

Child Marriage

By Cynthia Wechabe

Child marriage is recognized as a social evil in most countries of the world. It largely occurs because of ignorance and poverty: poor and uneducated parents, unable to support all their children, often marry off their daughters as soon as possible in order to relieve themselves of the burden of keeping them. In countries where dowries or bride prices are payable, parents have an added incentive to secure husbands for their daughters at an early age.

Young people generally lack the emotional maturity needed for marriage. The younger the parties are when they contract a marriage, the more likely it is that their marriage will break down. This is the case when both parties to the marriage are young, but the effects can be just as damaging when young girls are married off to older men [and it is always that way round: parents do not marry off their young sons to older women]. Young girls also often suffer physical injury from marriage. Their bodies are not sufficiently developed at puberty to cope with childbirth, and if they become pregnant mother and baby alike are endangered.

Child marriage has harmful social effects too. Once married, the girl child is unlikely to proceed further with her education, so she remains impoverished both intellectually and economically. If she enters the workforce at all, she is likely to do so as an unskilled and lowly paid worker. Therefore child marriage tends to perpetuate poverty. The parties to such marriages are unable to advance themselves through education so they remain poor and are likely to marry off their own children at an early age in order to relieve themselves of the burden of keeping them. And so the cycle goes on from one generation to the next.

International law

International treaties and conventions have recognized the evils of child marriage:

· Article 21.2 of the African Charter on the Rights and Welfare of the Child (1999) states:

“Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years.”

· Article 6(b) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003) [“the Maputo Protocol”] is to the same effect. It obliges states parties to enact legislation to guarantee that:

“The minimum age of marriage for women shall be 18 years.”

Zimbabwe is a party to both these conventions. It is therefore obliged by its international obligations to ensure that the minimum age of marriage is 18 years; in other words to ensure that people are not allowed to marry until they have reached the age of majority.

The Zimbabwe Constitution

The Constitution of Zimbabwe does not specify a minimum age at which people can marry. However, in section 78, which is entitled “Marriage rights”, it states that: “Every person who has attained the age of eighteen years has the right to found a family.” This ensures that once adulthood is reached persons cannot be prevented from marrying. [This doesn’t necessarily mean that children cannot marry - and it should be noted that marriage under 18 is permitted in most countries if there are special circumstance, but only after an application to a court.]

Our Constitution is, however, very strong on the rights of children and in section 81 [“Rights of children”] it states that every child – i.e. “every boy and girl under the age of eighteen years” – has the right:

“To be protected from economic and sexual exploitation ... or any form of abuse”.

Child marriage, as indicated above, involves both sexual exploitation and serious abuse. It is therefore prohibited by section 81.

Section 81 is also very strong on the child’s right to education, health care services, nutrition and shelter, and parental care where possible. And the Constitution prohibits discrimination on the ground of gender: this is stated particularly in section 56 [“Equality and non-discrimination”], under which women and men have the right to equal treatment and must not be unfairly discriminated against on the ground of their sex or gender.

Current Law Still Unaligned with the Constitution

The law of Zimbabwe, whether statute, common law or customary law, does not provide the protections against child marriage and its associated abuses which the country is obliged to provide by under the Constitution and its international commitments. This will become clear when we look at the types of marriages that our law recognizes.

There are essentially three types of marriage in Zimbabwe:

Marriages under the Marriage Act

These marriages are sometimes called “civil marriages” because the way in which they are solemnized, and the rights and duties of the spouses, are governed by the Roman-Dutch law as modified by statutes, rather than by customary law.

Under the Act:

- Girls under the age of 16 cannot get married, even if their parents or guardians consent, unless the Minister of Justice, Legal and Parliamentary Affairs has given written permission for their marriage, which he may do if he considers their marriage desirable [section 22].
- Boys under the age of 18 cannot get married unless the Minister has given written permission for their marriage [section 22].
- Girls between the ages of 16 and 18 can get married with the consent of their parents or guardians or, if a guardian refuses consent, with the consent of a judge of the High Court [section 20]. Boys under the age of 18, as already noted, cannot marry without the Minister's permission, even if their parents or guardians consent.

The Act is, therefore, defective in two respects. Firstly, it allows minors to marry, whereas Zimbabwe is bound, by the Constitution and by international treaties, to outlaw such marriages. Secondly, it distinguishes between boys and girls, which is prohibited by the Constitution.

Marriages under the Customary Marriages Act

These marriages are contracted under customary law. The Customary Marriages Act requires such marriages to be solemnized; that is to say, after the parties have gone through the customary formalities of marriage they must appear before a customary marriage officer and satisfy him or her that bride and groom as well as the bride's guardian have consented to the marriage; that marriage consideration [i.e. lobola or roora] has been agreed upon; and that there are no lawful impediments to the marriage. Upon being so satisfied the marriage officer registers the marriage under section 8 of the Act and it becomes a legally binding marriage.

The Customary Marriages Act has not been amended to take into account social and legal changes since Independence – for example, the Act continues to require that the bride's guardian should consent to her marriage, even if she is over the age of 18, and continues to regard lobola or roora as an essential element of a customary marriage – but for the purpose of this bulletin all we need say is that the Act does not specify a minimum age for marriage. Hence there is no bar to minors getting married under customary law, and one textbook on family law in Zimbabwe suggests that the Act permits the marriage of girls as young as 12 years old.

Even more than the Marriage Act, therefore, the Customary Marriages Act is defective. It breaches Zimbabwe's international obligations by allowing minors to marry, and by allowing young children to be married it breaches the constitutional provisions protecting children from abuse.

Non-statutory customary marriages - "customary-law unions"

These are marriages, which are contracted under customary law but are not solemnized or registered under the Customary Marriages Act. They exist in a semi-legal twilight. Because they are unsolemnised they are legally recognized only for certain purposes such as the status and custody of children [section 3 of the Act]. However, our courts have recognized them for other purposes as well, such as payment of maintenance to spouses and granting wives a share in their husbands' property on divorce.

There is no specific minimum age at which people can contract a customary-law union. Under customary law a girl's capacity to marry depends on her individual physical development, and it is possible for relatively young children to be married. In this respect therefore our law is again deficient in that it does not prohibit minors from getting married and does not protect children against abuse.

What should be done?

Although the relevant provisions of the Constitution have been in force since 22nd May 2013, no steps have been taken by the Government to get Parliament to correct the serious defects in our law outlined in the previous paragraph. That is why it has been thought necessary to bring the present case to the Constitutional Court, and to request the court not only to declare that the Constitution does, indeed, lay down that 18, the age of majority, is the minimum age at which boys and girls alike may marry, but also to reinforce this declaration by striking down as unconstitutional the existing legal provisions to the contrary.

If the Constitutional Court grants the present application, its decision will be binding on all other courts, on the Government and on every Zimbabwean, including every parent and every marriage officer.

A court order may, therefore, be enough, on its own, to put an end to child marriage in Zimbabwe, but it would be better if the Marriage Act and the Customary Marriages Act were also amended to bring them into line with the Court's ruling.

A Bill to amend the two Acts should provide for the following, at a minimum:

- No one, boy or girl, may legally marry if he or she is under 18 years of age. This should apply whether the marriage is contracted in terms of the Marriage Act or the Customary Marriages Act or under customary law.
- Before a marriage can be solemnized under the Marriage Act or the Customary Marriages Act, the bride and groom must satisfy the marriage officer that they are both over the age of 18.
- It should be a criminal offence for anyone to arrange or encourage the marriage of a person, boy or girl, who is under 18.

The Bill might allow minors [i.e. boys and girls under the age of 18] to marry in certain circumstances, but if it does the circumstances should be very restrictive:

- The minors should be over the age of 16.
- The approval of a judge of the High Court should be obtained, given after the judge is satisfied from reports of social welfare officers that marriage would be in the best interests of the parties and that the minor has freely and unreservedly consented.

Campaign Against Child Marriage

There has been a worldwide campaign against child marriage and this campaign has been vigorously pursued by several Zimbabwean organizations defending the interests of the girl child. It is somewhat surprising, therefore, that the Ministry of Women's Affairs, Gender and Community Development are opposing the present court application.

Also surprising, in the light of its acknowledgment of the need to align existing laws with our Constitution, is the opposition to the application by the Ministry of Justice, Legal and Parliamentary Affairs.