

***PUTTING AN OLD HEAD ON A CHILD'S SHOULDERS: A CRITICAL APPRAISAL OF CHILD MARRIAGES IN ZIMBABWE THROUGH THE LENS OF MUDZURU & ANOTHER V MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS N.O & OTHERS***

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*...mankind owes to the child the best it has to give.*<sup>2</sup>

**ABSTRACT**

The global increase in child marriages is repugnant and constitutes an egregious breach of human rights. This rising trend has culminated in some countries being classified as hotspots for child marriages by the United Nations International Children's Emergency Fund (UNICEF). Incidences of minors entering into 'marriage' with majors is a systematic conundrum which has spiralled in several countries including Zimbabwe. Prior to the *Mudzuru* dispensation s 22 (1) of the Marriages Act [Chapter 5:11] expressly allowed children under the age of eighteen to enter into marriage, provided *inter alia*, that certain statutory requirements were satisfied. The *Mudzuru* decision is a result of constitutional invocation of ss 78 (1) and 81 (1) of the Constitution of Zimbabwe Amendment Act (No. 20), 2013. The decision comes at a time of commemorating the 30<sup>th</sup> anniversary of the African Human Rights System. It highlights the deleterious consequences of child marriages. The objective of this paper is to analyse child marriages in Zimbabwe through the lens of the *Mudzuru* decision. The main argument proffered herein is that the decision represents a significant step in the right direction that must be followed by implementation i.e., legislative enactment, revision or alignment and creation of mutually-beneficial partnerships among stakeholders. It provides a normative framework in child law, constitutional and human rights discourse respectively. Furthermore, it is a starting point for government's strategy formulation; for civil societies' advocacy, project planning, implementation, monitoring and evaluation activities connected therewith with child marriages and gender. This paper provides statistical data on and scrutinises the drivers of child marriages such as poverty, culture and religious practices. The judgement is a giant-leap forward with progressive rule of law, human rights, constitutional interpretation, gender and development implications. Therefore, it must be construed as a legal victory for the development, promotion and protection of the entrenched best interests of the child.

The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the PROLAW program.

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## I. KEY WORDS

*Child marriages, Children rights, Transformative Constitutionalism, Constitutional Alignment*

## INTRODUCTION AND BACKGROUND

Child marriages constitute one of the most pressing global issues. The available statistical data creates a disturbing sense of urgency, and demands that appropriate action be taken by countries to ensure adequate and reasonable measures directed at combating, prohibiting and reducing incidences of child marriages, and providing recourse to the victims.<sup>3</sup> Zimbabwe is not an exception to the increasing trends in child marriages. The point of departure is that marriages entered into by minor children have no place in society, and are null and *void ab initio*.<sup>4</sup> Child marriages go to the root of violating and destroying the future of the child and constitute a serious breach of his or her fundamental rights.<sup>5</sup> Cultural and religious practices contribute immeasurably to the precarious nature of child marriages. Generally, men are conferred with vast authority and power when juxtaposed to women.<sup>6</sup>

In principle, under customary law, there are exclusive and distinct gender roles between men and women.<sup>7</sup> For example, a man is considered the head and sole provider for the entire household. Such that he must provide for the family and guarantee their safety. Additionally, are endowed certain rights like the right to own property.<sup>8</sup> Women and young men are generally *de facto* and *de jure* subservient.<sup>9</sup> Customary systems are cited herein to illustrate how specific practices within a country and community may perpetrate vulnerability of a specific group(s). The objective is not to conjecture that only customary practices contribute to exponential increase in child marriages. Zimbabwe is embroiled in a pressing moment were some sectors of the population, mainly young girls experience human rights violations triggered by multifarious factors.<sup>10</sup> The purpose of this case analysis is to offer a critical appraisal of the *Mudzuru*<sup>11</sup> judgement on child marriages in Zimbabwe. Crisply put, it is the objective of this study to analyse the constitutionality of child marriages in light of ss 78(1) and 81 (1) of the Constitution of Zimbabwe Amendment Act (No.20), 2013 (the Constitution) and international human rights law. This is divided into sections which cover the abstract; key words; global trends and incidences of child marriages; salient facts and issues; decision; international obligations; new constitutional landscape; legal and social justice implications; recommendations; and conclusion.

## GLOBAL TRENDS AND INCIDENCES OF CHILD MARRIAGES

<sup>3</sup> Belinda Maswikwa *et al* “Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Sahara Africa.” *International Perspective on Sexual and Reproductive Health*, 2015, 41(2):58-68.

<sup>4</sup> Article 21 (1) of the African Charter on the Rights and Welfare of the Child.

<sup>5</sup> See generally, “Africa: Forced Marriage of Young Girls Destroys Their Lives” *Women’s International Network News*. Summer 99, Vol. 25 Issue 3, p56. Child marriages severely affect the child’s right to education, dignity, freedom.

<sup>6</sup> Chuma Himonga *et al* “African Customary Law In South Africa: Post-Apartheid and Living Law Perspectives.” Oxford University Press South Africa (2014). However, certain customary practices for an example, primogeniture and the right of the husband to enter into polygamous marriages have been found unconstitutional and qualified respectively, on the basis of fundamental rights. See, *Bhe v Magistrate Magistrate* 2005 (1) SA 580 (CC) and *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

<sup>7</sup> TW Bennet “Customary Law in South Africa” Juta and Company Ltd (2004).

<sup>8</sup> Brian Baughan, “Africa: Progress & Problems. Human Rights in Africa.” Mason Crest Publishers Philadelphia (2007) 64.

<sup>9</sup> N JJ Olivier *et al* “Indigenous Law” (1995) 3. In customary law a person’s legal status, rights and obligations are determined by tribal membership, political status, gender, age, marriage and legitimacy.

<sup>10</sup> For an exposition of child marriages in Africa, see Walker JA, “Early Marriage in Africa-trends, harmful effects and interventions.” *African Journal of Reproductive Health*, 2012, 16(2): 231-241.

<sup>11</sup> *Mudzuru & Another v The Minister of Parliamentary Affairs, Justice and Legal Affairs & Others* Judgment No. CCZ 12/2015.

The global child marriage outlook as highlighted by the UNICEF State of the World's Children and the International Center for Research on Women (ICRW) paints a bleak picture.

Marriage below the age of 18 is a fundamental violation of human rights. Many factors interact to place a girl at risk of marriage, including poverty, the perception that marriage will provide 'protection', family honour, social norms, customary or religious laws that condone the practice, an inadequate legislative framework and the state of the country's civil registration system. Child marriage often compromises on girl's development by resulting in early pregnancy, on social isolation, interrupting her schooling, limiting her opportunities to career and vocational advancement and placing her at increased risk of domestic violence. Child marriages also affects boys, but to a lesser degree than girls.<sup>12</sup>

The ICRW website provides a detailed breakdown of child marriages statistics per country.<sup>13</sup> Niger is at the apex recording 75%, Chad 68%, Central African Republic 68%, Bangladesh 66%, Guinea 63%, Mozambique 56%, Mali 55%, Burkina Faso 52%, South Sudan 52%, Malawi 50%, Madagascar 48%, Eritrea 47%, India 47%, Somalia 45%, Sierra Leone 44%, Zambia 42%, Dominican Republic 41%, Ethiopia 41%, Nepal 41%, Nicaragua 41% of young girls who marry before reaching 18 years. According to the ICRW, one third of the girls in the developing countries are married before the age of eighteen and one in nine are married before the age of fifteen. In 2012, 70 million women aged 20 to 24 around the world married before the age of 18. Child marriages 'steal' children's potential and development. If left unfettered, the future of the girl child is at risk.<sup>14</sup>The consequences of child marriage on health are dire. Child marriage lead to increased risk for sexually transmitted diseases, cervical cancer, malaria and death during child birth.<sup>15</sup>Therefore, government must ensure that children get an education; devise poverty eradication initiatives and adopt laws to prosecute offenders.

### **SALIENT FACTS & ISSUES**

Mudzuru is a brilliant constitutional jurisprudence setting case which involve two young women, Loveness Mudzuru and Ruvimbo Tsopodzi (Applicants), aged nineteen and eighteen years respectively.<sup>16</sup> They brought a court application challenging the validity of child marriages in Zimbabwe,<sup>17</sup> at the backdrop of a new constitutional order. In their Constitutional Court application, the applicants sought a constitutional declaratory order averring that s 22 (1) of the Marriage Act [Chapter 5:11] and the Customary Marriages Act [Chapter 5:07], which allowed (expressly and impliedly) girls and boys who had reached sixteen and eighteen to solemnise marriage failed the constitutional compatibility test and thus were invalid. The applicants sought to highlight the perilous consequences of child marriages and establish that early marriages which were permissible under the impugned provision could not pass constitutional muster. Their substantive arguments were couched in terms of and supported by constitutional provisions and international human rights law standards. The constitutional court therefore, had to decide on the matter taking into account the exigencies of the moment specifically the vulnerability of minor children subjected to early marriage, and deleterious ramifications accompanying child marriages. The applicants relied on s 78 (1) read conjunctively with s 81 (1) of the Constitution to the effect that these provisions set the age of eighteen years as the minimum age of marriage in Zimbabwe. Inherent in their prayer was that the impugned provision and the Customary Marriages Act had to be declared unconstitutional to the extent of their constitutional inconsistency.<sup>18</sup> In the pre-

<sup>12</sup> Retrieved from [Data.unicef.org/child-protection/child-marriage.html](http://Data.unicef.org/child-protection/child-marriage.html) (accessed 6 September). See also the United Nations Children's Fund (UNICEF), *Early Marriage: A Harmful Traditional Practice*, New York: UNICEF, 2005.

<sup>13</sup> International Center for Research on Women. <http://www.icrw.org/child-marriage-facts-and-figures> (accessed 6 September 2016).

<sup>14</sup> Nour, N M, *Health Consequences of Child Marriages in Africa, Emerging Infectious Diseases*, 2006, 12(11):1644-1649. Nour examines the health consequences of child marriages. According to Nour, child marriages prevent girls from obtaining education; enjoying optimal health; bonding with their own age; maturity; and choosing their own partners.

<sup>15</sup> *Id* at 1644.

<sup>16</sup> *Mudzuru* at 1.

<sup>17</sup> The Minister of Justice, Legal & Parliamentary Affairs N.O, Minister of Women's Affairs, Gender & Community Development and Attorney General of Zimbabwe were cited as respondents in the matter.

<sup>18</sup> *Id*.

*Mudzuru* era, a girl who had attained sixteen years could legally and validly enter into marriage provided *inter alia*, that her legal guardian gave consent.<sup>19</sup> Before *Mudzuru* a child was statutorily defined as any person below the age of sixteen years.<sup>20</sup>

The legal questions for determination at the Constitutional Court were as follows:<sup>21</sup>

- i) *Whether or not the applicants had, on the facts, locus standi under s 85(1)(a) or 85(1)(d) of the Constitution to institute the proceedings claiming relief they sought.*
- ii) *If they were found to have standing before the court, did s 78(1) of the Constitution set the age of eighteen years as the minimum age for marriage in Zimbabwe.*<sup>22</sup>
- iii) *If the answer to issue No.2 is in the affirmative, did the coming into force of ss 78(1) of the Constitution on 22 May 2013 render invalid s 22 (1) of the Marriage Act [Chapter 5:05] and any other law authorising a girl who has attained the age of sixteen to marry.*<sup>23</sup>
- iv) *If the answer to No.3 is in the affirmative; what is the appropriate relief to be granted by the court in the wide discretion conferred on it under s 85(1) of the Constitution.*<sup>24</sup>

## **DECISION**

In a unanimous decision delivered by Malaba DCJ and a concurring decision by Hlatshwayo JCC, the Constitutional Court outlawed early marriages in Zimbabwe. The Court held that s 78 (1) read with s 81 (1) of the Constitution interpreted against the international human rights instruments had the effect of striking down s 22 (1) of the Marriages Act or any other law which authorised child marriages.<sup>25</sup> The Court adopted a broad, generous and purposive interpretative approach to ss 78(1) and 81 (1).<sup>26</sup> The Court found in favour of the applicants and that eighteen years is the minimum age of marriage in Zimbabwe. Accordingly, the Court held, that the impugned provision exposed the girl child to the horrific consequences of early marriage.<sup>27</sup>

On the issue of standing, the Court held that a constitutional litigant who wishes to invoke his or her constitutional rights must rely on a single ground enumerated in s 85 (1) of the Constitution.<sup>28</sup> The applicants had relied on both s 85(1)(a) and (d). The Court analysed the nature, content and scope of these provisions. It found that s 85(1)(a) rests on two legs.<sup>29</sup> The first being the traditional and narrow conceptualisation of standing which limits access to persons adversely affected or those who suffered direct harm as a consequence of a particular act.<sup>30</sup> The second conceptualisation denotes that a person has standing by virtue of being affected by the unconstitutional legislation regardless whether or not he or she was a victim. Therefore, it is not a requirement to have suffered

<sup>19</sup> “**22 Prohibition of marriage of persons under certain ages**

(1) *No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable:*

*Provided that-*

- (i) *Such permission shall not relieve the parties to the supposed marriage from the obligation to comply with all other requirements of this Act*
- (ii) *Such permission shall not be necessary if by reason of any such other requirement the consent of a judge is necessary and has been granted.”*

<sup>20</sup> See, s 2 of the Child Abduction Act [Chapter 5:05] and s 2 of the Children’s Protection and Adoption Act [Chapter 5:06] respectively.

<sup>21</sup> *Mudzuru* at 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id* at 8.

<sup>25</sup> *Id* at 49.

<sup>26</sup> *Id* at 44.

<sup>27</sup> *Id* at 53.

<sup>28</sup> *Mudzuru* at 9.

<sup>29</sup> *Id* at 9-10.

<sup>30</sup> *Id.* The court referred to *Mawarire v Mugabe NO and Others CCZ /2013* at p8 where the court held as follows:

“*Certainly this court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which actually engulfed them. This court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to save the threat, more so under the liberal post-2009 requirements.”*

material harm.<sup>31</sup> Further, the Court held that the term “*own interests*” in s 85(1)(a) encompasses both direct and indirect interests.<sup>32</sup> The court found that applicants could not benefit from a declaration of invalidity under this subsection because they were not direct victims of child marriages. Therefore, the Court upheld the respondents’ aversion in relation to s 85(1)(a) of the Constitution.

The applicants alternatively invoked s 85(1)(d) claiming that the matter was in the *public interest*. The Court as per Malaba DCJ, interpreted public interest broadly after conducting thorough provision analysis and considering foreign law, mainly South African and Indian jurisprudence.<sup>33</sup> The Court held that what constitutes public interests is a question of fact, and that its contents shall be determined caustically.<sup>34</sup> According to the court, public interest is an open ended, value laden and amorphous concept which does not have a closed list of categories.<sup>35</sup> The applicants averred that the case involved the well-being and rights of vulnerable children in Zimbabwe. The Court found that notwithstanding their reference to s 85(1)(a), pleadings showed that applicants believed themselves to be acting in terms of subsection (d). The Court held further, that s 85(1)(d) means that the effect of the infringement of a fundamental right impacts upon a community at large or a segment of the community such that there would be no identifiable persons or determinant class of persons who would have suffered legal injury. Furthermore, the Court held that the provision is geared towards the protection of public interest adversely affected by the infringement of a fundamental right. Importantly, s 85(1)(d) must be interpreted in line with s 44 of the Constitution which imposes the obligation on the state, and every institution and every agency of government at every level to respect, protect, promote and fulfil the fundamental rights and freedoms. Therefore, the state could not wilfully and flagrantly ignore violations of rights.<sup>36</sup>

Additionally, the Court held that s 85(1)(d) is a procedural and substantive remedy which is fundamental and essential for the effective protection of all other fundamental rights and freedoms in the Constitution. Held further, that it goes beyond the narrow conceptualisation of *locus standi* which may have negative ramifications on access to justice. The Court applied principles enunciated in the South African case of *Ferreira v Levin N.O. & Others*,<sup>37</sup> and held that s 85(1)(d) is a liberalised provision which must be construed broadly and generously to guarantee the fundamental right of access to justice. The Court was quite mindful of uncouth litigants who could take undue advantage of and abuse the court process. As such, it held that s 85(1) (d) prohibits litigants from invoking and using it to protect private, personal and parochial interests. The court held that “potentially viable public causes are not frittered away in frivolous, furtive, unfocused or self-serving private litigation”.<sup>38</sup> The Court noted its discretionary powers to determine what constitutes public interest in a particular case. Furthermore, it held, that a distinction must be made between what is in the public interest and what is of interest to the public.<sup>39</sup> The overarching test is that a Court must establish whether or not an applicant(s) stands to benefit personally from the judgement. Important factors to consider include: whether there is another reasonable and effective manner in which the challenge can be brought, the nature of the relief sought and the extent to which it is of general and prospective application, the range of persons or groups who may be directly or indirectly affected by any order by the court, and the opportunities that those persons or groups have had to present evidence and argument to the court.<sup>40</sup>

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<sup>31</sup>*Id* at 10. The Constitutional Court relied on Canadian jurisprudence of *R V Big M Drug Mart Ltd* [1985] 18 DLR [4<sup>th</sup>] 321 and *Morgentaler Smoling and Scott v R* [1988] 31 CRR1.

<sup>32</sup> *Mudzuru* at 10.

<sup>33</sup> *Id* at 20.

<sup>34</sup> *Id* at 18.

<sup>35</sup> Public interest encompasses public health, national security, international obligations, proper and due administration of criminal justice, independence of the judiciary, observance of the rule of law, the welfare of children, and environment.

<sup>36</sup> *Mudzuru* at 13.

<sup>37</sup> At 1082 G-H

<sup>38</sup> *Mudzuru* at 19.

<sup>39</sup> *R v Inhabitants of the County of Bedfordshire* [1855] 24 LJQB 81 at 84; *Lion Laboratories Limited v Evans* [1985] QB 526 at 553 & *O’Sullivan v Farrer* [1989] CLR 210 at 216

<sup>40</sup> *Ferreira v Levin* supra para 234. See also *State of Uttaranchal v Chauhal & Ors*, AIR [2010] SC 2550 & *Lawyers for Human Rights & Anor v Minister of Home Affairs & Anor* 2004 (4) SA 125 (CC) in para 18 where the court emphasizes the need to distinguish between subjective and objective factors.

Regarding the respondents' averment that applicants had not suffered direct infringement, and in relation to s 85(1)(d), the Court held:

It is not necessary for a person challenging the constitutional validity of legislation to vindicate public interest on the ground that the legislation has infringed or infringes a fundamental right, to give particulars of a person or persons who suffered legal injury as a result of the alleged unconstitutionality of the legislation.<sup>41</sup>

The Court found that the applicants had no personal or financial interest to gain from the case, and that "they approached the court in good faith to vindicate the rule of law and supremacy of the constitution." Therefore, lodging court proceedings was the "only reasonable and practical measure in the circumstances".<sup>42</sup>

An expansive approach to standing is fundamental to safeguarding and realising access to justice for indigent and marginalised persons. The Constitution recognises this integral right in s 85, and confers on litigants a constitutional right to standing to institute court proceedings when there is an alleged violation of rights. The category of persons who have standing in terms of s 85 is wide, ranging from persons materially affected by an act or omission, persons acting in the public interest or on behalf of others. The approach to standing adopted by the Constitutional Court in *Mudzuru* is expansive and places high premium on the promotion of access to justice in a constitutional democracy based on equality, freedom, fairness and inherent dignity. Thus, the interpretation to standing adopted is fundamental to the rule of law. Had the Constitutional Court adopted a narrow interpretation to standing, it would have resulted in an abortion of justice. The judgement provides interpretational clarity on the issue of standing in constitutional matters. The Court held that:

the approach must eschew over reliance on procedural technicalities to afford full protection to the fundamental human rights and freedoms in Chapter 4. A court exercising jurisdiction under s 85(1) of the Constitution is obliged to ensure that the exercise of the right of access to judicial remedies for enforcement of fundamental human rights and effective protection of the interests concerned is not provided hindered provided the substantive requirements of the rule under which standing is claimed are satisfied.<sup>43</sup>

We can deduce that the Constitutional Court's approach to standing is geared towards opening up access to courts in the initial stages of constitutional proceedings. It gives applicants the benefit by overlooking procedural requirements and placing importance on the substance requirements of the case.<sup>44</sup> It can also be argued that the applicants' decision to invoke both s 85(1)(a) and (d) was strategic. Firstly, it gave the court the opportunity to tease out the provisions and thereby providing clarity to those interested in public interest litigation. Secondly, the clarity provided will save litigants in terms of costs and time. Thirdly, the s 85(1)(d) conceptualisation is very profound in a democratic state with an infant constitutional jurisprudence. Fourthly, the interpretation of the nature, extent and scope of the provisions has put an end to confusion.<sup>45</sup> As can be seen from the case the respondents' averments in relation to subsection (a) were flawed. They argued that applicants were not adversely affected by the impugned provision. However, the court clearly set out that such averments are only relevant to subsection (d). Therefore, the court's reasoning must be applauded for promoting access to justice.

Besides the issue of standing, the court had to apply its mind to the contents and constitutional implications of s 78(1) read with s 81 (1) of the Constitution and rule on the constitutional validity of the impugned provision which allowed early marriages in Zimbabwe. Section 78(1) provides for the right to "*found a family*" for persons who have attained 18-years and s 81 (1) provides for fundamental rights of children. These provisions do not *per se* provide for the minimum age of marriage. Therefore, the Court had to determine whether or not to the effect that s 81(1) provides that a child is everyone below eighteen-years meant that eighteen years is the minimum age of marriage. The court took into account international human rights instruments in interpreting s 78(1) read with 81(1). Section 78(1) of the Constitution provides:

**"78 Marriage Rights**

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.

<sup>41</sup> *Mudzuru* at 22.

<sup>42</sup> *Id* at 24.

<sup>43</sup> *Id* at 14-15.

<sup>44</sup> *Id* at 14.

<sup>45</sup> A constitutional litigant can only rely on a single ground contained in s 85(1) of the Constitution.

(3) Persons of the same sex are prohibited from marrying each other.”

Whereas s 81(1) of the Constitution provides for the rights of children including the right to equal treatment, family or parental care, protection from economic and sexual exploitation, to education, health care services, nutrition and shelter. Section 81(2) provides that “a child’s best interests are paramount in every matter concerning the child.” According to s 81(3), children are entitled to adequate protection by the judiciary, especially the High Court as their upper guardian.

The Court gave considerable weight to the fact that Zimbabwe is a signatory to several human rights instruments including the Convention on the Rights of the Child ,1990 (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). These are critical standards which show a state’s commitment to protecting and enforcing the rights of the child. International legal instruments are discussed under VII below.

In its analysis of whether s 22 (1) of the Marriages Act passed constitutional muster, the Constitutional Court drew an important juxtaposition between the international human rights law as it applied when the impugned provision was enacted, and the current norms and standards as reflected in constitutional provisions cited above. Section 22 (1) of the Marriage Act was enacted in 1965 as a result of the gaps that existed at the time. The international human rights law at the time did not specify or prescribe the minimum age of marriage. Therefore, there was a disjuncture between the 1965 dispensation on one hand and the CRC and ACRWC dispensation on the other. The Court made reference to a non-binding recommendation accompanying the Marriage Convention directing State Parties not to specify a minimum age of marriage less than 15 years. The Marriage Convention together with other instruments conferred on States discretionary powers, which saw most countries stipulating the age of sixteen years as the minimum age of marriage for girls.<sup>46</sup>

### **INTERNATIONAL OBLIGATIONS AND NATIONAL LEGAL FRAMEWORK**

The international human rights discourse recognises the utility of protecting, promoting, fulfilling and respecting the rights of children. It achieves this through a series of hard and soft law standards.<sup>47</sup> The CRC and ACRWC constitute the most important instruments *in casu*.<sup>48</sup> Zimbabwe is signatory to and has ratified the CRC, adopted by the United National General Assembly on 20 November 1989 and entered into force on 2 September 1990. It is also bound by the ACRWC.<sup>49</sup> Child marriages gravely affect children. They fall squarely under harmful practices which usually are abhorrent to the best interests of the child.

According to Art.1(g) of the African Women’s Protocol, harmful practices entail “all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education, and physical integrity”.<sup>50</sup> Further, Art.4 of the Protocol provides *inter alia*, that-

- 1) State parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.
- 2) State parties shall take all necessary legislative and other measures to eliminate such practices, including:
  - a) the creation of public awareness in all sectors of society, regarding harmful practices through information, formal and informal education and outreach programmes.

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<sup>46</sup> *Id* at 30.

<sup>47</sup> The United Nations Universal Declaration on Human Rights 1948, Convention on the Elimination of All Forms of Discrimination Against Women, 1979 African Charter on Human and Peoples’ Rights, 1981, Declaration on the Elimination of Violence Against Women, 1993, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003, African Charter on the Rights and Welfare of the Child (1990), UN Convention on the Rights of the Child (1989) and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages respectively.

<sup>48</sup> Entered into force in October 1986.

<sup>49</sup> B de Villiers *et al*, “*Human rights: documents that paved the way.*” Human Sciences Research Council (HRSC) (1992). Essop M Patel & Chris Watters, “*Human Rights: Fundamental Instruments & Documents.*” Butterworths (1994)

<sup>50</sup> Article 1 (g) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003.

- b) Prohibition, through legislative measures backed by sanctions, of all forms of FGM scarification, medicalisation, and para-medicalisation of FGM and all other practices in order to eradicate them.<sup>51</sup>

The international human rights system protects the child's economic, social, cultural,<sup>52</sup> civil and political rights.<sup>53</sup> Furthermore, children are also protected from neglect, cruelty and exploitation.<sup>54</sup> In so far as marriageable age is concerned, Art.16 of the Universal Declaration of Human Rights,<sup>55</sup> provides that-

- 1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, and its dissolution.
- 2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- 3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.<sup>56</sup>

According to the Constitutional Court, Art.16, implies that persons who had not attained the age of majority could not exercise the right to marry and to found a family. The Court further held that the prevalent legal norm to the effect that minors could not consent applied *mutatis mutandis*. The Court, however, noted that the non-binding nature of soft law instruments and specifically the Declaration's failure to specify majority age.<sup>57</sup>

Conversely, the CRC,<sup>58</sup> provides in art.1 that "child means every human being below the age of 18 years." Art.3 further provides that "in all actions concerning the child, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."<sup>59</sup>The CRC does not specify the minimum age of marriage but defines child thereby giving CEDAW Committee a legal foundation on which to set eighteen years as the minimum age of marriage. There have been calls for the CRC to insert a specific clause dealing with child marriages.<sup>60</sup>Human rights law imposes a positive obligation imposed on state parties to "ensure to the maximum extent possible the survival and development of the child."<sup>61</sup> Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides *inter alia*, that "the betrothal and the marriage of a child have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage..." Article 16(1) of CEDAW reserved the right to marry and found a family to men and women of full age.

The Court looked at Review of States Reports presented to the CR Committee in 1997-2004 in which forty-four states specified a lower age for young girls than boys; E/1996/22 [1995] para 159 of the Committee on the International Convention on Economic Social and Cultural Rights ( ICESCR Committee) which indicated that differences in marriageable age between girls and boys violated provisions of international human rights instruments guaranteeing to girls and boys equal treatment before the law; Committee on the Convention on Civil and Political Rights (ICCPR Committee) expressed the view that based on the interpretation of s 22(1) that early marriage and the statutory difference in the minimum age of girls and boys for marriage, should

<sup>51</sup> *Id* at art.4.

<sup>52</sup> International Covenant on Economic, Social and Cultural Rights, the United Nations General Assembly by Resolution 2200A (XXI) of 16 December 1966 adopted and opened the Covenant for signature, ratification and accession and it was entered into force on 3 January 1976.

<sup>53</sup> International Covenant on Civil and Political Rights, the United Nations General Assembly by Resolution 2200A(XI) of 16 December 1966 adopted and opened the Covenant for signature, ratification and accession and it was entered into force on 23 March 1976.

<sup>54</sup> See Declaration of the Rights of the Child, UN General Assembly Resolution 1386 (XIV) ON 20 November 1959.

<sup>55</sup> The General Assembly of the United Nations, adopted and proclaimed by its Resolution 217A(III) on 10 December 1948.

<sup>56</sup> *Id* at art.16.

<sup>57</sup> *Mudzuru* n 4 supra page 28. The court held: "It is striking how poorly international human rights conventions addressed the practice of child marriage. Apart from their general lack of vision, the conventions, not being self executing, constituted promises by the adopting parties to enact domestic legislation and adopt other measures to achieve the desired objectives."

<sup>58</sup> Adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990.

<sup>59</sup> *Id* at art. 3.

<sup>60</sup> Askari Ladan "The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages" (1998) ILSA Journal of International and Comparative Law 123.

<sup>61</sup> Art.6(2) of the Charter.

be prohibited by law; and a comment by CEDAW Committee,<sup>62</sup> according to which s 22 (1) assumed incorrectly that girls have a different state of intellectual development from boys or their stage of physical and intellectual development at marriage was immaterial.

The above highlighted binding contemporary human rights norms, which contributed to a large extent to the Constitutional Court's decision to outlaw child marriages. Additionally, the Court also relied on the Zimbabwe Human Rights Bulletin Number 98 and the Inter-African Committee on Traditional Practices Affecting Health of Children and read it in line with the CEDAW Committee General Recommendation to find that the distinction between young girls and boys was erroneous and stereotypical. The Court described the respondents' argument as an "...old stereotypical notion that females were destined solely for the home and the rearing of children of the family and that only the males were destined for the market place and world of ideas".<sup>63</sup> Further, Court held that the respondents' submissions thus incompatible with the Constitution and fundamental values of women's dignity, gender equality, social justice and freedom.

Child marriages are prohibited under the ACRWU. The African human rights system contributed significantly in swaying the court's decision in *Mudzuru*. The Court considered the ACRWU, which most African countries are party and bound. Article 21 unequivocally, without exceptions prohibit child marriages and crisply provides as follows:

**"Article 21. Protection against Harmful Social and Cultural Practices.**

1. State parties to the present charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
  - (a) Those customs and practices prejudicial to the wealth or life of the child; and
  - (b) Those customs and practices discriminatory to the child on the grounds of sex or other status.
2. 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."

The principles enumerated in the CRC and ACRWC contributed immeasurably in *Mudzuru*. The Court held that article 21(1) of the ACRWC had a direct effect on its views on the validity of ss 20 (1) and 22 (1) of the Marriage Act respectively. It is therefore logical to opine that the African Human Rights System is clear and affords better protection to children. The problem however relates to the individual states' attitudes to domestication and compliance with the ACRWC. The limitation when it comes to regional human rights instruments is its application. There is a lot that still needs to be done by Zimbabwe to reform and align its laws to be compatible with the Constitution and international human rights instruments.

The Court held that the invalidity of the impugned provision was consistent with the fulfilment by Zimbabwe of the obligation it undertook in terms of the relevant CRC and ACRWU. Having engaged in constitutional analysis and interpretation, the court held, that s 78(1) as read with s 81(1) of the Constitution is born out of commitment by the international community including Zimbabwe to provide greater and effective protection of the fundamental rights of the child. It further, held further that the fulfilment of article 21(1) to specify by law eighteen years as the minimum age for marriage. In making this decision the Court make reference to article 18 of the Vienna Convention on the Law of Treaties,<sup>64</sup> in which a party is enjoined to hold in good faith and observe the rights and obligations in a treaty which is it a party.

The Court held further that s 78(1) cannot be construed literally because doing so will undermine justice and protection of the rights of children. Thus, the Court held, that only a broad, generous and purposive interpretation will give full effect to the right to found a family enshrined in s 78(1) of the Constitution. Importantly, the Court noted that marriage is the traditional way of founding a family. In a crisp fashion, it held as follows:

Section 78(1) of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe. Its effect is that a person who has not attained the age of eighteen has no legal capacity to marry. He or she has a fundamental right not to be subjected to any form of marriage regardless of its

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<sup>62</sup> General Recommendation 21 para 38

<sup>63</sup> *Mudzuru* at 52.

<sup>64</sup> Came into force on 2 January 1980.

source. The corollary position is that a person who has attained the age of 18 has no right to marry a person aged below 18 years.<sup>65</sup>

In its application of human rights law, especially ARCWU, the Court reiterated that the effect of s 81 (1) of the Constitution's definition of a child as a person below the age of 18 years means that a child cannot found a family and there are no provisions in the Constitution for exceptional circumstances. This absolute prohibition, the Court found, was in line with an interpretation and application of Art. 21(1) of ARCWC. The Court held, further, that the purpose of s 78(1) as read with s 81(1) of the Constitution is to ensure that social practices such as early marriages that subject children to exploitation and abuse are arrested. Accordingly, the espoused that the *Mudzuru* decision has created a special right applicable to children peculiarly known as "*the right to be protected from any form of marriage*". The *Mudzuru* decision should also probe the question whether the international order affords adequate protection to children. More so especially the CRC which does not expressly provide for the minimum age of and ban child marriages. This critique is valid considering that the CRC is the legal foundation when it comes to matters involving children. The principle of legality provides that laws must be ascertainable. The current international human rights framework on child marriages is difficult to ascertain except for the ARCWC which expressly bans child marriages.

Furthermore, Hlatshwayo JCC's concurring judgement in *Mudzuru* went a bit further by looking at the legislative history of s 78(1) of the Constitution. The learned justice considered the Draft Constitutional Proposals of Parliamentary Select Committee [COPAC] of 26 January 2012, the Draft Constitutional Proposals of 18 July 2012, and the 2000 Draft Constitution of Zimbabwe. Accordingly, Hlatshwayo JCC, held that when regard is had to the legislative history of s 78(1), general scheme of the section and a reading of the section in conjunction with other provisions of the Constitution, s 22 (1) failed the constitutional compatibility test and therefore invalid because the Constitution prescribes eighteen as the minimum age for marriage.

### **NEW CONSTITUTIONAL LANDSCAPE**

The new Constitution marked a constitutional death certificate of the Lancaster Constitution.<sup>66</sup> The Constitution is divided into Eighteen Chapters that include the following: founding provisions;<sup>67</sup> national objectives;<sup>68</sup> citizenship;<sup>69</sup> declaration of rights;<sup>70</sup> provisions on the executive arm; the legislature; elections; the judiciary and the courts; principles of public administration and leadership; civil service; security services; independent commissions supporting democracy; institutions to combat corruption and crime; provisional and local government; traditional leaders; agricultural land; finance; and general and supplementary provisions. The Constitution is the supreme law of Zimbabwe. Section 2 of the Constitution provides that:

- (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- (2) 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.<sup>71</sup>

Further, the Constitution envisages a country founded on the principles and values of democracy and the rule of law. Section 3(1) of the Constitution lists the founding values, to include the following: supremacy of the constitution;<sup>72</sup> the rule of law;<sup>73</sup> fundamental human rights and freedoms;<sup>74</sup> the nation's diverse cultural, religious and traditional values;<sup>75</sup> recognition of the

<sup>65</sup> *Mudzuru* at 46.

<sup>66</sup> Constitution of Zimbabwe Amendment Act (No.20), 2013.

<sup>67</sup> Chapter 1 of the Constitution.

<sup>68</sup> Chapter 2 of the Constitution.

<sup>69</sup> Chapter 3 of the Constitution.

<sup>70</sup> Chapter 4 of the Constitution.

<sup>71</sup> Section 2 of the Constitution.

<sup>72</sup> Section 3(1)(a) of the Constitution.

<sup>73</sup> Section 3(1)(b) of the Constitution.

<sup>74</sup> Section 3(1)(c) of the Constitution.

<sup>75</sup> Section 3(1)(d) of the Constitution.

inherent dignity and worth of every human being;<sup>76</sup> recognition of the equality of all human beings;<sup>77</sup> gender equality; good governance;<sup>78</sup> and recognition of and respect for the liberation struggle.<sup>79</sup> The list enumerated in s 3(1) is in sync with the principle of transformative constitutionalism. The Constitution provides for a Declaration of Rights in Chapter Four. It further provides for an interpretation clause.<sup>80</sup>

According to De Waal *et al*,<sup>81</sup> “the aim of interpretation is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with the provision”.<sup>82</sup> Furthermore, the authors opine that the inquiry followed by courts in constitutional interpretation is two-pronged. As summarised by De Waal *et al*, the two-staged approach involves the following: “first the meaning or scope of a fundamental right must be determined, then it must be determined whether the challenged law or conduct conflicts with the fundamental right;<sup>83</sup> and the second enquiry, that is the question of whether law or conduct is in conflict with a right, obviously involves the interpretation of the challenged law or a determined of what the challenged conduct amounts to. Therefore, one must determine whether there is conflict between the law or conduct and the Bill of Rights”.<sup>84</sup>

The *Mudzuru* decision highlights a new constitutional landscape. This is highlighted in the manner in which the Constitutional Court teased out the values that underlie the Constitution and implicated constitutional provisions. The court went in detail in delineating the scope of s 185(1) (a) and (d) and ss 78(1) and 81 (1) of the Constitution, before it could determine whether the impugned provision was in conflict with the Constitution. It can be argued, therefore, that the Constitutional Court is building a progressive children’s rights jurisprudence. The Court interpreted s 78(1) to mean that children are now afforded protection from early marriages. The decision is a victory for access to justice. It broadens access to courts by not placing unjust emphasis on procedural aspects albeit insisting that applicants must adduce evidence to establish their substantive claim. Further, the decision has progressive constitutional implications on the best interests of the child standard enumerated in international human rights law and the Constitution. The Court held, that the best interests of the child would be served if the impugned provisions were repealed. Further, the Court held, that invalidity of the impugned provision was triggered at the time when ss 78(1) & 81(1) came into operation and not at the time a fundamental right is said to be infringed or order pronounced.

### **LEGAL AND SOCIAL JUSTICE IMPLICATIONS OF THE JUDGEMENT**

*Mudzuru* is a seminal case on children’s rights and sets a new constitutional trajectory. Under Roman-Dutch Law, boys aged 14 and girls aged 12 could conclude a valid marriage.<sup>85</sup> Comparatively, Hahlo cites the South African Marriage Act 25 of 1961, ss 24, 24A, 25, 26 and 27 and the Matrimonial Property Act 88 of 1984, s 24 which give people of unmarriageable age a legal right to conclude a marriage provided there is consent.<sup>86</sup> The judgement has done away with the notion of minors of marriageable age. It adopts a restrictive approach which bars children from entering into marriage. Therefore, it is a progressive step in the realisation of child rights.

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<sup>76</sup> Section 3(1)(e) of the Constitution.

<sup>77</sup> Section 3(1)(f) of the Constitution.

<sup>78</sup> Section 3(1)(h) of the Constitution.

<sup>79</sup> Section 3(1)(i) of the Constitution.

<sup>80</sup> Section 46(1) of the Constitution provides that when interpreting the rights contained in the Declaration of Rights “a court, tribunal, forum or body must give full effect to the rights and freedoms...; must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3; must take into account international law and all treaties and conventions to which Zimbabwe is a party; must pay due regard to all the provisions of this Constitution in particular the principles and objectives set out in Chapter 2; and may consider relevant foreign law; in addition to considering all other relevant factors that are to be taken into account in the interpretation of the Constitution.”

<sup>81</sup> Johan de Waal, Iain Currie & Gerhard Erasmus “*The Bill of Rights Handbook*” (4 ed) 2001.

<sup>82</sup> *Id* at 126.

<sup>83</sup> *Id*.

<sup>84</sup> *Id* at 127.

<sup>85</sup> H.R Hahlo “*The South African Law of Husband and Wife*” Sed Juta & Co (1985) 89.

<sup>86</sup> *Id*.

The Constitutional Court adopted a progressive approach to standing, and held that:

the form and structure of s 85(1)(d) shows that it is a product of the liberalisation of the narrow traditional conception of locus standi. The traditional rule of standing gave a right to approach a competent court for enforcement of a fundamental right or freedom to a person who would have suffered direct legal injury by reason of infringement or threatened infringement of his or her fundamental right or legally protected interest by the impugned action of the state or public authority. Except for a case where a person was unable to personally seek redress by reason of being under physical detention on one could ordinarily seek judicial redress for legal injury suffered by another person.<sup>87</sup>

The *Mudzuru* decision is an example of how courts can spearhead the constitutional alignment process.<sup>88</sup> Since the adoption of the Constitution some laws have become outdated and unconstitutional. The Marriage Act is a classic example. *In casu*, the Marriage Act was pitted against the purport and spirit of the Constitution, and was found to be inconsistent. The Constitutional Court's decision to outlaw child marriages in Zimbabwe was offered credence by the international human rights normative framework, especially the CRC and ACRWC. Consequently, child marriages are absolutely illegal in Zimbabwe. In response to the respondents' contention that s 22 (1) does not infringe s 78(1) of the Constitution, the court held:

No law can validly give a person in Zimbabwe who is aged below eighteen years the right to exercise the right to marry and found a family without contravening s 78(1) of the Constitution. To the extent that it provides a girl who has attained the age of sixteen can marry, s 22(1) of the Marriage Act is inconsistent with the provision of s 78(1) of the Constitution and therefore invalid.<sup>89</sup>

The *Mudzuru* Court dismissed the traditional view that a girl matures early (psychologically, physically and emotionally) and that she must be treated differently from boys. According to the Constitutional Court, s 81(1) of the Constitution "sets the principle of equality, dignity and rights for girls and boys, effectively prohibiting discrimination and unequal treatment on the ground of sex or gender".<sup>90</sup> What remains to be seen is how the judgement will be implemented across the country especially in rural areas. Government has suggested criminalising the payment of dowry for children below eighteen years old.<sup>91</sup> Child marriages require urgent parliamentary intervention which goes beyond mere rhetoric. Furthermore, the judgement raises questions about traditional marriages involving minors and Apostolic Sects that are involved in child bride practices. Part X below, provides for recommendations.

The *Mudzuru* decision is seminal insofar as s 46 of the Constitution is concerned. Section 46 peremptorily enjoins a court, tribunal or forum to consider international law whenever interpreting the Constitutional text. The Constitutional Court acted in accordance with and applied international human rights law applicable to child marriages in declaring the impugned provision invalid. As such it shows the extent to which courts are prepared to consider international law in the adjudication process. Consequently, the legal effect of the judgement is that s 21 (1) and 20 (1) of the Marriage Act has been repealed as of 20 January 2016. The Legislature must amend or align laws that still allow child marriage, specifically laws that do not provide for the minimum age of marriage. Furthermore, government is edged to develop a Comprehensive National Action Plan to end child marriage.<sup>92</sup> On a positive note, the judgement is a very important lobbying tool geared towards social change.

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<sup>87</sup> *Mudzuru* at 14.

<sup>88</sup> This paper is cognizant of a possible separation of powers argument against *Mudzuru*. This contention may be based on the approach adopted by the Constitutional Court of South Africa in *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC). The separation of powers doctrine provides that government authority is divided amongst the Legislature, Executive and Judiciary branch respectively. According to Rautenbach & Malherbe "Constitutional Law" (2<sup>nd</sup> Ed) Butterworths, 1997 at 69, "the distinction between the three branches means that the government body or bodies responsible for the enactment of rules of law shall not also be charged with their execution or with judicial decisions about them. The executive authority is not supposed to enact law or to administer justice, and the judicial authority should not enact or execute laws." A question for a different paper is whether the Constitutional Court should have afforded the legislative branch an opportunity to remedy the constitutional defect of s 22(1) of the Marriage Act in observance of the separation of powers doctrine.

<sup>89</sup> *Id* at 50.

<sup>90</sup> *Id* at 49.

<sup>91</sup> <http://www.newsdezimbabwe.co.uk/2016/03/new-law-to-ban-lobola-for-minors.html>

<sup>92</sup> Dewa Mavhinga "Dispatches: Ending Child Marriage in Zimbabwe."

<https://www.hrw.org/news/2016/03/31/dispatches-ending-child-marriage-zimbabwe>.

Furthermore, the *Mudzuru* judgement will give crucial stakeholders for an example, the Zimbabwe Republic Police (ZRP) ample opportunity to consider devising strategies to deal with child marriages. On the strength of the judgement they can embark on community outreach programmes to raise awareness and sensitise affected peoples about recent legal developments on marriage. However, it must be noted that as it stands there are no criminal consequences attaching to child marriages. The judgement merely outlaws child marriages but it does not provide for the criminal ramifications of same. Therefore, what basically means is that an old man who enters into marriage with a child cannot be held criminally liable. However, the said marriage is considered *void ab initio*. Importantly, the judgement triggers scholars to probe the constitutionality of existing laws that deal with children. One question which can be posed is whether *Mudzuru* case has a bearing on the age of consent. As it stands, the law sets sixteen years as the age of consent on one hand and bars children below the age of eighteen from entering into marriage. What this means is that older men are allowed to have sexual intercourse with young girls but they cannot marry them.

The post-*Mudzuru* dispensation will be characterised by rigorous sensitisation and awareness by civil society, government, police, community leaders and schools to the effect that affected parties know their rights and that actions that may flout the law are avoided. However, challenges in implementing the judgement may include: community and individual resistance; illiteracy; poverty; culture; unemployment; lack of willingness or inability to report incidents of child marriages or abuse to the authorities; fear of community reprisals and resource constraints

## RECOMMENDATIONS

### *i) Enforceability of judgement.*

The law is the first step in protecting human rights. Victims of arbitrary actions and human rights violations usually find recourse in law. Whether or not victims of child marriage will get justice can be answered in relation to the enforceability question. The main consideration concerns the methodology that would be adopted to enforce the judgement. As it stands, child marriages are void in law. Stopping child marriages therefore means that resources must be directed towards changing perceptions that perpetuate child marriages, capacitating victims and devising child marriage delay mechanisms. Ethiopia came up with a brilliant delay-mechanism which can be replicated across the continent. The *Berhane Hewan Program* is discussed in detail below.

### *ii) Awareness and sensitisation in remote/ vulnerable areas, police, schools.*

“Transformative obedience” will only be achieved only when the relevant parties strategically, effectively and efficiently play their respective roles. The several parties including the state, police, school, and civil society must play a role in engaging and empowering ordinary members of the society about child marriages.<sup>93</sup> The court held, that “once the fact that child marriage has been abolished in Zimbabwe is known, the imperative character of the law shall be felt in the hearts and minds of many men and women so strongly that transformative obedience to it shall become a matter of habit”.<sup>94</sup> Awareness campaigns must engage parents, local and religious leaders.<sup>95</sup>

### *iii) Interventionist/Child Marriage Delay Strategy.*

We have seen from the *Berhane Hewan Program*,<sup>96</sup> how the Ethiopian government tried to delay child marriages in rural Ethiopia through a combination of group formation, support groups to remain on school and community awareness. According to Nour,<sup>97</sup> “ending child marriage requires a multifaceted approach focused on the girls, their families, the community, and the government. Culturally appropriate programs that provide families and communities with education and reproduction health services can help stop child marriage, early pregnancies and illness and death in young mothers and their children”.<sup>98</sup> *Berhane Hewan Program* was an

<sup>93</sup> Nour n 13 *supra* at 1644.

<sup>94</sup> *Mudzuru* at 54.

<sup>95</sup> Nour *supra*.

<sup>96</sup> Erulkar, Annabel S & Muthengi, Eunice “*Evaluation of Berhane Hewan: A Program To Delay Child Marriage in Rural Ethiopia.*” International Perspectives on Sexual & Reproductive Health. Mar 2009, Vol. 35 Issue 1, p6-14.

<sup>97</sup> Nour *supra* at 1645.

<sup>98</sup> *Id.*

initiative of the Ethiopian Ministry of Youth and Sport and the Amhara Regional Bureau of Youth and Sport. It targeted married and unmarried girls aged 10-19 years respectively.<sup>99</sup> Its overarching goal was to establish appropriate and effective mechanisms to protect girls at risk of forced early marriage and support adolescent girl who were already married.<sup>100</sup> The objectives of the program were: the creation of safe social spaces for the most vulnerable and isolated girls to meet same-sex friends and interact; a reduction in the prevalence of childhood marriage among adolescent girls; and an increase in the use of reproductive health services among sexually experienced girls.<sup>101</sup> *Berhane Hewan Program*'s success included improvements in girls' school enrolment, age at marriage, reproductive health knowledge and contraceptive use.<sup>102</sup> Therefore, Zimbabwe can extrapolate lessons from the Ethiopian experience. Cognisant that having a judgement is only a first-step in the fight against child marriages. There is need for government to adopt a multifaceted and pragmatic approach taking into the above lessons.

**iv) Sustainable Development Goals (SDGs).**

Poverty is an incentive for perpetuating child marriages. According to Nour, parents want to ensure their daughters' financial security.<sup>103</sup> Secondly, daughters are regarded as an economic burden by parents,<sup>104</sup> and child marriages are seen as a measure for reducing the risk for HIV and other Sexually Transmitted Diseases (STDs). However, research reveals that this perception is incorrect. Research conducted in Kenya and Zambia revealed that child marriages increase the risk of contracting HIV by almost 50%. The argument therefore, is that the realisation of SDGs will lead to a reduction of child marriages. For an example, if countries work towards poverty alleviation/reduction and hunger, quality education for all children and women empowerment, child marriages will be significantly reduced in Africa. Countries like Korea, Taiwan and Thailand managed to decrease child marriages through improvements in education, increased employment and the provision of health care for the populace.

**v) Monitoring and Evaluation.**

Parties must devise practically feasible monitoring and evaluation strategies. This can be done on an on-going basis in order to track progress and determine whether there is a decline or increase in child marriages post intervention strategy.

**vi) Collaborative partnerships.**

The success or failure of implementation, to a large extent, will depend on the approach adopted by each stakeholder. Thus government must work closely with the civil society and private sector to come up with an implementation strategy. Ending child marriages is a gradual process which requires a holistic approach. The government of Zimbabwe can extrapolate lessons from the *Berhane Hewan Program*. The civil society is always abreast of community reality and challenges whilst the private sector may provide financial resources to implement projects geared towards delaying child marriages.

**vii) Alignment of Laws post-Mudzuru dispensation.**

This decision raises a number of issues. One such issue relates to the misalignment of laws. *Mudzuru* has an impact on the age of consent. As noted in the judgement, early sexual activity, child pregnancies and devastating health complications will continue to rise. Hlatshwayo JCC held, that "the refinement of the local laws both civil and criminal consequent upon this decision showed in advocating the abolition of child marriages in Zimbabwe".<sup>105</sup> There are grave legal inconsistencies which must be remedied. On the one hand, *Mudzuru* has outlawed child marriages, that is to say, it set eighteen years as the minimum age for marriage and on the other hand, the Criminal Law Codification and Reform Act sets sixteen years as the minimum age of consent.<sup>106</sup>

<sup>99</sup> Erlkar & Muthengi *supra* at 6.

<sup>100</sup> *Id.*

<sup>101</sup> *Id* at 7.

<sup>102</sup> *Id* at 6.

<sup>103</sup> Nour *supra* at 1645.

<sup>104</sup> *Id.*

<sup>105</sup> *Mudzuru* at 62.

<sup>106</sup> One plausible intervention would be to amend s 70 of the Act, by criminalizing all sexual activity with a minor.

## **CONCLUSION**

The Constitution sets out the path that Zimbabwe wants to follow in its constitutional and human rights trajectory. It provides for inalienable rights and obligations. Further, the international human rights framework further concretises and supplements the constitutional normative framework. The abhorrent nature of child marriages was highlighted in the *Mudzuru* case. The case brought to the fore flagrant human rights violations associated with child marriages. Furthermore, the international trend of same highlights the pressing need for interventionist strategies by governments to protect vulnerable children and women. From the above we can deduce that the *Mudzuru* decision is a giant leap forward in terms of constitutional jurisprudence, best interests of the child standard and social justice. The judgement brought the Marriage Act in line with binding international human rights standards which absolutely prohibit child marriages especially the CRC and the ACRWC. With effect from 20 January 2016, early marriages are no longer permissible. However, there is need for government to take practical steps in order to implement the judgement and align all laws to the Constitution.

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