requirement that the best interests of the child are paramount in actions or decisions concerning children.<sup>147</sup> It is for this reason that there is a need to investigate the international, constitutional and legislative provisions which elevate the principle of promoting the best interests of children in every respect.

This chapter serves to contextualise the rights of children in the broad framework of international instruments. An outline of various international instruments and regional instruments which prohibit child marriage will also be discussed briefly. It is important to note that South Africa and Zimbabwe have not ratified all the conventions that will be discussed in this chapter. However, international law plays a significant role in both of the legislative frameworks of the respective countries.<sup>148</sup> Thereafter, the chapter will provide an overview of the best interests of the child in its wider application and its relationship to culture and child marriage in South Africa and in Zimbabwe. The chapter seeks to determine how and why the principle of the best interests of the child could relate to the practice of child marriage.

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<sup>146</sup> According to Tiwari 2004 *Child abuse and Human rights* 21 "many societies primarily in Africa and South Asia support the idea of child marriage".

<sup>147</sup> Tiwari 2004 *Child abuse and Human rights* 21.

<sup>148</sup> S 34 of the Constitution of Zimbabwe states that "the state must ensure that all international conventions, treaties and agreements that Zimbabwe is a party are incorporated into domestic law. And s 231 and 233 of the Constitution of South Africa provide for the implementation of international law that has been ratified by the state into municipal law.

### **3.2 International and regional legal framework**

It is vital to discuss briefly the application of international law in municipal law [for the purposes of this chapter]. This is because principles that govern international law require states to respect the treaties and establish the application of the provisions of the treaties in their municipal law.<sup>149</sup> The terms monism and dualism are used to describe the two different legal traditions pertaining to the application of international law in municipal law.<sup>150</sup> Monism views public international law and municipal law as a single system of law whereas dualism regards the two as separate distinct legal systems that exist alongside each other.<sup>151</sup> South Africa seems to follow both monism and dualism approaches as provided by sections 231 and 232 of the Constitution.<sup>152</sup> According to section 231(4) any international agreement becomes law in South Africa when it is enacted into law by national legislation,<sup>153</sup> excluding a so-called self-executing provision of an agreement, unless it is inconsistent with the Constitution or an Act of Parliament.<sup>154</sup> Zimbabwe, on the other hand strictly follows the dualist approach and requires the incorporation of international law into its municipal law.<sup>155</sup> This implies that the government can choose whether or not to transform international law into municipal law.<sup>156</sup>

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<sup>149</sup> The Peace and Justice Initiative date unknown <http://www.peaceandjusticeinitiative.org>.

<sup>150</sup> Ferreira and Snyman 2014 *PELJ* 1471.

<sup>151</sup> Ferreira and Snyman 2014 *PELJ* 1471. "According to the monist approach public international law is therefore directly enforceable before municipal courts without any need for incorporation into municipal law. A dualist approach, on the contrary, implies that public international law has to be formally incorporated into municipal law before it would be enforceable in a municipal court".

<sup>152</sup> In terms of s 231(2) an international agreement binds South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Section 231(3) provides that some international agreements, such as those of a technical, administrative or executive nature, or those which do not require either ratification or accession, bind South Africa without approval by the National Assembly and the National Council of Provinces.

<sup>153</sup> Robinson "The right to recovery and reintegration of child victims of child law" 38.

<sup>154</sup> Ferreira and Snyman 2014 *PELJ* 1473.

<sup>155</sup> S 34 stipulates that the state must ensure that all international treaties, conventions and agreements to which Zimbabwe is a party are incorporated into domestic law.

<sup>156</sup> Robinson "The right to recovery and reintegration of child victims of child law" 38. Transformation is a formal process of specific introduction of international law on the national level. There are two methods to transform treaties: by way of a statute of parliament or through an authorisation of the executive in a pre-existing parliamentary Act to grant applicability to the terms of an agreement.

### 3.2.1 Early developments of the rights of children

In early Roman law children did not have rights and were not legally protected from abuse and harm.<sup>157</sup> Children were under the absolute control of their fathers (*pater familias*) who could do whatever they deemed necessary with the child.<sup>158</sup> The result was that children could not report or institute any action against their parents. It was not until the twentieth century that children began to be recognised as legal subjects in their own right legally.<sup>159</sup>

In the early 1920's the Save the Children Fund was organised for the (International Save the Children Union) with the support of the International Committee of the Red Cross (ICRC) in an effort to advance the rights of children.<sup>160</sup> Through this funding and collaboration the International Save the Children Union produced the Declaration of Children's Rights in 1923. In 1924, the first ever international organisation, the League of Nations adopted the document produced by the International Save the Children Union as the Geneva Declaration of the Rights of the Child (1924 Geneva Declaration).<sup>161</sup> Substantively the 1924 Geneva Declaration comprised a few principles and these were:

- i. The child must be given the means requisite for its normal development, both materially and spiritually;
- ii. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;
- iii. The child must be the first to receive relief in times of distress;
- iv. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;

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<sup>157</sup> Robinson 2002 *Stellenbosch LR* 309.

<sup>158</sup> Robinson 2002 *Stellenbosch LR* 309.

<sup>159</sup> Van Deusen 1991 18 *Pepperdine Law Review* 417.

<sup>160</sup> Humanium <http://www.humanium.org>.

<sup>161</sup> League of Nations O.J. Spec. Supp. 21 43 (1924).

- v. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

Evidently, this document was the first international document to require parents and guardians to fulfil their responsibilities towards their children on the basis that “mankind owes to children the best it has to give”.<sup>162</sup> Although it provided that children needed more attention and care, the document was limited in scope which led to the successor of the League of Nations, the United Nations adopting the Declaration of the Rights of the Child, 1959 (United Nations Declaration).<sup>163</sup> This was the first international human rights document to refer specifically to the best interests of the child. Principle 2 states the following;

The child shall enjoy special protection and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration.

Further, the UN Declaration (1959) called for the protection of children against all forms of neglect, cruelty and exploitation.<sup>164</sup> Notably however, both the 1924 Geneva Declaration and the 1959 United Nations Declaration did not define when childhood begins and ends.<sup>165</sup>

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<sup>162</sup> The Preamble to the 1924 Geneva Declaration.

<sup>163</sup> A/RES/1386(XIV).

<sup>164</sup> See Principle 9. According to this principle, if a practice like customary marriage is exploitative and demonstrates that a child has been subjected to neglect, then whoever has facilitated such exploitation and neglect is violating the rights of the child.

<sup>165</sup> Humanium date unknown <http://www.humanium.org> date.

### 3.2.2 Children and marriage

#### 3.2.2.1 *The Universal Declaration of Human Rights (UDHR)*

One of the essential requirements of a marriage is consent of both parties to the marriage.<sup>166</sup> The first international instrument to document this was the (UDHR) 1948.<sup>167</sup> It provides that marriage shall be entered into only with the free and full consent of the intending spouses.<sup>168</sup> Although the UDHR does not specifically refer to children, its application to children is implied when children become part of a marriage whether arranged by family members or not. It follows then that the cultural practice of child marriage could be subjected to the UDHR: in the sense that consent becomes relevant at the moment that a child is married off to someone. It is important to submit that the UDHR is relevant to South Africa and Zimbabwe because of its impact on the development of all human beings, including children and children's rights are based on human rights.<sup>169</sup>

#### 3.2.2.2 *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

CEDAW (1980) is clearer in its objectives in that it addresses issues related to women specifically. First, CEDAW notes that there are stereotypes that exist in relation to the status of women in society and cultural practices. It thus requires states:

- a) to modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary practices that are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women;<sup>170</sup>

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<sup>166</sup> The Children's Act of South Africa stipulates the requirement of consent for the conclusion of marriage Civil Union Act 2006 and Recognition of Customary marriages Act 1998 all require consent for a marriage to be concluded.

<sup>167</sup> Universal Declaration of Human Rights (1948).

<sup>168</sup> A16 (2) of UDHR.

<sup>169</sup> Humanium date unknown <http://www.humanium.org>.

<sup>170</sup> A 5(a).

- b) to deal with the issue of marriage and stipulates that women should not be discriminated against in matters relating to marriage and should be afforded the same right to enter into marriage with their free and full consent<sup>171</sup> and
- c) that precautionary measures must be carefully enforced in any decisions made on behalf of women, especially girls, without their knowledge or consent. Article 16(2) of CEDAW further states that;

The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.<sup>172</sup>

Such marriages take the form of betrothals even before the child has reached adolescence.<sup>173</sup> It has been discussed in the previous chapter that Zimbabwe and South Africa have some traditional communities that marry off children and practise betrothal marriages. However, because such practices are prohibited by law and there are consequences that follow people that are found practising child marriage.<sup>174</sup> This provision has been incorporated in both Zimbabwe and South Africa.<sup>175</sup>

### 3.2.2.3 *Convention of the Rights of the Child (CRC)*

The most important instrument in relation to children however, is the CRC. In terms of this Convention, and unlike the 1924 Geneva Declaration and the 1959 United Nations Declaration, the CRC defines a child as every human being below the age of eighteen years.<sup>176</sup> While there is much in the CRC on the rights of children generally, an instructive proviso relevant to the present discussion is to be found in article 3 which provides for the following;

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<sup>171</sup> A 16(1) (a-b).

<sup>172</sup> A 16(2).

<sup>173</sup> Gorney 2011 Child brides in India <http://ngm.nationalgeographic.com>.

<sup>174</sup> See discussion under 2.3.

<sup>175</sup> South African Sexual Offences Act 32 of 2007 *and* Zimbabwean Domestic Violence Act 24 of 2006 provide criminal sanctions for people found practicing child marriage. Also as pointed out in the *Jezile case*.

<sup>176</sup> A 1.

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>177</sup>

Further, the CRC directly confronts the issue relating to the voice of children.<sup>178</sup> As noted in Chapter one, decisions in relation to child marriage are typically made on their behalf, rarely with their opinions or views being taken into consideration. Article 12 provides that states must ensure that a child who is capable of forming his/her own view is afforded the right to express such views in all matters affecting them.<sup>179</sup> By implication, a child who cannot or is unable to form a view could be considered too young. This means that any child marriage in relation to such child is a direct violation of the CRC.<sup>180</sup> Although child marriage is not overtly mentioned in the CRC, the UN Committee on the Rights of the Child,<sup>181</sup> a committee tasked with monitoring the implementation of the Convention, has noted that child marriage is a harmful practice that negatively affects the sexual and reproductive health of girls and strongly recommends that all states parties set a minimum age for marriage laws at 18 years.<sup>182</sup> South Africa and Zimbabwe have both ratified the CRC and have an obligation to implement measures that curb the practice of child marriage. As highlighted earlier, South Africa follows both a monism and dualist approach and Zimbabwe only a dualist approach. However, they are both member states to the CRC. Therefore implementation of the provisions of the CRC is important in order to protect children and their rights.

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<sup>177</sup> A 3(1).

<sup>178</sup> A 12.

<sup>179</sup> A 12(1).

<sup>180</sup> Armstrong 2014 "Child marriage in Nigeria: the health hazards and socio-legal implications" 11.

<sup>181</sup> Committee on the Rights of the Child, "General comment No. 4 (2003), Adolescent health and development in the context of the Convention on the Rights of the Child," CRC/GC/2003/4, para 20.

<sup>182</sup> Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18. While the *CRC* gives obligations and duties to various bodies that should see to it that the best interests of the child are considered and applied, the provision has been criticised for its exclusion of obligations on parents, guardians and extended family members. See Freeman 2007 *A commentary on the UN Convention on the Rights of the Child* 47.

### 3.2.2.4 The regional framework

In addition to the international framework on the rights of children, Africa as a regional block has also been at the forefront of elevating children's rights. For instance the Declaration on the Rights and Welfare of the African Child (1979)<sup>183</sup> acknowledged the unequal status of female children in some parts of Africa and also encouraged states to review their legal frameworks relating to the rights of children.<sup>184</sup> A clear reference to child marriage and the fact that it is harmful to children is provided for in the Declaration as follows:

Member States should thoroughly examine cultural legacies and practice that are harmful to normal growth and development of the child such as child marriage and female circumcision, and should take legal and educational measures to abolish them.

There have been more efforts towards binding legal frameworks through the African Charter on the Rights and Welfare of the Child, 1990 (the ACRWC). The development of the ACRWC was motivated by the fact that some writers argued that the CRC was highly motivated by western cultures and did not incorporate African values.<sup>185</sup> The ACRWC is considered to be the most comprehensive instrument in all regional systems as it focuses on children's rights from an African perspective.<sup>186</sup> The first article notes that any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter is discouraged.<sup>187</sup> Article 4(1) affirms the primacy of the principle of the best interests of the child in relation to any actions undertaken by any person or authority in relation to such child.

Evidently aware of the incidence of child marriage in many African societies, the ACRWC explicitly prohibits child marriage in article 21 where it is stated that:

Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage

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<sup>183</sup> AHG/ST. 4 (XVI) Rev.1.

<sup>184</sup> Declaration 2 of the document.

<sup>185</sup> Lloyd 2002 *AHRLJ* 11, Lloyd argues that the African Children's Charter is the key source of inspiration for African member states and a collective recognition of the rights and welfare of the African child. It also established a legal framework for the protection of children.

<sup>186</sup> Freeman 2007 *A commentary on the UN Convention on the Rights of the Child* 21.

<sup>187</sup> See A 1(3).

to be 18 years and make registration of all marriages in an official registry compulsory.<sup>188</sup>

The ACRWC is amongst the few international instruments that precisely indicate the minimum marriageable age to be 18 years and prohibits the betrothal of children.<sup>189</sup> Article 21 further specifies that state parties should take all appropriate measures to eliminate any cultural practices that might be harmful and prejudicial to the child.

The discussion above demonstrates that when it comes to the rights of children, there is an array of international and regional frameworks that have developed over time. A noticeable issue from these instruments, however, is the missing definition or conceptualisation of the concept of the best interests of the child.

### **3.3 Core meaning of the principle of best interest of the child**

#### *3.3.1 A South African perspective*

There have been attempts to define the principle of the best interest of the child. Eekelaar puts it across as basic interests that include physical, emotional and intellectual developmental interests which assist the child to enter adulthood without disadvantages.<sup>190</sup> This essentially means that the principle is holistic in nature, including every single aspect that affects the life of the child. For some writers, best interests can be reduced to a satisfaction of material needs, emotional security, psychological well-being and moral and religious welfare.<sup>191</sup> In the juvenile justice context, Cameron J in *Centre for Child Law v Minister of Constitutional Development (Centre for Child Law)*<sup>192</sup> interprets section 28 (2) of the Constitution that the child's best interests are of paramount importance, to mean that the child's interests are

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<sup>188</sup> See A 21(2).

<sup>189</sup> A 21 (2) of the ACRWC.

<sup>190</sup> Freeman 2007 *A commentary on the UN Convention on the Rights of the Child* 27.

<sup>191</sup> Currie and de Waal Bill of Rights Handbook 618, in *Bannatyne v Bannatyne* 2003 (2) SA 363 CC par 24 the Constitutional court held that the 'best interest' requirement entailed an obligation in the first instance on parents to properly care for children.

<sup>192</sup> *Centre for Child Law v Minister of Constitutional Development (Centre for Child Law)* Case CCT 98/08 [2009] ZACC 18 para 29.

“more important than anything else”.<sup>193</sup> However, Cameron J admits that a wide variety of factors are significant in determining the interests of the child.<sup>194</sup>

The South African Children’s Act provides guidance on assessing whether parents consider the best interests of the child when making decisions for them. It lays down a number of relevant factors that need to be considered in determining the best interests such as:

(l) The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;<sup>195</sup>

(i) the need for the child to be brought up in a family and happy environment; and<sup>196</sup>

(ii) the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or other harmful abuse; or exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person<sup>197</sup>

In *McCall v McCall*<sup>198</sup> further guidelines were provided in order to guide courts when considering the best interests of the child. Although the case dealt with a divorce matter, the guidelines illustrate the need for a child to grow up in an environment which is not hostile and which adds positive value to the growth and development of that child. Furthermore, as a way of ensuring that the best interests of the child are inherently protected, the Children's Act prohibits the marriage of children below a legally set age. Section 12(2) of the Children’s Act states that children:

- i. below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and

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<sup>193</sup> Para 29.

<sup>194</sup> Moyo 2012 *AHRLJ* 144.

<sup>195</sup> S 7(h).

<sup>196</sup> S 7 (k).

<sup>197</sup> S 7 (l)(i) and (ii).

<sup>198</sup> *McCall v McCall* 1994 (3) SA 201 (C).

- ii. above that minimum age may not be given out in marriage or engagement without his or her consent and therefore should be dealt with according to the laws of this country.

Furthermore, the concept of the best interest of the child has assisted in developing other rights and clarifying the ambit and limitation of rights in the Bill of Rights.<sup>199</sup> Section 28(2) therefore is not merely a principle but rather a right in itself.<sup>200</sup> In the case of *Minister of Welfare and Population Development v Fitzpatrick and others*<sup>201</sup> the Constitutional Court declared section 18(4) of the Child Care Act<sup>202</sup> to be invalid because it prohibited the adoption of a South African citizen by non-citizens.<sup>203</sup> The court found that the law was too restrictive because it limited the best interest of the child. It was in this judgement that the Constitutional Court enunciated the fact that section 28(2) does not only refer to the rights enumerated in section 28(1), but also that section 28(2) is a right and not just a guiding principle.<sup>204</sup> Per definition the implication of this finding is that in instances where there is a conflict of interests of the parents and the girl child, a balance of their constitutional rights should take place. However, the fact that child marriage has been held to be illegal and infringes upon the rights of the girl child, it is submitted that there is no need for such balancing of rights.

### 3.3.2 A Zimbabwean perspective

The Zimbabwean Constitution expressly provides for the consideration of a child's best interests and gives the State an obligation to adopt policies and measures to ensure that the child's best interests are paramount.<sup>205</sup> The Children's Act<sup>206</sup> of Zimbabwe covers specific aspects of children's rights and their protection but does not make mention of the determination of the best interests of the child. Nevertheless,

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<sup>199</sup> Skelton "Constitutional protection of children's rights" 280.

<sup>200</sup> Skelton "Constitutional protection of children's rights" 280.

<sup>201</sup> *Minister of Welfare and Population Development v Fitzpatrick and others* 2000 (3) SA 422 (CC).

<sup>202</sup> Child Care Act 74 of 1983.

<sup>203</sup> Skelton "Constitutional protection of children's rights" 280.

<sup>204</sup> Par 17 of the *Fitzpatrick case*.

<sup>205</sup> S 19 (1) and 81 (2).

<sup>206</sup> Children's Act of Zimbabwe 2002.

Zimbabwe has ratified key international and regional treaties that concede to the principle of the best interest and therefore the principle is also incorporated into Zimbabwean law.<sup>207</sup>

Nevertheless, both Zimbabwe and South Africa adopt the principle of best interests of the child. Parents need to consider the consequences and the negative impacts of child marriage before they marry off their daughters for marriage.<sup>208</sup> However, when it comes to what is in the best interests of the child not even culture should override the interests of the child.<sup>209</sup> The concern is whether parents or guardians in exercising their parental rights consider the best interest of the child in practices such as child marriage. Ironically many of these children are considered to be too young to make other equally important decisions, but not too young to marry.

Nevertheless there are still instances of child marriage happening in South Africa and as discussed in Chapter 2, regardless of the legislative framework provided by both countries. The next section discusses the parent-child relationship and the exercise of parental responsibilities and rights over their children.

### **3.4 The parent child relationship**

Parents and guardians are the custodians of their children and *ex lege* have duties and parental obligations bestowed upon them over their children.<sup>210</sup> As a result a parent-child relationship exists between parents or guardians and their children.<sup>211</sup> While in the past the law regulating the relationship between children and parents was not codified,<sup>212</sup> recent developments have seen the rights of children and parental responsibilities being elevated to constitutional status and are codified in child specific laws.<sup>213</sup> For instance, in South Africa there is the Children's Act 38 of 2005. The Act

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<sup>207</sup> S34 of the Constitution states that "the state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law".

<sup>208</sup> UNICEF 2014 <http://www.unicef.org>.

<sup>209</sup> Bennett 1999 "the best interest of the child in an African context" 146.

<sup>210</sup> A 5 of the CRC gives parents and guardians duties and responsibilities over their children and those responsibilities should be exercised in a manner consistent with the evolving capacities of the child.

<sup>211</sup> If there was no legislation to regulate such authority, children would not have any rights and parents would do whatever they deemed necessary to their children without being questioned.

<sup>212</sup> Spiro 1971 *Law of parent and child* 1.

<sup>213</sup> Skelton "Parental responsibilities and rights" 62.

recognises that there is a diverse range of family practices and different forms of care arrangements. For that reason, the Children's Act allows parents to acquire responsibilities and rights over children.<sup>214</sup> Unlike the South African Children's Act, Zimbabwe's Children's Act of 2002<sup>215</sup> does not provide for the responsibilities and rights of parents. However it provides consequences that are imputed upon parents and guardians who do not exercise their parental duties well.<sup>216</sup> The Constitution of Zimbabwe is also elusive on the precise rights and responsibilities that parents have over their children, but it affords every child the right to family and parental care.<sup>217</sup> The only piece of legislation which incorporates guardianship laws in Zimbabwe is the Guardianship of Minors Act<sup>218</sup> which affords guardianship to the father under both customary law and Roman-Dutch law.

### 3.4.1 Brief historical overview of the parent-child relationship

#### 3.4.1.1 Roman law

In pre-Roman law legal systems there was no specific law regulating the relationship between parents and their children.<sup>219</sup> Under the Roman law the power of the *pater familias* over his dependants was absolute.<sup>220</sup> The *pater* was the head of the family and had power over his children until they died.<sup>221</sup> He had absolute control and power over his children to the extent that he had the right to marry off, divorce or even emancipate his children regardless of whether the children were legitimate or illegitimate.<sup>222</sup> This power was so wide that it also included the power to put the *pater's* family members and children to death (the so-called *ius vitae necisque*), as well as selling them as slaves (*Trans Tiberim*).<sup>223</sup> In time the harshness of these practices

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<sup>214</sup> Chapter 3 of the Children's Act extensively discusses the parental rights and duties.

<sup>215</sup> Children's Act Chapter 5: 06 of 2002

<sup>216</sup> S 7 (i) provides that parents should not ill-treat, neglect or exploit their children in a manner likely to cause the child unnecessary suffering or affect his health. Furthermore, any parents who does not prevent the neglect, ill-treatment and exploitation will be guilty of an offence.

<sup>217</sup> S 81 (d) of the Constitution.

<sup>218</sup> Chapter 5:08.

<sup>219</sup> Spiro 1971 *Law of the parent and child* 1.

<sup>220</sup> Robinson 2002 *Stellenbosch LR* 309.

<sup>221</sup> Robinson 2002 *Stellenbosch LR* 309.

<sup>222</sup> Spiro 1971 *Law of parent and child* 2.

<sup>223</sup> Spiro 1971 *Law of parent and child* 2.

disappeared as fathers were no longer permitted to kill their children and some duties, like the duty to support children, were placed on him.<sup>224</sup> The mother however, did not have the same powers over her children as the powers bestowed on the father.<sup>225</sup>

#### 3.4.1.2 Germanic and Roman-Dutch law

Roman-Dutch law followed German customs, and the father continued to enjoy his *patria potestas*.<sup>226</sup> In early Germanic period, the father *qua* head of the family had power over his wife and children and this position remained throughout different periods until the Renaissance. However, the influence of Christianity terminated the severity of these laws to a halt.<sup>227</sup> Age of majority and marriage of the child brought the control by the father to an end and courts now had some form of control and protection over the child.<sup>228</sup> Roman-Dutch law differed from Roman law in various ways. A mother, unlike in Roman law had certain rights in respect of her children. Upon the death of one parent the surviving parent retained custody and the parental power. Additionally parents in Roman-Dutch law had the duty to support their children even after they became of age provided they were not able to support themselves.<sup>229</sup>

#### 3.4.1.3 Development of the concept of parental authority in South Africa

Although South African law on the parent-child relationship is based on Roman-Dutch law, modern South African law has developed and refined the concept of parental authority.<sup>230</sup> As a starting point, section 2(f) of the Children's Act outlines the objectives of the Act and stipulates that it seeks to promote the protection, development and well-being of children. It is submitted that this sub-section means that any conduct that might affect or intervene with the development of the child falls to be subject to scrutiny. In general parental power is described by Spiro as "the sum total of rights, duties and responsibilities of parents with regard to their children on

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<sup>224</sup> Spiro 1971 *Law of parent and child* 2.

<sup>225</sup> Spiro 1971 *Law of parent and child* 2.

<sup>226</sup> Spiro 1971 *Law of parent and child* 3

<sup>227</sup> Spiro 1971 *Law of parent and child* 3.

<sup>228</sup> Spiro 1971 *Law of parent and child* 3.

<sup>229</sup> Spiro 1971 *Law of parent and child* 26.

<sup>230</sup> Robinson 2002 *Stellenbosch LR* 309.

account of their parenthood".<sup>231</sup> The Children's Act contains a detailed chapter on the responsibilities and rights that parents have in respect of children. It therefore shifted and replaced the concept of parental power with parental responsibilities and rights.<sup>232</sup> Parental authority comprised all rights and duties parents had in respect of children born within a marriage.<sup>233</sup> The common law of parental authority included guardianship, custody and access.<sup>234</sup> The introduction of the Children's Act brought about significant changes to the common law which includes the sharing of parental responsibilities and rights irrespective of whether the parents were married, divorced or had never been married.<sup>235</sup> Section 18 (2) of the Children's Act states the following:

The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right:

- i. to care for the child;<sup>236</sup>
- ii. to maintain contact with the child;<sup>237</sup>

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<sup>231</sup> Spiro 1971 *Law of parent and child* 27.

<sup>232</sup> Skelton "Parental responsibilities and rights" 63.

<sup>233</sup> Skelton "Parental responsibilities and rights" 63, however fathers of children born out of wedlock did not have parental rights over their children unless there was reason to believe that there was indeed enough grounds to be granted by the court.

<sup>234</sup> Skelton "Parental responsibilities and rights" 63.

<sup>235</sup> Skelton "Parental responsibilities and rights" 64.

<sup>236</sup> According to s1 (1) of the Children's Act care in relation to a child, includes, where appropriate-

- (a) within available means, providing the child with-
  - (i) a suitable place to live
  - (ii) living conditions that are conducive to the child's health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

<sup>237</sup> Robinson *et al Introduction to South African Family law* 61. Contact replaces the common law concept of access and has developed the meaning to include maintaining a relationship with a

- iii. to act as guardian of the child<sup>238</sup>; and
- iv. to contribute to the maintenance of the child.<sup>239</sup>

Section 18 further gives parents the responsibility and right to refuse or consent to a child's marriage.<sup>240</sup> *Prima facie* this gives parents the responsibility to make decisions which may detrimentally affect the child. Therefore the question remains to what extent they are parents legally competent to marry off a young girl or refuse the proposal or dowry payment by an interested man? There is a duty upon parents to care for the child so that the child can be protected from any possible harm.<sup>241</sup> It should be noted that the responsibility of parents to give consent or to refuse consent should be guided by the consideration of the best interests of the child.<sup>242</sup> The Children's Act in section 7(1)(b)(ii) specifically states that the best interests of the child should be taken into account wherever there is exercise of parental responsibilities and rights in respect of the child.

The English case of *Gillick v West Norfolk and Wisbech Area Health Authority case*,<sup>243</sup> seems to have been a major impetus in the development of the parent-child relationship in South Africa. In *casu* a Health Department gave notice that a doctor could lawfully prescribe contraceptives to a girl below the age of 16 years of age without prior consent of her parents. Mrs Gillick, the mother of five daughters was not satisfied with this position and argued that it interfered unjustifiably with her parental authority. The court, however, held that parental authority was not absolute and that parental rights are derived from parental duty and exist only as long as they are

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child if he or she lives with someone else. If a person exercises his or her right of contact, he is empowered to exercise parental responsibilities and rights that are associated with care.

<sup>238</sup> Robinson *et al Introduction to South African Family law* 59. A person with guardianship must involve a child in making important decisions. In terms of s 18(3)(c) guardianship entails that a person who acts as guardian or parent of the child must give or refuse any consent required by law in respect of the child, including (i) consent to the child's marriage

<sup>239</sup> Robinson *et al Introduction to South African Family law* 61. A child's parents are responsible for providing the means and services for fulfilling a child's constitutional rights to basic nutrition, shelter, basic health and social services.

<sup>240</sup> S 18 (3) 4.

<sup>241</sup> A 19 (1) of the CRC. The duty to care for the child requires the responsibility of parents to protect their children from any harm including physical harm.

<sup>242</sup> S 7 of the Children's Act.

<sup>243</sup> *Gillick case*.

needed for the protection of the child.<sup>244</sup> In other words, specific parental rights terminate as soon as the child acquires the capacity to make his or her own choices.<sup>245</sup>

Based on the *ratio* of *Gillick* a girl child who is mature enough can make decisions affecting her, including the decision as to whether she should consent to her own marriage. The *Gillick* case can be said to have influenced the Children's Act as the Act gives children the right to participate in all matters concerning them.<sup>246</sup> This provision is subject to the child's ability to understand and formulate reasonable decisions. By implication there is no way in which girls under this age can legally marry.<sup>247</sup>

#### 3.4.1.4 Parental responsibility and rights in Zimbabwe

Zimbabwean law, as with South African law, was influenced by Roman-Dutch law. The powers and the rights that fathers had over their children in Roman-Dutch law is almost similar to that of which fathers in Zimbabwe had.<sup>248</sup> In the African cultural context parental authority is similar to Roman-Dutch law but subordination in customary law does not equal the marital powers for wives and guardianship for children. However children and women fall under the authority of the men in the family

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<sup>244</sup> Case found at [http://www.hrcr.org/safrica/childrens\\_rights/Gillick\\_WestNorfolk](http://www.hrcr.org/safrica/childrens_rights/Gillick_WestNorfolk).

<sup>245</sup> *Gillick* case. Lord Fraser held that "It seems to me verging on the absurd to suggest that a girl or a boy aged 15 could not effectively consent, for example, to have a medical examination of some trivial injury to his body or even to have a broken arm set. Of course the consent of the parents should normally be asked, but they may not be immediately available. Provided the patient, whether a boy or a girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorise the medical man to make the examination or give the treatment which he advises. After all, a minor under the age of 16 can, within certain limits, enter into a contract. He or she can also sue and be sued, and can give evidence on oath. I am not disposed to hold now, for the first time, that a girl aged less than 16 lacks the power to give valid consent to contraceptive advice or treatment, merely on account of her age."

<sup>246</sup> S 10 of the Children's Act.

<sup>247</sup> Children's Act 38 of 2005 indicates 18 as the marriageable age however there are provisions which require the consent of guardians to conclude civil marriage. The importance of consent is really a significant requirement otherwise the marriage will be regarded as null and void. The Civil Union Act and Recognition of Customary Marriages Act also require consent by the minor or the guardians. However, I submit that children should not be provided with the option of getting parental consent if they are still below the age of 18 years. Marriage between minors should be prohibited with or without consent.

<sup>248</sup> Ruombwa "Exploring the legal and social parameters of equal and joint responsibility of minor children in Zimbabwe".

and society.<sup>249</sup> Under customary practices, fathers own their daughters and they can be given to other men through marriage.<sup>250</sup> The payment of *lobola* serves to transfer ownership of the daughter from the father to the one who paid the *lobola*. From an African customary law and Roman-Dutch law context, it is certain that men have parental authority over children and that this authority includes rights of guardianship and custodianship.<sup>251</sup>

#### 3.4.1.5 Development of parental rights and responsibilities in Zimbabwe

The Guardianship of Minors Act<sup>252</sup> currently governs all issues concerning the guardianship of children born to married parents. The principles of guardianship under customary law are not different from common law as both systems grant inherent guardianship to the father.<sup>253</sup> Section 3 provides that the father should at all times consult with the mother of the child when he wants to make a significant decision concerning the child. It states that:

Where the parents of a minor

- i. are living together lawfully as husband and wife or
- ii. are divorced or are living apart and the sole guardianship of the minor child has not been granted to either of them by order of the high court or a judge:

The rights of guardianship of the father shall be exercised in consultation with the mother and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the health or morals of the child to his detriment, she may apply to a judge in chambers who may make such order in the matter as he thinks proper.

The provision acknowledges and apprehends the fact that the mother has an important role to play in the upbringing of the child.<sup>254</sup> It is also clear that decisions

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<sup>249</sup> Mutambara "Do custody laws protect the best interests of children in Zimbabwe in the light of international instruments"? 7.

<sup>250</sup> Mutambara "Do custody laws protect the best interests of children in Zimbabwe in the light of international instruments"? 7.

<sup>251</sup> Mutambara "Do custody laws protect the best interests of children in Zimbabwe in the light of international instruments"? 7.

<sup>252</sup> Guardianship of Minors Act Chapter 5:08.

<sup>253</sup> Ruombwa "Exploring the legal and social parameters of equal and joint responsibility of minor children in Zimbabwe" 8.

<sup>254</sup> Ruombwa "Exploring the legal and social parameters of equal and joint responsibility of minor children in Zimbabwe" 8.

that are made by the father that might affect the well-being of the child can be subjected to legal and judicial scrutiny, which stands as a safeguard for children's rights. A decision by a father to marry off his young daughters is detrimental.<sup>255</sup>

Zimbabwean law which regulates parental rights and responsibilities is prejudicial to unmarried fathers for not affording them parental duties and responsibilities to their children.<sup>256</sup> In other words, the father of a child has no rights or duties over his non-marital child, which leaves the mother of such child with sole guardianship and custody over the child. The mother of the child can therefore make the decisions in addition to providing parental guidance and consent to jurist acts on behalf of the child.<sup>257</sup>

### **3.5 Conclusion**

Children's rights have been steadily evolving since the early 1920's. There has been a marked increase in international and regional agreements or conventions that indicate that children's rights are now firmly embedded in international law. The chapter has also shown that parental authority has its roots in Roman and Roman-Dutch law. In modern South Africa the Children's Act has done away with the authority of parents and replaced it by parental responsibilities and rights. In fulfilling their parental responsibilities and rights, parents and guardians should consider the best interests of the child. It has been shown that South Africa recognises the best interest of the child as a constitutionally entrenched right which implicates that child marriage violates a child's constitutional rights. The *Fitzpatrick* case explained that section 28(2) of the Constitution should not be regarded as a mere guiding principle but as a right in itself.

In Zimbabwe the best interests of the child only serves as guiding principle and this negatively impacts on the best interests of the child because it should be an enforceable right on its own rather than just a guiding principle. The chapter further

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<sup>255</sup> UNICEF 2014 *State of the World's Children 2015: Reimagine the future* <http://www.unicef.org> Child marriage can have health implications on the girl because girls who give birth under age 15 are five times more likely to die in childbirth than young women in their early 20s.

<sup>256</sup> The Guardianship of Minors Act regulates the rights of married fathers and excludes unmarried fathers.

<sup>257</sup> Mutambara "Do custody laws protect the best interests of children in Zimbabwe in the light of international instruments"? 7.

discussed how parental responsibilities and rights are regulated by the Children's Act in South Africa and the Guardianship of Minors Act in Zimbabwe. The chapter has demonstrated that the law requires parents to exercise their responsibilities and rights in a manner that is not prejudicial to the child. Additionally a child who is mature enough to formulate reasonable opinions and choices should be heard in decisions that affect her, including whether or not she wants to be married off. The age at which it is legally permissible for a girl child to marry was referred to in the Recognition of Customary Marriages Act and the Constitution of Zimbabwe which sets it out as 18 years old. However the most complex issue raised by the best interests of the child is the interaction between the rights of children, their parents and other family members.

## **Chapter 4**

### **4 Conclusion**

#### ***4.1 Introduction***

Child marriage is a cultural practice that has gained international notoriety because of the effects it has on children. Many African countries, including South Africa and Zimbabwe, have communities that practise various forms of child marriage. However, it seems that these cultural practices, although forming important components of the culture of specific groups and societies, could pose threats to constitutionally entrenched rights of children. The objective of this study therefore was to determine how and to what extent the practice of child marriage can be justified in a constitutional democracy that recognises and promotes the best interests of the child, yet also recognises the rights of people to practise their religious and cultural practices.

This final chapter concludes the study. First, the chapter will provide a summary of each of the preceding chapters. Thereafter, the chapter sets out the findings and conclusions drawn from the chapters which will culminate in the formulation of recommendations in line with the conclusions reached in the study.

#### ***4.2 Summary of the chapters***

Chapter one introduced the study by providing an overview of what the study would entail. The chapter briefly demonstrated that certain communities in both South Africa and Zimbabwe take part in the cultural practice of child marriage. When confronted by law, such parents use culture as defence of their constitutional right to culture. This right, however, is not an unqualified right, as practices of one's culture may not infringe on other constitutional rights. The chapter then provided an overview of children's rights which stand to be violated by the practice of child marriage. The chapter also set out the aims of the study, the research methodology as well as the outline of the study.

The purpose of chapter two was to discuss the practice of child marriage in South Africa and Zimbabwe. The chapter identified the practice of child marriage within the

cultural and religious practices of certain societies. For the reason that children are born into these cultures and do not participate in decisions affecting them, child marriage is often initiated by parents and guardians. To illustrate the incidence of child marriage, the study discussed some forms of child marriage in South Africa and Zimbabwe. The practice of *ukuthwala* in South Africa was discussed and reference was made to the case of *Jezile v The State and Others* case. The study found that there are three forms of *ukuthwala* and not all of them constitute criminal offenses. However the third form of *ukuthwala* which involves forced marriage is equated to kidnapping and trafficking of the child which acts are punishable under criminal law. The chapter illustrated that child marriage can violate a number of children's rights such as the child's right to education, the right to be heard and the right of the child to be protected from maltreatment, neglect, abuse and degradation.

Chapter three covered the legal framework on the protection of children from the harmful practice of child marriage. Children's rights were traced back to the early 20<sup>th</sup> century to the Save the Children Fund being at the forefront of deliberations on children's rights. These and other deliberations led to the emergence of a steady and focused network of international treaties and conventions on the rights of children generally. From this network of laws, the study noted that the principle of the best interest of the child is not only a guiding standard in South Africa but a constitutionally entrenched right in itself. Instruments such as the CRC and the ACRWC expressly provide for the protection of children and the consideration of a child's best interests in matters concerning the child. The chapter also showed that the South African and Zimbabwean constitutions elevate the promotion of the best interests of the child. As such, chapter three found that parents and guardians have responsibilities over their children and they are required to consider the best interests of the child when making decisions on behalf of the child or any other decisions that affect the child.

### **4.3 Findings and conclusion**

#### **4.3.1 Findings**

Child marriage negatively affects the growth and development of a child. Some of its consequences include health complications emanating from forced sexual intercourse

as well as psychological harm stemming from her emotionally ill-preparedness for marriage. This study has demonstrated that child marriage is influenced by cultural and religious beliefs based on the law, which also gives individuals the right to practise their cultural and religious beliefs. Nevertheless, although everyone has the right to belong to a cultural or religious group there is a qualification to this right: that cultural and religious practices should not be inconsistent with other constitutional rights.

The study found that parental responsibilities and rights which parents and guardians have over their children sometimes serve as justification for child marriage. Most African cultures do not consider the views of the child in any decision-making process irrespective of the child's opinion. This results in parents exercising their parental responsibilities and rights to the detriment of their child, forcing her into marriage on the basis that they practise their culture. Arguably, children need parents and guardians to make decisions on their behalf but this should always be done with their best interests in mind.

The study also found that poverty is one of the contributing factors behind the practice of child marriage. Zimbabwe for instance is going through economic turmoil and most families are struggling to support themselves and their children. Child marriage seems to be a solution for most families as the *lobola* payment is realised to be a means of escape from difficult times. Young girls are therefore victims of abuse and exploitation as their position in an impoverished family is regarded to be a burden.

There also seems to be an inherent belief by some families that culture cannot be derogated from, as was the instance in the *Kupemba* case. Many traditional and cultural families fear abating their old cultural practices and beliefs and this results in the continuation of old repressive practices that could result in the violation of rights of others. For example, practices such as virgin pledging are some of the practices that are traditionally being practised. Now that children's rights are enshrined in constitutions, resulting in children to be protected from any harmful practices, there is a need for such old cultural practices to be eradicated.

The persistence of some old cultural practices could also be linked to the ignorance of implementation of the law on the part of some of the families that tolerate child

marriage. The result is that in some instances, some families genuinely believe that they are participating in a noble practice, for instance in the pledging of their daughters as appeasement for the death of someone at the hands of their relative. Some might not even know that the law prohibits such practices and that there are consequences for individuals who force or instigate such marriages. They might not be aware that the right to belong to a cultural group and to practise one's culture is limited to the extent that it should not violate other constitutional provisions. Furthermore, children themselves may not be aware of the fact that they are legally protected and that child marriage is a violation of their rights: or that they can institute legal actions against any person who forces them into a marriage.

The study's overall and general finding is that the girl child is at a higher risk of growing up uneducated and unsuccessful in a cultural society where child marriage is prevalent. The enjoyment of childhood, the opportunity to experience adolescence and a number of other rights are taken away from the girl child as a result of child marriage. Accordingly, child marriage cannot be justified in a constitutional democracy that recognises and promotes the best interests of the child despite the recognition of people to practise their religious and cultural practices.

#### ***4.3.2 Recommendations and conclusion***

The study has shown that both South Africa and Zimbabwe formally adhere to norms and standards set by international instruments and have enshrined children's rights in their Constitutions. However, the provision of laws must be followed by the effective implementation of such laws.

- Given that child marriage is predominantly practised in rural societies, governments have a responsibility to facilitate awareness of relevant laws and policies. Such awareness programmes must be targeted at every tier of rural societies or traditional societies: that is at the king or chief level, the headman as well the general community level. These awareness programmes must aim to develop people's knowledge of the limitations of their right to cultural practices as well as the liability that comes with violation of children's rights.

- Using chiefs and elderly people to campaign against child marriage can have a positive effect in reducing and eliminating the practice especially in rural areas. When chiefs are directly involved and agree to abolish child marriage, their position of influence will impact significantly on the response of their communities accordingly.
- Activism has been an essential tool in exposing child marriage since many of the incidences of child marriage never make it to court or mainstream media. As such, non-governmental organisations and civil society must continue to expose the practice of child marriage with the aim of moving towards total abolition of child marriage. Private-public partnerships between activists and governments could also be useful platforms to ensure that there is unity of purpose between governments and the civil society.
- For Zimbabwe in particular, there is a need for a supporting legal framework to regulate family relations and curb cultures that endorse sexual abuse and exploitation of the girl child. There must be a detailed provision of parental rights and responsibilities in the Children's Act similar to the South African Children's Act. Such provisions would provide guidelines on the exercise of parental rights over their children.
- Apart from implementing and revising legislation, it may also be possible to adopt and incorporate the provisions of the international instruments such as CEDAW through national courts.
- Human rights education can and does play an important role in building a culture of human rights in culturally diverse societies such as South Africa and Zimbabwe. More human rights educational campaigns and awareness programmes need to be set up in schools and communities. This will assist to impart informative knowledge to families and children on the unlawful nature of child marriage, the risks and consequences the practice has on children and the criminal implication for any person who supports or initiates child marriage.

- Courts should embark upon an avenue by means of which the interests of parents and children could be balanced. This suggestion flows from the decisions in *Fitzpatrick* that the best interests of the child is a constitutionally entrenched right. Per definition this means that in instances of conflict of constitutional rights, such rights must be balanced.
- Lastly there is a need to develop customary law to ensure that it is compatible with the respective constitutions and this would help to minimise the potential clash between culture and human rights.

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### **List of abbreviations**

A	Article
ACRWC	African Charter on the Right and Welfare of the Child
AIDS	Acquired Immune Deficiency Syndrome
AHRLJ	African Human Rights Law Journal
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
Fn	Footnote
HIV	Human Immunodeficiency Virus

PELJ	Potchefstroom Electronic Law Journal
Par	Paragraph
PER	Potchefstroom Electronic Review
S	Section
Stellenbosch LR	Stellenbosch Law Review
UD	Universal Declaration
UN	United Nations