

A Critical Analysis of Section 26 of the Constitution of Zimbabwe in Relation to Child Marriage: Key Insights for Zimbabwe's Child Protection Practitioners

Anthony Musiwa¹

Section 26 of the Constitution of Zimbabwe (as amended in 2013) provides for the protection of children from child marriage. Lack of understanding of the meaning and implications of this statutory provision has been widely regarded as limiting its real significance and efficacy in child protection work. Therefore, this study employs legal hermeneutics to analyze the statute's legal and practical implications, and highlights key insights for child protection interventions for Zimbabwean practitioners related to protecting children from child marriage, including prosecution of perpetrators and child rights advocacy.

Background to the Statute

Like many countries in sub-Saharan Africa, and others across the world, Zimbabwe faces high rates of child marriage (Girls Not Brides (GNB),

¹LLM Candidate, University of London (UK); MSc, National University of Science and Technology (Zimbabwe); BSW Hons, University of Zimbabwe (Zimbabwe); and, Cert. Women's & Gender Issues, George Mason University (USA).

2015; Maswikwa et al., 2015). Child marriage generally refers to the marriage of a person before they attain the stipulated majority age (Research and Advocacy Unit (RAU), 2015). While the problem cuts across gender boundaries, girls are the most affected (GNB, 2016). In Zimbabwe, although data is largely anecdotal due to poor documentation and lack of research on the subject, the latest national population census reports that 22% of females—compared to 2% of males—ages 15 to 19 were married or were in union at the time of the census (Zimbabwe National Statistics Agency (ZIMSTAT), 2012a). Likewise, a government study concluded that 5% of women and 0.3% of men ages 15 to 49 marry or enter into a union before the age of 15, while one in three women and less than one in 20 men ages 20 to 49 years marry or enter into a union before they turn 18 years of age (ZIMSTAT, 2012b). All these statistics, which are worrying given the large size of Zimbabwe's child population, demonstrate the high prevalence of child marriage in the country.

Child marriage has devastating effects on the child, especially if it is the female. It weakens the child's rights to autonomy, to a life free from violence and coercion, and to attainment of an education (UNICEF, 2001). Like any marriage, it is expected that the union will produce children soon after marriage, meaning that intercourse is, by default, sanctioned (GNB, 2016). This is child sexual abuse (Musiwa, 2016). Ultimately, the practice leads to severe pregnancy and maternal health complications, like obstetric fistula, or even death, since the girl is not physically ready to shoulder the responsibilities of child-bearing (UNFPA, 2012). In addition, the huge age gap that normally characterizes child marriage leads to the inability of the female child to negotiate safe sex, thus risking exposure to sexually-transmitted infections, including HIV (Panos Institute Southern Africa (PSAf), 2015). Overall, this puts the child's health and life chances of survival at risk (International Planned Parenthood Federation (IPPF), 2006).

Moreover, the social problem deprives the child of critical opportunities to develop themselves and, consequently, participate in helping develop their community and nation (Plan International Zimbabwe, 2011). Female child marriage victims normally bear many children, yet they have limited financial options, thus increasing their economic dependence on men, often leading to abuse and exploitation (GNB, 2016). Likewise, children born out of child marriages often commence life at a disadvantage, leading to the perpetuation of the cycles of poverty and relative deprivation (Nour, 2006). Overall, this issue is a cause and consequence of human rights violations, especially as it leads to a complete halt or crippling of the child's ability to realise a wide range of human rights (Human Rights Watch (HRW), 2015). Indeed, it also violates international and regional human and child rights standards as well (UNICEF, 2005).

To address child marriage, the Government of Zimbabwe has, over the years, developed various child protection policies and laws. Zimbabwe's key child protection policy, the National Action Plan for Orphaned and Vulnerable Children (NAP for OVC)—which has evolved over the years from phases I (2004-2010) and II (2011-2015) to the current III (2016-2020)—provides guidelines for promoting the rights of all children, including protecting them from all forms of abuse. It identifies “married girls” as a particularly vulnerable population and puts in place measures to identify and help them (UNICEF, 2014). It is also complemented by other policies, like the National Case Management Guidelines, National Gender Policy, National Orphan Care Policy, and Zimbabwe National HIV and AIDS Strategic Plan (I to III), which, though implicitly, speak to child protection work. Elaboration of these policies is, however, beyond the scope of this article.

Additionally, Zimbabwe has a legal system comprising several laws relating to children and child protection in general. The Children's Act 23 of 2001 (5:06) is seen as the country's most comprehensive legal document that guides the care and protection of children from abuse, exploitation, and neglect (UNICEF, 2004). This legal framework provides guidelines for the protection, welfare and supervision of children; establishment and operation of children's courts, institutions and institutes; and, support for child protection coordination, among others. Meanwhile, there are also other laws which complement this piece of legislation in speaking to child marriage issues. Examples include the Legal Age of Majority Act 19 of 1982, Customary Marriages Act 23 of 2004 (5:08), Marriage Act 23 of 2004 (5:11), Sexual Offences Act 123 of 2011, and Criminal Law (Codification and Reform) Act 109 of 2008. Nonetheless, beside continuous reference to some of these laws in this article, their in-depth analysis is beyond its scope.

Though it might seem as if Zimbabwe has what it needs to address child marriage, a close look reveals that these systems are fraught with discrepancies which, ultimately, make them ineffective (Muswiwa, 2016). For instance, NAP for OVC and the Children's Act 23 of 2001 (5:06) make it illegal for one to marry before they are 18, or get married to a person ages 17 years or less. This applies equally to both boys and girls. Conversely, the Marriage Act 23 of 2004 (5:11) provides that boys are eligible to marry, or get married, only when they are 18 years old, while girls can marry, or get married, when they are 16 years with both their consent and that of their parent(s) or legal guardian(s). Meanwhile, the Customary Marriages Act 23 of 2004 (5:08) does not specify the legal age for marriage eligibility. In other words, by design or default, both the Marriage

Act 23 of 2004 (5:11) and Customary Marriages Act 23 of 2004 (5:08) allow for child marriage. Hence, the practice continues.

This situation was allowed to happen as the Constitution of Zimbabwe remained silent about child marriage until 2013 when, through adoption of Section 26 (titled “Marriage”), the practice was made illegal. There are also other sections in the supreme law (ref. Sections 19 (“Children”), 78 (“Marriage Rights”), and 81 (“Rights of Children”) which, by upholding a series of children’s rights, implicitly speak to protection of minors from child marriage. However, it is Section 26 in particular that marked a new, positive, and progressive era for child protection work because it explicitly outlawed the marrying of a person, male or female, ages 17 years or less. Effectively, being the supreme law of the land and the “ultimate judge”, it nullified all other marriage provisions (and divergences) in the various laws and policies in Zimbabwe. For instance, in 2016, based on this constitutional provision, the Constitutional Court of Zimbabwe ruled that no person, whether male or female, can enter into any marriage or union whatsoever before they are 18 years old, and that both the Marriage Act 23 of 2004 (5:11) and Customary Marriages Act 23 of 2004 (5:08) are unconstitutional in their provisions, or lack thereof, regarding marriage age eligibilities which run contrary to the country’s supreme law (*Mudzuru & Another v Minister of Justice & 2 Others* [2016] Z79/14 (CC)).

Despite that, many children, especially girls, continue to be married off before they reach 18 years of age. Central among the factors for this, such as economic poverty (UNFPA, 2012) and harmful cultural practices (Walker, 2012), is the ignorance of how to use the law for protection, exacerbated by the complexities of legal language (HRW, 2015). In the same way, the author believes that a lack of understanding of Section 26 of the Constitution of Zimbabwe and related provisions has shrouded the recognition by many child protection practitioners—lay and professional—of the real power and weapon they have at their disposal to protect minors from the harmful practice. To the author’s knowledge, no papers yet address this knowledge gap, despite it being crucial for the promotion of appropriate and sustainable child protection interventions. This article seeks to address some of that gap through its hermeneutic analysis of the legal and practical implications of Section 26. It also highlights insights for interventions related to protecting children from child marriage, including prosecution of perpetrators and child rights advocacy.

The Use of the Legal Hermeneutics Model

This study uses legal hermeneutics as its design because it “is one of the most fruitful methods for cognition of law” (Merezhko, 2014:1). This scientific method of interpreting and applying legal rules is derived from philosophical hermeneutics, which is basically a method of interpreting and analyzing texts (Merezhko, 2014). Generally, hermeneutics is a positive reading and a critical perspective which strives to bring out understanding rather than offering explanations or providing an authoritative reading or conceptual analysis of a text (Jardine, 1998). The method includes two ways of critiquing texts. The first is “explaining”, which is based on structuralism and language theories, whereby texts are analyzed in their own right and their constructions and genres contribute to the impression on how the texts are to be explained (Ricoeur, 1984). The second is “understanding”, which entails the reader’s comprehension of the meaning of the texts (Ricoeur, 1984). This is a conference of two perspectives—from the texts and from the reader—which demands dialogue, that is, a dialectical process between the two perspectives whereby the reader comes to the text with questions, and new questions are raised by the texts (Ricoeur, 1984).

As a derivation of philosophical hermeneutics, legal hermeneutics exists mainly in the interpretation of law statutes with the main aim being to best interpret and understand a legal text (Jardine, 1998). Instead of taking a particular approach to meaning, it focuses on the nature of meaning, understanding, and interpretation (Leyh, 1992). It suggests that, to get a proper legal meaning of the text, one must look at both previous and current explanations, including analysis of the conditions for the possibility for both (Merezhko, 2014). Legal hermeneutics does not dwell on any ideology or methodology, but seeks to bring to the attention of the interpreter the fact that every step made toward an understanding of the law is a step made toward the interpretation of it (Leyh, 1992). It is more about clarifying the nature of how legal analysis works rather than a theory of how legal analysis ought to work (Dilthey, 1980). Thus, it is both descriptive and normative. In relation to constitutional matters, it supposes that the interpreter takes note of their own identity and that of previous interpreters, the socio-historical and political climate at the time the text was written, as well as the experience given by those affected by the law in the text (Merezhko, 2014). In other words, the law is not separated from its history.

Guided by this design, this article analyzes Section 26 of the Constitution of Zimbabwe by applying the basic rules of statutory interpretation. It examines the constructive parts of the statutory provision, that is, each and every word as written in the text, to understand the whole context. Analysis moves from a naïve understanding, that is, the initial artificial grasp of

Section 26, to in-depth understanding where the parts of this text (that is, the sub-sections of the statutory provision) are understood in relation to the whole section and vice-versa. Thereafter, the author makes an informed evaluation of the legal and practical implications of the legal provision. The discussion is largely descriptive, analytic, and normative. Hermeneutical studies have been proven to be practically useful through providing insights on issues that have direct implications for practice (McCaffrey and Moules, 2016; Merezhko, 2014). This article also highlights key insights for interventions related to protecting children from child marriage, including prosecution of perpetrators and child rights advocacy.

Analysis of Section 26

Since instruments such as Section 26 of the Constitution of Zimbabwe provide a global moral code for protecting children from violence, abuse and exploitation (Mushunje, 2006), and are the fundamental epitome of children's rights (Blanchfield, 2013), this analysis shows how the Zimbabwean situation adheres to such standards. This is important for clarifying both the relevance of the country's fight against child marriage and the support base child protection practitioners in Zimbabwe have at the international level. In some cases throughout this analysis, reference will be made to other provisions of the Constitution of Zimbabwe and key literature sources to fully drive home certain points.

Section 26 of the Constitution of Zimbabwe

Provisions. The right of children to protection from child marriage is provided for in Section 26 of the Constitution of Zimbabwe (titled "Marriage"), as reproduced below:-

The State must take appropriate measures to ensure that:

- no marriage is entered into without the free and full consent of the intending spouses;
- children are not pledged in marriage;
- there is equality of rights and obligations of spouses during marriage and at its dissolution; and
- in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses

(Section 26 of the Constitution of Zimbabwe, 2013)

Textual Meaning. Section 26(a) provides that marriage can only be entered into by freely and fully consenting spouses. This means that, without the free and full consent of the intending spouses, a marriage cannot be entered into and, if it happens, then that marriage is null and void. As detailed later, this text recalls Article 16(2) of the Universal Declaration of Human Rights (UDHR) and Article 16(1)(b) of the Convention of the Elimination of all forms of Discrimination against Women (CEDAW). A key term used here is “consent”, which is not just about saying ‘yes’, verbally or otherwise. According to IPPF (2006), consent is about full disclosure of the natures of both the marriage or union and the involvement of all the parties in it; adequate understanding of the responsibilities involved in the marriage or union by all parties involved; voluntary choice to enter into that marriage or union by all parties involved; and, the capacity of all parties involved to make the decision to enter into that marriage or union (IPPF, 2006). As clearly illustrated above in the introductory sections, a child, whether male or female, is unable to “consent” to marriage by their very physical, physiological, mental, social and economic natures.

Further, the textual content of Section 26(a), particularly the concept of “consent”, implies a condemnation of any use of force or coercion whatsoever in entering a marriage or union. Anything contrary to it is tantamount to a “forced” marriage. Force can be conveyed in various forms, including physical, financial, cultural, and psychological, for instance. It compromises the capacity or ability of a person to fully and freely consent. A closer look shows that child marriage in Zimbabwe (and many other countries) involves one or more forms of coercion. One example, among others, is that of *kuripa ngozi* (atonement for avenging spirits), whereby a girl child (usually a virgin) from a responding family is “married off” to an aggrieved family. This is equivalent to a culturally and psychologically enforced marriage. Overall, child marriage is a form of forced marriage as it involves both coercion and the incapacity or inability of the child to fully and freely consent. Hence, the phenomenon violates Section 26(a), and the State is obligated to intervene accordingly to protect the best interests of the child or children involved.

In sub-section (b) of Section 26 of Zimbabwe’s supreme law, the government obligates itself to ensure that children are not pledged in marriage. Essentially, this is where it precisely outlaws child marriage. A key word to note here is “pledged”, which is one of the key ways by which child marriage in Zimbabwe is perpetrated. According to the Oxford English Dictionary (2017), a “pledge”, in legal terms, is “a thing that is given as security for the fulfilment of a contract or the payment of a debt and is liable to forfeiture in the event of failure” (p. 1). This definition invokes two issues central in this article’s argument; that is, satisfying a contractual

obligation or debt and liability to forfeiture. For instance, child marriage in Zimbabwe, and in sub-Saharan Africa generally, is a socio-cultural practice that has spanned generations (IPPF, 2006). Practices like *lobola* (bride-price), *kugara nhaka* (wife inheritance), *kuzvarira* (wife pledging), and *kuripa ngozi* (atonement) are customary in most cultural and/or religious communities in the country. Female children are basically treated as “tokens”, “things”, or “materials” for the purposes of fulfilling a contract or debt and, yet, still are liable to forfeiture.

In other cases, child “pledging”, which is a form of child marriage, happens as a result of economic “forces” such as poverty. For instance, a UNFPA-led survey, as reported by PSAf, 2015:5) states that “girls from the poorest 20% of the households in the survey were more than 4 times likely to be married or in union before age 18 than those from the richest 20% of the households in the survey”. A perfect illustration of this scenario is the historical case managed by the Constitutional Court of Zimbabwe between 2014 and 2016, where the two complainant girls in the petition became victims of child marriage due to a promise of financial gain and escape from their respective economic hardships (*Mudzuru & Another v Minister of Justice & 2 Others* [2016] Z79/14 (CC)). Herein, “force”, which manifested in financial form, affected the capacity of the girls to consent to marriage, recalling the key components of ‘consent’ suggested by IPPF (2006). In any case, they could not consent, and did not have the capacity or ability to consent, because they were children and, typically, developmentally immature. This, and the predicaments that later befell them, make the case against child marriage all the more powerful. Section 26(b) of the Constitution of Zimbabwe is an acknowledgment of such complexities.

In Section 26(c), all spouses currently in a marriage or after its cessation are deemed to have equal rights and obligations. This is a human rights-based lens which determines that all spouses in a marriage or after its dissolution have equal rights and obligations. In other words, no party—both in the lifetime of the union or after its termination—is worthier than the other(s). More so, the sub-section also entails that whatever obligations the spouses may have during the marriage or after its disbanding must be shared equally between or among them. Whatever these obligations are, they surely should include the welfare, care, and protection of the children borne out of the union and which the spouses should bear equally. Again, the State is required to take proper measures to safeguard this “equality of rights and obligations” and ensure that children are well taken care of.

The observations and arguments above raise interesting but critical inferences relevant in the case of child marriage. Section 26(c) recognizes the imbalances between/among spouses that normally characterize most marriages. Obviously, such historical inequalities between men and

women have been widely demonstrated through various empirical studies. Therefore, if fully and freely consenting adult parties in a marriage can, presumably, disagree on their rights and obligations, and hence require laws and constitutions to manage such differences, then, if one or more of those parties are children, the actual or potential risks are magnified. This leads to the unassailable question of the rationality of marrying a child when it is obvious that they enter a marriage or union already at a disadvantage. As demonstrated earlier through the case of *Mudzuru & Another v Minister of Justice & 2 Others* [2016] Z79/14 (CC), whereby the two complainants highlight the “hell” they went through during and after the dissolution of their respective “marriages”, married children have little decision-making capacity which, ultimately, costs them their health, dignity, and lives.

Section 26(d) buttresses, to some degree, its preceding counterpart by clarifying that all children and spouses must be protected in the event of dissolution of a marriage. Accordingly, dissolution is regarded as allowable based on one of two reasons: death or divorce. According to Section 4 of the country's Matrimonial Causes Act 2 of 1990 (5:13), there are only two grounds for divorce in Zimbabwe: “irretrievable breakdown of a marriage” and “incurable mental illness or continuous unconsciousness of one of the parties to the marriage”. In-depth analysis of the details of marriage termination is beyond the scope of this article. Nevertheless, it is imperative to highlight the fact that, in any case, Section 26(d) puts the care and protection of children at the epicenter when a marriage is terminated. This viewpoint invokes a child rights-based approach, which clarifies the relationship between a child or children as rights-holders with valid claims, and parents or guardians, state, and other non-state actors as duty-bearers with correlative obligations (Jonsson, 2003). Thus, whatever happens to a marriage, the government assumes the obligation to ensure that adequate “provision” is made for the protection, care, and welfare of children.

Relationship with Key International Child Rights Instruments

Section 26 of the Constitution of Zimbabwe is consistent with other global human and child rights instruments to which Zimbabwe is a signatory and therefore bound by them. Key among these is the 1964 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (the “1964 Convention”) which the country signed in 1994. This convention requires, in Article 1, that all parties involved in a marriage or union be freely and fully able to consent to that marriage or union. Article 2 specifies that State Parties should “take legislative action to specify a minimum age for marriage” and that “no marriage shall be legally

entered into by any person under this age". By requiring parties to fully and freely consent to marriage, as well as stipulating the marriage age as 18 years for both girls and boys, Section 26 abides by the terms of the 1964 Convention. It is crucial to echo the sentiments of the International Planned Parenthood Federation (2006) that consent is about disclosure, adequate understanding, voluntary choice, and full capacity to make the decision to enter into a marriage or union.

Additionally, Section 26 is in tandem with UDHR and its two treaties, that is, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). For instance, in Articles 16, 23, and 10, UDHR, ICCPR, and ICESCR, respectively, refer to marriage as applicable to those with the freedom and ability to fully consent. As per Zimbabwe's supreme law, only persons aged 18 years or older can consent to marriage, which makes children unqualified by virtue of their age. Also, UDHR, ICCPR, and ICESCR all call upon State parties to implement supportive measures to safeguard children from child marriage in the same way Section 26 of the Constitution of Zimbabwe does. Meanwhile, by espousing a range of children's human rights—something which has a bearing on the issues raised in Section 26—Sections 71 ("Marriage Rights") and 81 ("Rights of Children") of the Constitution of Zimbabwe run congruent with UDHR, ICCPR, and ICESCR, which basically cover a broad range of human (and child) rights. Hence, they identify child marriage as a civil, political, economic, social, and cultural right issue especially as it violates most, if not all, of these human rights as well.

Furthermore, Section 26 speaks the same language as the United Nations Convention on the Rights of the Child (UNCRC) which, in Article 19(1), while not naming "child marriage" per se, calls upon State parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". This makes Section 26 a direct translation of such UNCRC ideals because child marriage is, indeed, a form of violence, abuse, and exploitation of the child (Musiwa, 2016; Mushunje, 2006). Additionally, Section 81(1)(e) of Zimbabwe's law, which backs up Section 26, abhors any form of abuse, maltreatment, and exploitation of children. By its devastating nature, child marriage is a part of such horrific acts.

Likewise, Section 26 is compatible with CEDAW, which is the only human rights treaty worldwide that specifically focuses on women and girls. This Convention also calls on State Parties to take measures to eliminate discrimination against women and girls in all areas of life such as

political participation, employment, education, healthcare, and family (Blanchfield, 2013). The fact that Zimbabwe's Marriage Act 23 of 2004 (5:11) sets the marriage age at 16 years for girls and 18 years for boys is discriminatory against the girls. Similarly, the Customary Marriages Act 23 of 2004 (5:08) specifies no marriage age which, in turn, provides ample room for child marriage. Again, this is discrimination at its worst, as it is clear that girls are the ones who suffer the most from the phenomenon. Thus, with Section 26 stating that 18 years is the marriage age regardless of sex, it both aligns itself with CEDAW and establishes Zimbabwe as part of the global campaign to uphold the rights of women and girls and end child marriage. Indeed, the harmful practice is a women's (and human's rights) issue because it mainly affects women and girls and violates women's (and human) rights standards (HRW, 2015; Blanchfield, 2013).

Closer to home, Section 26 follows the African Charter on Human and Peoples' Rights (ACHPR), which contextualizes all human rights as espoused in UDHR, to the African setting. In Article 18(1), ACHPR calls on states to "ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions". While this instrument does not use the term "child marriage" verbatim, this article infers that the mention of protecting the rights of children (and women) is tantamount to calls for upholding the rights of children to be protected from all harmful practices, including child marriage.

Additionally, Section 26 is reminiscent of the ideals of the African Charter on the Rights and Welfare of the Child (ACRWC). In particular, Article 21(2) of ACRWC expressly forbids child marriage by stating that, "child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory". This narrative is interesting because ACRWC is a regional instrument that localises child rights to the African context based on the so-called "cultural uniqueness of child rights". Meanwhile, child marriage has, for a long time, been regarded as a "normal" socio-cultural practice (Walker, 2012). Consequently, while this issue has attracted a lot of controversy, it is crucial to clarify that both ACRWC and Section 26 of the Constitution of Zimbabwe deem child marriage illegal, regardless of what "culture" thinks of it. Accordingly, as this article argues, while cultural preservation forms a key part of the essence of humanity, it is outweighed by the fact that child marriage, as evidence shows, is harmful to the survival, growth, and development of that same culture.

Though it is commendable that Section 26 of the Constitution of Zimbabwe aligns the country with child rights standards in relation to child

marriage, full implementation of all the above instruments is yet to be realized. In particular, Zimbabwe is still lacking in legislative measures that outlaw child marriage. As analyzed in detail in the next section, the fact that there is no specific law to both illegalize child marriage and stipulate the marriage for both boys and girls as 18 years means that the fight against the disturbing practice remains difficult to win. Meanwhile, the only solace currently available in terms of enforcement is established in terms of Section 327(6) of the supreme law which states that, “when interpreting any legislation, every court or tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe”. Thus, whether implementation has been achieved in full or not, all global instruments embody human rights norms which are broadly accepted by the entire international community, Zimbabwe included, and so should be incorporated into domestic jurisprudence by judicial interpretation (Gubbay, 1997). This means that there is ample room to fight child marriage both constitutionally and legally.

Key Legal and Practical Implications

The inclusion of children rights to protection from child marriage in the Constitution of Zimbabwe, as championed in Section 26, carries with it legal and practical implications which the State, as well as every Zimbabwean citizen and or permanent resident, must uphold. The supreme law confirms, in Section 2(2) that, “the obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them”. Thus, the duty to facilitate the realization of children’s right to protection from child marriage must be fulfilled by every individual, agency, and or institution bound by that law.

Moreover, as a key duty-bearer in terms of human rights law, the State must delegate the authority to uphold children’s right to protection from child marriage to its arms of government, that is, the Executive, Legislative, and Judiciary branches (Section 2(2) of the Constitution of Zimbabwe). This is because merely having a constitution in place is not enough to facilitate children’s rights. The constitution must be translated into actual deliverables through such arms of government as mentioned. For instance, in the case of child marriage, while the Executive is required to develop and implement child protection policies which are in the best interests of the child, the Legislature must enact child protection laws which put the realization of those into motion. Meanwhile, the Judiciary must

uphold these rights by presiding over disputes relating to violation of the rights and, in this case, when a child has been pledged in marriage.

Section 26 acts as a voice for the voiceless. In human rights circles, children are often marginalized and abused due to their inferior physical, mental, social, and cultural statuses (UNICEF-UK, 2015). Thus, Section 26 is a fundamental advocate for children who, in most cases, cannot grasp the crucial political power to speak for themselves. It gives them that voice against oppression, speaks on their behalf, and protects them from being pledged in marriage. This provision also guards against violation of this right by other persons, agencies, and/or institutions, including the State.

By description, a constitution is the foundational document of a nation which gives voice to the aspirations and concerns of the people. Normally, a people that feel its collective interests are reflected in the supreme law will embrace it with pride and ownership, and understand that their rights will be respected and protected by government. Similarly, having child protection rights in a Bill of Rights both gives expression to societal values in general and affirms government's commitment to the interests of children in particular. Section 26 of the Constitution of Zimbabwe expresses the rational commitment by the State to protect children who, by socio-cultural portrayal, are regarded as developmentally immature and, therefore, dependent. Principally, guaranteeing children's right of protection from child marriage in the supreme law means that the public, which includes children, has been given the "power" to legally challenge child marriage in the courts of law. This "power" is one of the most invincible and sustainable child protection weapons that Zimbabwean society has been given to fight and end the unjust and detrimental treatment of children, especially girls.

While the State is required to be transparent, accountable, and supportive at all times, Section 26 encourages Zimbabweans, including the children, to actively participate in child protection decision-making processes, for instance, through identifying ways to improve the lives of children and build collaborative social movements that work towards realization of child protection rights. The constitutional provision provides citizens with the ability to demand rights protections, including through court cases, and to hold political leaders accountable to justify policy decisions that affect children. This includes challenging culture and religion—two key institutions within which child marriage thrives.

Another implication of Section 26 is that the State has, finally, taken responsibility to protect children from child marriage and its life-long ill-effects. However, while commendable, the State must take the next step of ensuring that there are fully-functional and effective systems in place to allow for the full realization of the right. This includes harmonizing the

country's two conflicting marriage laws (the Marriage Act 23 of 2004 (5:11) and Customary Marriages Act 23 of 2004 (5:07) which were crafted before the adoption of the Constitution of Zimbabwe in 2013. These laws should be both consistent with the supreme law and effectively enforce implementation of the provisions therein, mainly Section 26. Otherwise, child marriage perpetrators will continue to practice the offence which, ultimately, leads to reluctance on the part of local communities to report the crimes as they feel like justice is unlikely.

Still, with Section 26 in place, any aggrieved party is now free and encouraged to report child marriage to the Constitutional Court of Zimbabwe for redress. Notwithstanding the current irregularities in the country's marriage laws, and the tendencies for manipulation therein, the decisions of the Constitutional Court, as set forth in Section 127(1)(a) of the Constitution of Zimbabwe, are not only based on the ideals of the supreme law in general but also bind those of all other courts. In essence, the Constitution of Zimbabwe provides for the Constitutional Court to function as a court of constitutional justice. Any person who feels that their rights, or those of another, have been violated, can petition this court for recourse.

Thankfully, the Constitutional Court of Zimbabwe, as an independent institution, has the legal authority to compel anyone, even the State, to comply with the obligations stated in Section 26 of the Constitution. The 2016 historical ruling by the court in the case of *Mudzuru & Another v Minister of Justice & 2 Others* is testimony to that effect. This means that, under this statutory provision, the right of children to protection from child marriage is now justiciable. Justiciability is the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur (Bendor, 1996). As stressed above, prior to adoption of Section 26 to the Constitution, it was difficult, if not impossible, to enforce children's right to protection from child marriage since the then-constitution was silent on the issue. The adoption of Section 26 is a significant development in both Zimbabwean jurisprudence and child protection practice which should be fully embraced and utilised to effectively uphold the rights of children by protecting them from child marriage and its detrimental consequences.

Key Insights for Zimbabwe's Child Protection Practitioners

The fact that Section 26 of the Constitution of Zimbabwe is testimony of the Government of Zimbabwe's commitment to uphold children's right to protection from child marriage cannot be doubted. As reasoned above, due to their immature developmental age, whether mental, physical, or otherwise, children possess neither the freedom nor the ability to fully consent

to marriage. Whatever the motive for marrying a child, the practice is unethical, inhumane, and degrading, and should be prohibited at all costs. As this article has also shown, the practice is now unconstitutional in Zimbabwe. Without a doubt, child protection work in Zimbabwe should take this legal provision as a positive development and fully employ it to effectively further children's rights and protect them from early marriage. A number of strategies can be pursued in this regard.

The worrying fact that, at present, the right to protection of children from child marriage is only a constitutional matter means that only half the battle has been won. Thus, child protection practitioners and organisations in Zimbabwe, including national human rights agencies, ombudspersons, human rights commissions, local administrative bodies, and international human rights bodies, should earnestly call for legal enforcement of Section 26. In other words, they should advocate for and put pressure on government to fast-track harmonization of the two currently conflicting marriage laws so that child marriage is deemed a criminal offence liable for prosecution in a criminal court.

The textual composition of Section 26 of the Constitution of Zimbabwe is one way to hold the government accountable to its word and effectively call for the legal enforcement and criminalization of child marriage. For instance, the term "must" in the opening line of this statutory provision is crucial. In terms of the presumptions of statutory interpretation, the word "must", as opposed to "may" or "ought", means that something is peremptory. The use of this word in this constitutional provision entails that Section 26(c) of the Constitution of Zimbabwe allows no discretion by the State to forbid the pledging of children in marriage. The State is not called upon to choose or not to fulfill this obligation. Rather, it is obligated to use any and every measure legally necessary to ensure that child marriages do not occur.

Meanwhile, it should be noted that the rights of all persons in Zimbabwe apply vertically and horizontally. According to Section 2(2) of the Constitution, the duties "imposed are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them". Intrinsically, the country's supreme law imposes the legal duty on the State and every Zimbabwean to ensure that anyone's rights are not prejudiced. Thus, a person is not allowed conduct that may lead another to suffer prejudice of their right. Bluntly speaking, this means that, by "marrying" a child, perpetrators act in violation of the Constitution of Zimbabwe. At the same time, every child who is a citizen or permanent resident of Zimbabwe has the right to be protected from child marriage since the practice violates

their rights and, thus, constitutes an offence. If and when violations happen, “the State, and all its executive, legislative and judicial institutions and agencies of government at every level” are required to intervene (Section 2(2) of the Constitution of Zimbabwe).

Therefore, Zimbabwe’s child protection practitioners should be in a position to hold perpetrators of child marriage accountable and facilitate their prosecution under the constitutional provisions. This work should involve, for instance, critically examining cases of violations of children’s right to protection from child marriage, carrying out inquiries and investigations, and recommending the adoption of appropriate measures to the relevant local and national authorities. More so, child protection practitioners and organisations should play a key role in protecting children from child marriage by monitoring implementation of child protection rights at both local and national levels. While their findings may not be legally binding, their recommendations are important, as they wield political and legal pressure upon the relevant authorities and institutions.

Lastly, but not the least, Zimbabwe’s child protection sector should conduct vigorous awareness-raising activities at the national, community, family, and individual levels on the subject of child marriage and its ill-effects. Such interventions could highlight the constitutional rights which children have on the matter and how they can be enforced. Undeniably, of course, the Human Rights Commission is tasked with the responsibility to promote awareness of and respect for human rights and freedoms at all levels (Section 243 of the Constitution of Zimbabwe). However, the institution cannot do it all alone, and this is where child protection practitioners and agencies should contribute with material, technical, financial, and human resources to complement such constitutionally guaranteed positive efforts.

As emphasized at the beginning of this article, a key confounding factor associated with the continued perpetration of child marriage in Zimbabwe is ignorance, primarily on the part of the ordinary citizen, of what the law states. For that reason, the general public needs to be well-informed of children’s rights as enshrined in the Constitution in Section 26. They must be made to understand children’s rights and freedoms, as well as the duties and obligations incumbent upon citizens and the State, to uphold those rights and freedoms pursuant to both the supreme law and international instruments relating to the protection rights of children against child marriage.

Conclusion

Framed within the legal hermeneutics design, the forgoing has applied the basic rules of statutory interpretation to critically analyze the legal and practical implications of Section 26 of the Constitution of Zimbabwe in the protection of children from child marriage. It emphasises that, by adopting this provision in the supreme law in 2013, the Government of Zimbabwe made children's right to protection from marriage justiciable. This was further confirmed by the Constitutional Court of Zimbabwe's ruling in the case of *Mudzuru & Another v Minister of Justice & 2 Others* [2016] Z79/14 (CC) in which it made child marriage illegal. As well, this ruling deemed unlawful the marriage age specifications in both the Marriage Act 23 of 2004 (5:11) and Customary Marriages Act 23 of 2004 (5:07), since those laws now run contrary to the supreme law. These are important and progressive developments in the fight to end child marriage in Zimbabwe. Most importantly, they mean that children's right to protection from child marriage is now constitutional and, therefore, justiciable. Children are entitled to protection by the courts, and anyone who violates their rights should be prosecuted. Therefore, child protection practitioners in Zimbabwe should pursue the various available strategies, some of which have been proposed in this article, to facilitate translation of such efforts into action.

References

- Bendor, A. L. (1996). Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of the Israeli and American experience. *Indian International and Comparative Law Review*, 7(2), 311-317. Available at <https://journals.iupui.edu/index.php/iiclr/article/view/17696/17736>.
- Blanchfield, L. (2013). *United Nations Convention on the Rights of the Child: Congressional Research Service Report for Congress*. Washington, DC: CRS. Available at <https://pdfs.semanticscholar.org/b869/7f72bed0f86b1394afa0ff7b62789b4f3ddb.pdf>.
- Dilthey, W. (1980). *A hermeneutic approach to the study of history and culture*. The Hague: Martinus Nijhof. ISBN: 978-94-009-8869-9.
- Girls Not Brides. (2016). *The role of parliamentarians in ending child marriage: A toolkit*. London: Girls Not Brides. Available at

- https://www.girlsnotbrides.org/wp-content/uploads/2015/05/GNB_The_Role_of_Parliamentarians_2016_v9_Final.pdf.
- Girls Not Brides. (2015). *Ending child marriage in Africa: A brief by Girls Not Brides*. London: Girls Not Brides. Available at <https://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf>.
- Gubbay, A. R. (1997). The protection and enforcement of fundamental human rights: The Zimbabwean experience. *Human Rights Quarterly*, 19(2), 227-254. DOI: 10.1353/hrq.1997.0016.
- Human Rights Watch. (2015). *Ending child marriage in Africa: opening the door for girls' education, health, and freedom from violence*. New York: Human Rights Watch. At https://www.hrw.org/sites/default/files/supporting_resources/ending_child_marriage_in_africa_updated_final.pdf.
- International Planned Parenthood Federation. (2006). *Ending child marriage: A guide for global policy action*. London: International Planned Parenthood Federation. Available at <http://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf>.
- Jardine, D. (1992). *To dwell with a boundless heart: Essays in curriculum theory, hermeneutics and the ecological imagination*. New York: Peter Lang. ISBN: 9780820439419.
- Jonsson, U. (2003) *Human rights approach to development programming*. Washington, DC: UNICEF. Available at https://www.unicef.org/rightsresults/files/HRBDP_Urban_Jonsson_April_2003.pdf.
- Leyh, G. (1992). Legal hermeneutics: History, theory and practice. California: UCP. https://conservancy.umn.edu/bitstream/handle/11299/166809/10_01_BR_Campos.pdf?sequence=1.
- Maswikwa, B., Richter, L., Kaufman, J., & Nandi, A. (2015). Minimum marriage age laws and the prevalence of child marriage and adolescent birth: Evidence from sub-Saharan Africa. *International Perspectives on Sexual and Reproductive Health*, 41(2), 58-68. Available at https://www.guttmacher.org/sites/default/files/article_files/4105815.pdf.
- McCaffrey, G., & Moules, N. J. (2016). Encountering the great problems in the street: Enacting hermeneutic philosophy as research in practice disciplines. *Journal of Applied Hermeneutics, Article 1*, 1-7. DOI: <http://hdl.handle.net/10515/sy5dv1d51>.
- Merezhko, O. (2014). Legal hermeneutics and methodology of law. *European Political and Law Discourse*, 1(2), 1-7. <https://eppd13.cz/wp-content/uploads/2014/2014-1-2/03.pdf>.

- Mushunje, M. T. (2006). Violence against children: Yesterday, today and tomorrow. *Journal of Social Development in Africa: Special Issue on Orphans and Other Vulnerable Children*, 21(1), 12-34.
- Musiwa, A. S. (2016). Management of intrafamilial child sexual abuse by Zimbabwe's Victim-Friendly Courts: Key policy issues for consideration. *African Journal of Social Sciences*, 6(3), 44-61. Available at <http://sachajournals.com/user/image/ajss2016musiwa001.pdf>.
- Nour, N. M. (2006). Health consequences of child marriage in Africa. *Emerging Infectious Diseases*, 12(11), 1644-1649. Available at <https://dx.doi.org/10.3201/eid1211.060510>.
- Panos Institute Southern Africa. (2015). *Media brief on ending child marriages in Zimbabwe*. Lusaka: Panos Institute Southern Africa. Available at <http://www.panos.org.zm/wp-content/uploads/2017/04/PSAf-ECM-Media-Brief-or-Zimbabwe.pdf>.
- Plan International Zimbabwe. (2011). *Situation analysis on adolescent girls*. Harare: Plan International Zimbabwe.
- Research & Advocacy Unit. (2015). *Marriage in Goromonzi District*. Harare: RAU. Available at <http://researchandadvocacyunit.org/system/files/Child%20Marriage%20Report%20Goromonzi.pdf>.
- Ricoeur, P. (1984). *Hermeneutics and the human sciences*. London: Cambridge University Press.
- United Nations Children's Fund – United Kingdom (2015) *Child Rights Partners: Putting Children's Rights at the Heart of Public Services – Information Booklet*. London: UNICEF-UK. Available at https://www.unicef.org.uk/child-rights-partners/wp-content/uploads/sites/3/2016/11/Unicef-UK_CRP-information-booklet_14.11.16.pdf.
- United Nations Children's Fund. (2014). *Ending child marriage: Progress and prospects*. New York: United Nations Children's Fund. Available at https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf.
- United Nations Children's Fund. (2005). *Early marriage: A harmful traditional practice*. New York: United Nations Children's Fund. Available at https://www.unicef.org/health/files/Early_Marriage_12.lo.pdf.
- United Nations Children's Fund. (2004). *Child protection information sheet: Child marriage*. New York: United Nations Children's Fund. Available at https://www.unicef.org/publications/files/Child_Protection_Information_Sheets.pdf.
- United Nations Children's Fund. (2001). Early marriage: Child spouses. *Innocenti Digest 7*. Available at <https://www.unicef-irc.org/publications/pdf/digest7e.pdf>.

- United Nations Population Fund. (2012). *Marrying too young: End child marriage*. New York: United Nations Population Fund. Available at <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>.
- Walker, J. A. (2012). Early marriage in Africa: Trends, harmful effects and interventions. *African Journal of Reproductive Health*, 16(2), 231-240. Available at <https://www.ajol.info/index.php/ajrh/article/view/77850/68266>.
- Zimbabwe National Statistics Agency. (2012a). *Zimbabwe population census 2012 national report*. Harare: Population Census Office. Available at http://www.zimstat.co.zw/sites/default/files/img/National_Report.pdf.
- Zimbabwe National Statistics Agency. (2012b). *National baseline survey on the life experiences of adolescents: Preliminary report 2011*. Harare: Population Census Office. Available at https://www.unicef.org/zimbabwe/UNICEF_NBSLEA-Report-23-10-13.pdf.

Cases

- Loveness Mudzuru and Ruvimbo Tsopodzi v Minister of Justice, Legal and Parliamentary Affairs N.O and Others* 2016 Z79/14 (CC) Available at <http://www.veritaszim.net/node/1559>.

Legislation

- 2013 Constitution of Zimbabwe
- African Charter on Human and Peoples' Rights
- African Charter on the Rights and Welfare of the Child
- Children's Act 23 of 2001 (5:06)
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
- Convention on the Elimination of all Forms of Discrimination against Women
- Criminal Law (Codification and Reform) Act 109 of 2008
- Customary Marriages Act 23 of 2004 (5:07)
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Legal Age of Majority Act 19 of 1982
- Marriage Act 23 of 2004 (5:11)
- Matrimonial Causes Act 2 of 1990 (5:13)
- National Action Plan for Orphaned and Vulnerable Children (I, II & III)

National Case Management Guidelines

National Gender Policy

National Orphan Care Policy

Sexual Offences Act 123 of 2011

United Nations Convention on the Rights of the Child

Universal Declaration of Human Rights

Zimbabwe National HIV and AIDS Strategic Plan (I, II & III)