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## Hurdles Underpinning the Implementation of Legal Instruments on Child Marriages in a Few Countries of the Developing World

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### Abstract

The practice of child marriage has been recognised internationally and regionally as a clear violation against the rights of children, attracting more attention from governments, international organisations and civil societies alike. This paper explores the hurdles underpinning the implementation of laws that fight against child marriages in a few countries of the developing world, focusing on South Africa, Namibia, Zimbabwe and Malawi. Utilising secondary data, through a review of policy documents, reports and surveys, the paper argues that there are still legal inconsistencies that threaten the effective enforcement of the laws on protecting children from child marriages. The challenges that are hindering the enforcement of these laws include harmful religious practices, harmful cultural practices, lack of awareness to legal practices, political ignorance and lack of clear prescriptive measures. This paper advocates for a practical approach to instituting laws that are against child marriages. It is recommended that religious beliefs that are suppressive to girls be banned, dogmatic measures that fight child marriages are introduced.

**Keywords:** *Child marriages, law, hurdles, implementation, legal instruments*

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## 1. Introduction

Child marriage is defined as the unlawful betrothal of young persons who are below the age of 18 into a setting of marriage. The practice of child marriage is prohibited by a number of international and regional treaties, conventions, resolutions and platforms (Wang, 2016). The UN Convention on the Rights of the Child (UNCRC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) are amongst the most crucial legal instruments that speak against ending child marriages. Both these instruments recommend legislating a minimum age of marriage at 18 years. The practice of child

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marriage entered the political agenda in many African countries after they committed to the Beijing Platform of Action in 1995 (Mawodza, 2015). The platform calls upon states to enforce laws securing a minimum age for (Beijing Platform for Action, Chapter IV, 274). However, there is growing literature on the harmful consequences of child marriage, but less knowledge about the process leading up to child marriage law reform (Wang, 2016).

Studies show that data on the exact statistics of child marriages in the world are inaccurate. Global estimates by UNICEF indicate that some 64 million young women (20-24) were married off before the age of 18 (UNICEF, 2017). One girl below the age of 18 is married off every three seconds worldwide (UNICEF, 2018). A report by Plan UK (2016) entitled 'Breaking Vows' cites that 10 million children under the age of 18 become child brides every year. Statistics pertaining to the rate of early marriages in Europe are also cited to be high especially in central and Eastern Europe where 2.2 million girls are married off before the age of 18 years. The highest rates are in Georgia (17%) and Turkey (14%).

More so, despite there being laws against child marriages, statistics in Southern Africa on child marriages show that 12% of spouses in child marriages are below the age 15 years while 40% were married before the age of 18 (Mawodza, 2015). Moreover, it has to be noted that child marriages mostly affect girl children more than boy children. Globally, Southern Africa is one of the regions that have a rate of child marriage prevalence which stands at 36%. This percentage is higher than the global average. Internationally, more than one in four young women (29%) are married off before the age of 18 (UNICEF, 2017). In Southern Africa, there are serious gender disparities when it comes to child marriages with 1.5% of boys getting married before the age of 18 whilst 13% of girls marry between the ages of 10 and 18.

## 2. Zimbabwe

Cumulatively, statistics from the past decade (2010-2020) show that Zimbabwe has high rates of child marriages. Sibanda (2011) asserts that 21% of children who are below the age of 18 are married off in Zimbabwe either coercively or willingly. The Girl Child Network in Zimbabwe estimated that about 8000 young girls have been coerced into marriage or were held as sex slaves since 2010. According to ZIMSTAT (2012), in Zimbabwe there is a colliding relationship between women's level of education and the median age at marriage. Statistically, the median age at first marriage among women aged 25 to 49 with no formal education is 17.7 years, and it sharply rises to 23.4 years among those with more than a secondary education (ZIMSTAT and ICF, 2012). This median age shows that more women are married before they reach the age of 18 which has been a chief characteristic of Southern African states such as Zimbabwe. Mashangwa (2015) cited that the Mashonaland Provinces have the highest rates of child marriages compared to all other provinces in Zimbabwe. According to Dzimiri *et al.* (2017), Mashonaland Central has the highest rates of child marriages standing at 50% followed by Mashonaland West with 42%, Mashonaland East with 36%, Midlands with 31%, Manicaland with 30%, Matebeleland North with 27%, Harare 19%, Matebeleland South with 18% and lastly Bulawayo with 10%. Moreover, Mashangwa (2015) argues that the overall rate of child marriages in Zimbabwe stands at 30% and the child marriage rate for the world stands at 29%. These numbers show that the rates of child marriages in Zimbabwe are at alarming levels despite the existence of several programs and legal amendments that have been set to combat child marriages.

Moreover, Zimbabwe has taken strides to combat child marriages. On the 20<sup>th</sup> of January 2016, the Constitutional Court of Zimbabwe took a crucial step to safeguard children's rights by banning child marriages and other harmful practices that are detrimental to childhood (Dziva and Mazambani, 2017). The ruling came at an opportune moment so as to mitigate the inadequacy of marriage laws, and to ban all archaic practices that were deemed responsible for an upsurge in child marriages (Dziva and Mazambani, 2017). This was undeniably a ground breaking ruling in the eyes of diverse actors who for long had been fighting to combat the increase and impact of child marriages in Zimbabwean communities.

## 3. Malawi

In Malawi, child marriages continue to thrive without heed of growing pressures from government instituted legal frameworks. According to Mawodza (2015) this is as a result of deep-rooted cultural practices engrained

in Malawian communities. In several communities, child marriages are commonly the result of harmful cultural practices that regulate marriages and initiation ceremonies that predispose girls to marriages. Out of the 40% child marriages recorded in Southern Africa, 11.7% of marriages are from Malawi (Mawodza, 2015). In Malawi, the gender disparity between boys and girls in child marriages is quite alarming with 23.4% of female adolescents getting married as compared to just 2.2% of males in the same age group (UNICEF, 2017). Like Zimbabwe, Malawi is also a party to several international and regional human rights instruments that have attempted to address issues of cultural practices that lead to child marriages not only as a human rights crisis but also as health and social problem for girls (Mwambene and Mawodza, 2017). Malawi has echoed some of the legal stipulations embedded within these statutes. In relation to the international legal instruments, Malawi enacted several pieces of legislation which include: the Child Care Act, Protection and Justice Act, the Marriage, Divorce and Family Relations Act and the Gender Equality Act (Mawodza, 2015).

According to UNICEF (2017) on February 12, 2015 the Malawian Parliament passed the Marriage, Divorce and Family Relations Bill (Marriage Act). The Act was signed into law in April by President Peter Mutharika (Mawodza, 2015). The passing of the Marriage Act was an important milestone in securing women and girls' rights in a country where patriarchal norms are deeply entrenched, poverty is widespread and women and girls generally score low on development indicators and lag behind in many areas of life (Wang, 2016). The new law consolidates multiple marriage regimes and addresses some of the discriminatory provisions in previous laws governing marriage and family relations (Mwambene and Mawodza, 2017).

#### 4. Namibia

The rate of child marriages in Namibia is also a concern although it is lower than that of Zimbabwe and Malawi. According to UNICEF (2017) the practice of child marriage affects approximately 5.4% of females aged 15-19 in Namibia. UNICEF (2017) further states that in Namibia the rate of child marriages has decreased commendably from just above 10% to lower than 10% in the last 25 years. 2.4% of girls who are under the age of 15 years are married off and 8.6% are married off by the age of 18 years (Braun, 2018). In 2011, the Namibian census found that child marriage affects both boys and girls, with 3828 girls and 1699 boys' consensual unions or traditional marriages (UNICEF, 2017). Approximately 26% of girls give birth to their first child before they reach the age of 18. Approximately 3.6 give birth before the age of 15 (Braun, 2018).

More so, the traditional practice of olufuko still takes place in Namibia. Olufuko is an archaic traditional wedding or marriage ceremony whereby girls, often as young as 12, converted supposedly into adult women (UNICEF, 2017). Part of the initiation process involves humiliating virginity and pregnancy testing. Men can choose the child they want to marry by placing a bracelet on a girl's wrist (Braun, 2018). Even though the practice is said to have been banned about 80 years ago, it seems to have been revived (Chenge and Maunganidze, 2017).

Moreover, laws have been enacted in Namibia to curb the prevalence of child marriages. The Married Person's Equality Act amends the Marriage Act to set the age at which a child can be married in a civil marriage at 18. The age was previously 18 for boys and 15 for girls (Legal Advice Column, 2009). In Namibia, the Child Care and Protection Bill gives clear protection to children who are forced into marriage against their will. The Bill states that no person may compel a child to get married or engaged—the child must freely consent to the marriage. On 16 June 2015 in Groot Aub, Namibia, the Government of Namibia through the Ministry of Gender Equality and Child Welfare, in collaboration with UNICEF and other partners called on the acceleration of efforts to end child marriages (Braun, 2018).

#### 5. South Africa

Child marriages in South Africa are relatively high but lower as compared to other Southern African States such as Zimbabwe and Malawi. Data on child marriages in South Africa indicates that 6% of girls are married off before reaching the age of 18 years, and 1% of them are married by the age of 15 years (UNICEF, 2018). Mwambene (2018) states that this figure is way lower compared to that of Zimbabwe (4%

marrying by the age of 15, and 31% of girls before 18 years) and Malawi (12% marrying by the age of 15, and 50% before the age 18 years). For example, in 2013, Statistics South Africa (SSA) reported that 14 grooms and 172 brides, below the age of 18, were married according to civil law. In the same year, 9 grooms and 79 brides under the age of 18 were married according to customary law. South Africa has a strong equality and child rights focus in its Constitution and legislation. However, while the minimum age of marriage for boys is 18 years, it is only 15 years for a girl to marry (Braun, 2018). It is also legally possible for children younger than this to marry with the consent of their parents and the Minister of Home Affairs (Chenge and Maunganidze, 2017).

In South Africa, child marriage interlinks with a cultural practice called *ukuthwala*, which can be defined as the act of forcing a marriage negotiation process when it is proving difficult to do so under normal circumstances. *Ukuthwala* is mainly practised among the Zulu and Xhosa communities in KwaZulu-Natal and the Eastern Cape respectively (Mwambene, 2018). According to tradition, the process is a form of kidnapping, whereby a young woman is carried off to the home of a man who has the desire to marry her, by a group of his friends. The suitor often lets his family know in advance so that they can prepare to welcome the girl when she arrives (Nkosi and Wasserman, 2014).

More recently, the South African Law Reform Commission proposed the Prohibition of Forced Marriages and Child Marriages Bill in 2015 which seeks to criminalise all forced and child marriages as a result of, among other factors, *ukuthwala* (Mwambene, 2018). The Prohibition of Forced Marriages and Child Marriages Bill is a response to concerns expressed from the Gender Directorate. The Gender Directorate argued that children affected by *ukuthwala*, resulting in their rights to personal safety and well-being being violated, are at risk of lifelong developmental burdens, including HIV infection and other physical, emotional and social problems. The Directorate also stressed that South African values, beliefs and practices must be consistent with the Constitution, which specifically guarantees the rights of children (Nkosi and Wasserman, 2014). With this end in view, the Law Reform Commission produced a report on *ukuthwala* which culminated in the Prohibition Bill (Mwambene, 2018). As pointed out earlier, the Prohibition Bill is aimed at criminalising forced marriages and child marriages, including those as a result of *ukuthwala*. If the Prohibition Bill becomes law, it will be the first time that such child marriages will be criminalised in South Africa. Besides criminalising forced marriages and child marriages, the Prohibition Bill will give effect to international law and the constitutional values of human dignity.

## 6. Hurdles Underpinning the Implementation of Laws against Child Marriages

### 6.1. Inconsistencies in Laws

Most countries have laws on the minimum age of marriage but they are largely ineffective, not enforced or operate alongside customary and religious laws of which must not be used as an excuse to protect young women (UNIFPA, 2006). The Zimbabwean Constitution states that every person who has the age of 18 has the right to find a family (Constitution of Zimbabwe, 2013) section 78(1). This provision is vague and unequivocal for it does not define the legal age of marriage but just protects the right of a person above 18 to marry. In addition, in Zimbabwe the legal framework that protects the girl child from child marriages does exist. There is the Civil Marriage Act (Marriage Act 5:11) that sets legal marriage age at 16 and permits marriage below 16 on consent by parents. More so, there is the Registered Customary Marriage (Marriage Act 5:7) which is governed by the customary law and local courts. This type of marriage is silent on the age of marriage thus creating a fertile ground for child abuse and the increase of child marriages. This is a challenge considering that the constitution is the supreme law of the land (section 2) and yet it does not contain a definite legal age of marriage.

South Africa, by prescribing the marriageable age to be 18 years for both girls and boys under the Recognition of Customary Marriages Act, arguably has outlawed all customary marriages of children under the age of 18 years. However, the Recognition of Customary Marriages Act, read with the Marriage Act, allows persons below the age of 18 to get married provided they have the necessary consent. This position sends conflicting messages in respect of the efforts to end child marriages linked to customary practices in South Africa. Moreover, despite there being the Married Person's Equality Act in Namibia which states that a child is not supposed to

be married until the age of 18, the government can decide to consent the marriage of child based on certain conditions ([Legal Advice Column, 2009](#)). The Namibian constitution also sets that marriage shall only be entered into with free consent of the intending spouses but however does not express prohibition on child marriage. Therefore it shows that in these countries laws are not being enforced and some lack laws for children below 18 years.

### **6.2. Bribery and Fear of Disclosing the Perpetrator**

The implementation of laws against child marriages is also being hindered by corruption within the judicial and legal systems in Southern Africa. One study by Kambamura (2020) in Mashonaland Central in Zimbabwe showed that some policemen receive bribes from perpetrators and these perpetrators are easily freed. In a recent study, a project officer from Simukai, a local NGO, noted that there is an existing challenge of bribery between the perpetrator and the police where he would have been held captive. The project officer pointed out that at times after retrieving a child from child marriage and getting the perpetrator arrested, the organisation often receives information that the perpetrator managed to get out and fled. The next thing they receive information that perpetrator is nowhere to be found. These cases happen when one policeman has been bribed and let go of the prisoner. This issue of bribery disrupts the whole issue of letting people get the message that child marriage is illegal. When a perpetrator gets arrested and he is seen outside roaming around then people will get the wrong information and some will see it as it is not important to report more cases. Bribery with the authorities slows down the process of handling child marriages. One of the Project officers mentioned that some community members are afraid of disclosing the perpetrators. Not only the community members but also the victim can withhold such a case and go silent on it. Moreover, Mambwene (2018) asserts that in South Africa bribing policemen to evade a crime is very common and hence this can directly lead to child marriage perpetrators being released. Nevertheless, bribery becomes a barricade to fully mitigate the increase of child marriages in these few countries of the developing world.

### **6.3. Language Barrier and Lack of Awareness**

Most laws in Southern Africa are written in English. It is estimated that 48% of people in rural communities in Southern Africa are either illiterate or partially illiterate as some of them cannot read nor write. It becomes difficult for them to read and decipher the terms and words in legal instruments such as constitutions, acts and bills. One study done in Namibia, showed that most of the girls who are married before the age of 18 are either illiterate or too enculturated to the extent that they fail to grasp the meaning of the law and how it can protect their rights from harmful practices ([Legal Advice Column, 2009](#)). In Zimbabwe, 40% of rural dwellers do not either know how to read or write English or Shona. One study in Malawi showed that 60% of people residing in rural areas are illiterate ([Mambwene, 2018](#)). Therefore given the sheer number of people in rural areas who are illiterate it becomes a major concern as they fail to understand the legal apparatus that is often produced by the government. The major languages spoken in rural communities of Southern are vernacular. One of the obstacles in effecting laws to guard against child marriages is lack of awareness by people of the provisions of the legal instruments ([Chenge and Maunganidze, 2017](#)). Illiteracy and legal illiteracy are the common features among rural people and more so among women. If people have no knowledge about the law, one can hardly expect them to abide by it. On one hand people are unaware of presence of Acts and Laws that forbid early girl child marriages, and do not know that an early marriage is not allowed according to law. Child marriages continue due to poor implementation of the existing laws.

### **6.4. Harmful Cultural Practices**

Cultural practices are some of the hurdles to fully instituting laws against child marriages in both Zimbabwe and Malawi. Jabson (2015) identified three cultural practices in Zimbabwe which encourage child marriage. These include: *kuripira ngozi* where a girl is used as a compensation for a serious crime committed by her family, *kuzvarira* where a girl is married off in return for financial support and *kugara mapfiwa* where a brother's daughter replaces an aunt who fails to conceive children or dies. A study done by Kambamura (2020) discovered that these cultural practices were instigated by patriarchal societies that obey the voice of the man. She also noted that men are the ones in control and whatever they say is to be followed.

This culture of patriarchal society can be a barrier because its only men who have a say and women are not allowed to say anything, comment or even to question. Thus when the elders decide they want to marry they look for young girls in the community and make them their wives. In parts of Kwazulu Natal in South Africa women have no say because they are taught that culture is the one that makes decisions in issues to do with marriage and no-one can go against it (Jabson, 2015). So the patriarchal society heavily influences some challenges that are being faced in implementing laws more effectively. According to Walker (2012) deep cultural practices in Sub-Saharan Africa make it difficult to implement laws as they need a long term process to desensitize them so that communities are able to function in conjunction with laws rather than with what harmful practices dictate.

### **6.5. Political Ignorance**

Politicians continue to echo the need to implementation of laws against child marriages but with little action taken. There is a need for stronger political will to amend, enforce, or create awareness about the laws and acts on child marriage. Women's interests are accorded less weight in the political process thus hindering any further improvement in their status. In Malawi, the parliamentary debates do not instigate action in the communities that require understanding the illegal nature of child marriages (Mambwene and Mawodza, 2017). In South Africa, the government can allow matrimony between a girl under the age of 18 with the right conditions and consent from parental parties involved as well as the girl in question (Jabson, 2015). A study conducted in Lilongwe Malawi, showed that politicians used the rhetoric of campaigning to speak about child marriages yet they could not substantiate the rhetoric with follow up campaigns (Mwambene, 2018). Walker (2012) also asserts that politicians should be at the forefront of implementing laws against child marriage but it seems they intervene at a lower rate. Women's voices are given less heed of in the political arena such as in Namibia where women in certain regions are denied the right to political awareness and participation (Chenge and Maunganidze, 2017).

### **6.6. Lack of Clear Prescriptive Measures**

Most laws on child marriages are less pragmatic. The Zimbabwean Constitutional Court's decision might be paper law, with no legal effect on child marriage in Zimbabwe (Jabson, 2015). It did not prescribe measures to ensure that children are protected from child marriage. For example, in addition to outlawing child marriage, the Constitutional Court could have prescribed a reasonable time for Parliament to amend laws that allow child marriage to be implemented. In response to its obligations, Zimbabwe passed several Acts relevant to addressing child marriage. Principal among this legal framework is the 2013 Constitution. In discussing Malawi's recent legal response to child marriage, the starting point is the constitutional amendment of 14 February 2017 (Wang, 2016). The parliament voted to remove a constitutional provision allowing children to marry with the consent of their parents.

The protracted process to this constitutional amendment saw different stakeholders making several recommendations on the Malawi Law Commission's proposal to review the Malawian Constitution. The process leading up to the Malawian Marriage Act has been far from straightforward (Walker, 2012). The Malawi Law Commission produced a report on how to harmonize marriage laws already in 2006. Since then compromises have been made along the way. Age of marriage and polygamy proved to be among the most sensitive and difficult issues to deal with, and especially age of marriage has received a lot of media attention. It is arguable that there is no clear indication of laws that are specifically meant to provide justice in fighting child marriages in these few countries of the developing world which will continue to pose challenges in increasing rates of child marriages.

## **7. The Way Forward**

### **7.1. Banning Religious Beliefs that are Suppressive to Girls and Boys**

Religion has become one of the obstacles for the implementation of laws against child marriages in many societies where girls are forced to marry at the age of 18 because of various reasons in the doctrines of various churches. It is the duty of the government and other stakeholders from different countries to ban or abolish

religious doctrines that are suppressive to young children in order to fully uphold their rights. The banning of religious beliefs will require a desensitisation process whereby the communities are gradually taught about the negative effects of these religious beliefs and their role in perpetuating the rates of child marriages. There is need to consider framing the current laws that speak against the abolition of child marriages in sync with aspects of religion. Churches should also be registered in order that these beliefs be always in check through a system of checks and balances within the government. Walker (2012) asserts that removing religious beliefs means that some of the communities will be helped from the current state of brainwashing that has been indoctrinated into them.

## **7.2. Removal of Harmful Cultural Practices**

Although as African countries we still uphold to our culture, however, some of the cultures have become suppressive to children rights. Rights to choose a partner when they are ready for marriage, right to attain education, right to health services, right to have freedom of say among others are not recognized by the society that forces children into marriages at a tender or younger age. It is however important that the government of these few countries of the developing world take the greatest lead in removing all harmful cultural practices that suppress young children to marriages. More so the government should also come with punishment like the imprisonment of people who break all legal instruments all policies put in place to mitigate child early marriages in all the countries. Criminalising and outlawing these harmful practices increases the chance of young girls getting better opportunities in the academic spheres. The government has the right to enforce an educational curriculum that is inclusive of information that teaches people about the dangers of these harmful practices. For example, the *ukuthwala* practice in South Africa, *chimutsa mapfihwa* or *kuripa ngozi* in Zimbabwe calls for the government to help educate communities on the dangers of these practice and on how it is illegal in tandem with the dictates of the country's constitution.

## **7.3. More Awareness on Legal Instruments**

It is sad to note that people are not even aware of legal instrument in their own countries pertaining child marriages the reason being that the government and other stakeholders are not disseminating information to people. However most people that suffer are in rural areas where technology has not reached its peak like in urban areas. It is therefore important for governments of the developing world to disseminate information to all the people in order to mitigate the spread of child marriages. Legal framework to protect girl child from child marriages. In Zimbabwe the legal framework that protects the girl child from child marriages does exist but there seem to be some loop holes. There is the Civil Marriage Act (Marriage Act 5:11) that sets legal marriage age at 16 and permits marriage below 16 on consent by the Chief Justice or Minister of legal and Parliamentary Affairs. More so, there is the Registered Customary Marriage (Marriage Act 5:7) which is governed by the customary law and local courts. This type of marriage is silent on the age of marriage thus creating a fertile ground for child abuse and the increase of child marriages. The government of Zimbabwe should amend or revise the marriage laws that exist that still allow child marriage and rather come up with a Child Marriage Act that discourage child marriages. The few countries of the developing world governments should also come up with strategies to empower girls, develop for them life skills that will enable them to value themselves, to know how to exercise their rights so that they will also be able to stand up for themselves. Furthermore, these governments should also consider sex and child marriage education in schools and it should be taken seriously.

## **7.4. Introduce Dogmatic Measures or Policies that Fight against Child Marriages**

The few countries of the developing world need to come up with dogmatic measures or specific policies that seek to eliminate child marriages. Because looking at the Zimbabwean constitution it does not specifically deals away with the problem because somehow its clauses contradict or even support marriages at a young age if the parents decide on their behalf. In Malawi, although effort has been made to amend the constitution still nothing has been done so far to come up with laws that free children from getting married at a younger age without their consent. In addition in South Africa the government remains silent on the issue of allowing a person who is 15 years old to consent to marriage. Therefore there is need for governments in Africa to look into the current laws and try to come up with policy blueprints that are in tandem with international legal statutes as opposed to focusing on local practices that may be harmful to children.

## 8. Conclusion

The trends and patterns of child marriages in Southern Africa continuously show an upsurge in the number of young girls mostly who are married off before the age of 18. Hurdles that hinders the implementation of laws against child marriages include; inconstancies in laws, fear of disclosing the perpetrator, language barrier and lack of awareness, harmful cultural practices, political ignorance and lack of clear prescriptive measures. The article also cited some key ways to help end scourge of child marriages in Southern Africa. It suggested banning religious beliefs, banning harmful practices and increasing awareness of existing laws that speak against child marriages. These few countries of the developing world if they take action against this menace these children rights will be fully upheld and their future will be secured as they will be able to make their decision when the right time to get married comes.

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