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Investigating the planned prohibition of child marriage in South Africa against children's evolving capacity to consent

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CHAPTER 1

1.1 Introduction

According to the United Nations Committee on the Rights of the Child (CRC) General Comment No. 4, it is recommended that the age of marriage should be 18 years with or without the inclusion of parental consent.[1] A different view was initially adopted by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the Committee on the Rights of the Child on Harmful Practices (hereafter GR31/CG 18),[2] whereby the two Committees had originally provided exceptions to the effect that children below the age of 18 could get married, subject to third party approval.[3] In 2019, the Committees reviewed their stance and now provide that the age of marriage should be 18 years.[4]This was most probably influenced by the consequences of health risks associated with child marriage.[5]

At a regional level, article 21[6] of the African Charter on the Rights and Welfare of the Child (ACRWC), has encouraged state parties to adopt measures that will

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[1] UN Committee on the Rights of the Child (CRC), General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4. United Nations, Joint General Recommendation/ General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and (CEDAW) No. 18 of the CRC on harmful practices, November 2014, CEDAW/C/GC/31/CRC/C/GC/18.

[3] GR 31/CG 18. See under heading "Child and /or Forced Marriage", paragraph 6.2. (https://reliefweb.int/report/world/joint-general-recommendationgeneral-comment-no-31-committee-elimination-discrimination)

[4] Ann Skelton "Children" in Christina Binder, Manfred Nowak, Jane A Hofbauer and Phillip Janig (eds) (2022) *Elgar Encyclopaedia of Human Rights* p244-248.

[5] CRC/GC/2003/4.

[6] Art 21 of the (ACRWC) Rights and Welfare of the Child provides that:

1. States 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 health 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 girls shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

eliminate all forms of harmful social and cultural practices, and further prescribes that the age of marriage should be eighteen years.[7] A further example of guidance in line with this is encapsulated by the Southern African Development Community (SADC), which has viewed child marriage as a serious violation to human rights and therefore warrants the prohibition thereof in totality. [8]
To expand on the above chapter 2 will focus on the international and regional instruments that have been in the forefront of abolishing child marriages.

Currently in South Africa, section 12 of the Children's Act 38 of 2005, makes provision that that *a child below the minimum age set out by law for a valid marriage may not be given out in marriage or engagement*. [9] Previously, the aim of the Children's Act's Draft Bill, was to regulate the age of marriage to eighteen years,[10] however even under the current provisions, the Act refers to the minimum age, and is not explicit about eighteen as the set age, as the drafters of the bill had originally intended.

However, an interesting comparison can be made with Zimbabwe where in the case of *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others*,[11] the court ruled that, no marriage for person who are under the age of 18 years shall be deemed to be legal. [12] This judgment condemned any child marriage concluded under any laws in Zimbabwe.[13]

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[7] Art 21 of the ACRWC.
[8] UNFPA "A Guide to Using the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage for Parliamentarians, Civil Society Organisations and Youth Advocates" (2018) https://esaro.unfpa.org/en/publications/guide-using-sadc-model-law-eradicating-child-marriage-and-protecting-children-already accessed (last accessed on 2025-15-01)
[9] Section 12 (2) (a) of the Children's Act 38 of 2005.
[10] See section 12 of the Draft bill 18 of 2020.
[11] *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/2015.
[12] As above; Sloth-Nielsen and Hove *"Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A Review"* 2015 *AHRLJ* 554-568.
[13] Mwambene "Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi "*2018 AHRLJ* 18 2.

This mini-dissertation considers the proposed law reform in South Africa, but also refers extensively to the Zimbabwean case of *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others*,[14] and how both these countries have aimed at regulating the age of marriage to eighteen years.

While it may be correct that children ought to be protected against harmful practices perpetuated by child marriage, especially where consent is lacking, there are however instances where children below the age of 18 may choose to get married, but due to stringent measures may not be able to so. This mini-dissertation explores the apparent tensions between the recognition of children's evolving capacity and their growing autonomy on the one hand, with the need to protect them from the harmful effects of child marriage.

Dr Angela Melchiorre proposes that while the minimum age of child marriage can be regulated at an international level, it can still pose a challenge in implementing such uniformity at a national level due to various cultural and societal influences. [15]Melchiorre in referring to article 1 of the United Nations on the Convention on the Rights of the Child (CRC) opines that the definition of child should not be limited to what international standards prescribe, but the approach should be flexible and comprehensive balancing protection and autonomy. [16] She argues that while marriage might entail adult responsibilities, there are still those adolescent spouses that are willing to take up such responsibility and the minimum age of capacity should therefore recognise the child's evolving capacity and autonomy. [17]

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[14]*Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others* Case No: AR579/2019.

[15] Melchiorre "A Minimum Common Denominator? Minimum Ages for Marriage Reported under the Convention on the Rights of the Child" Submission on Child, Early and Forced Marriage, Women's Human Rights and Gender Section Office of the United Nations High Commissioner for Human Rights (OCHCR) 2013 1

[16] Melchiorre (2013) Submission to the OCHCR.

[17]Melchiorre (2013), Submission to the OCHCR.

Moreover, Article 12 of the United Nations Convention of the Rights of the Child (CRC), read together with article 4(2) of the African Charter on the Rights and Welfare of the Child (ACRWC) provide instances where the views of the child are to be given due consideration, in matters that affect them. In South Africa, this has been beautifully encapsulated in the Children's Act 38 of 2005 (Children's Act), wherein different scenarios are incorporated whereby children are able to provide consent in decisions that directly affect them and their wellbeing. The latter is evidenced in section 129, wherein a child is able to consent to medical treatment if he is above the age of 12, section 134, which allows children to be provided with condoms and contraceptives without the consent of their parents, section 130 where children can be tested for HIV and Aids, only if they have consented to same, and are over the age of 12 years. There are many other examples where children are able to consent without the assistance of their parents or guardians, and the current research paper will explore some of those developments, with the aim of demonstrating that South African law rests on the idea that children are able to make decisions which directly affect them, in line with their evolving capacities. It is striking that the absolute prohibition of marriage with no exceptions below the age of eighteen year pulls in the opposite direction, and therefore appears to move away from the premise in the Children's Act that children should gradually be able to make decisions as their capacity evolves. There may be good reason for the protective approach to the abolition of child marriage, and this thesis will examine the tension between the recognition of autonomy and the need for protection.

To achieve this, the topic will be explored through five different chapters, that will look at child marriage, the problems around child marriages and the developments which have influenced the prohibition thereof drawing a comparison between South Africa and Zimbabwe, further looking at consent and the ability of the child to consent. A final analysis on the child's evolving capacity and the regulation of the age of marriage to eighteen years will be made, to assist in determining whether the approach in South African law is coherent.

1.2 Research Questions

In addressing the gap between the child's evolving capacity and the regulation of the age of marriage to 18 years, the following research questions will have to be addressed:

1. What have been some of the main influences that have been in the forefront of prohibiting child marriage?
2. Is there a connection between culture, tradition and the total prohibition of child marriage?
3. What is a child's evolving capacity and what does it entail?
4. Is there enough reasonable evidence that justify adolescents to make their own decisions around marriage, and if so, should there be an absolute ban on child marriage with no exceptions?

1.3 Proposed Research Methodology

The purported research will be based on theoratical study that will be conducted through desktop research, and other sources which includes articles and textbooks. The study will focus on South African law but will also consider relevant aspects of Zimbabwe where there have been recent legal responses to child marriage.[18] The study will further explore the child's evolving capacity and whether or not it is necessary for these two countires to regulate the age of marriage as prescribed by international standards. It is against this backdrop, that a comparison will be conducted between these two countries in view of what perpetuates this behaviour, and a comparison of their domesticlaws, to determine whether there is a safe way that children who can consent are able to consent to marriages if proper practices are established, and whether the absolute prohibition of all child marriage is defensible.

[18] Mwambene "Recent legal responses to child marriage in Southern Africa: the case of Zimbabwe, South Africa and Malawi" 2018 *AHRLJ* 18 2.

1.4 Literature Review

Alderson and Montgomery highlight that while adults may be required to assist children in making decisions,[19] but the authors also suggest that in protecting the developing autonomy of children, adults should exercise an element of trust which stems from the support afforded to these children by listening to them and engaging them on serious decision making.[20] From an international human rights law perspective, this would entail state parties considering the best interest of the child and evolving capacity of each individual child, when developing policies and practices that affect the child.[21] Professor Van Beuren further suggests that with the development of these legislations, the views of the child should be taken into consideration. [22]

Article 5 of the CRC, makes provision that state parties should respect parents and all custodians of children when affording children guidance during the exercise of their rights, and that this should be done in accordance with the child's evolving capacity.[23] This in turn means that the CRC provides children with an opportunity to make autonomous decisions once the child has reached a certain level of intellectual maturity. [24] Alderson and Montgomery lean towards this view, as they have expressed that in line with article 5 of the CRC, children should have the opportunity to exercise their choices and make autonomous decisions.[25] Article 5, according to the United Nations International Children's Emergency Fund (UNICEF), provides children with an opportunity to make decisions which

[19] Alderson and Montgomery *Health Care Choices: sharing decisions with children* (1996).
[20] As above.
[21] Van Bueren "The International Law on the Rights of the Child" 1995 *Fordham International Law Journal* 283.
[22] Van Bueren 1995 *International Law Journal*.
[23] Art 5 of the CRC.
[24] Leanne Kives "Adolescent Consent in Reproductive and Sexual Health Decision Making: Should There be an Arbitrary Age of Consent or Should it be based on the Evolving Capacities of the Child?" (2008) *Journal of Paediatric and Adolescent Gynaecology* 49.
[25] Alderson and Montgomery (1996).

affect them, without a specific age linked to the capacity, but in accordance with the knowledge, skills afforded to the child in exercising his or her rights. [26]

While structures like the African Union,[27] have built campaigns on ending child marriages, probably motivated by an aim to stop the perpetuation of devastating cultural and social patterns, A question posed by Ayodele Atsemuwa, is: What happens to young people who are sexually mature and who want to be sexually active, but would rather have sexual interactions within marriage? Should they legally be precluded by this law? [28] Atsemuwa further argues that prohibiting the marriage of young people who wish to enter into marriage should not be the primary bone of contention, but rather shifting the focus on dealing with the unpleasant effects posed by these early marriages. [29]

The horrendous effects of child marriage do exist, and these cannot be condoned. However, regulating the age of marriage of older adolescents where both children have consented and understand the result of their actions in line with autonomy and their evolving capacity should not prejudice them from entering into marriage and limiting their decision making through legislative prescripts.

Based on the above, the research will be divided into the following chapters:

1. Chapter one introduces the topic and an outline of the research.
2. Chapter two focuses on international and regional instruments that have been in the forefront of prohibiting child marriage.

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[26] Lansdown *The Evolving Capacities of the Child UNICEF* Innocenti Research Centre 4.
[27] African Union "Campaign to End Child Marriage in Africa: Call to Action" 2014 https://au.int/sites/default/files/pages/32905filecampaign_to_end_child_marriage_in_africa_call_for_action-_english.pdf (last accessed 2021-07-20)
[28] Atsemuwa "Promoting Sexual and Reproductive Rights Through Legislative Interventions: A case study of Child Rights Legislation and Early Marriage in Nigeria and Ethiopia" 2014 *Pretoria University Law Press* 294. The writer in this study, refers to the Child Right's Act 2003 in the Jagiwa State, which prohibits persons who are under the age of 18 from getting married.
[29] Atsemuwa (2014) *Pretoria University Law Press*.

3. Chapter three will focus on a comparative assessment between South Africa and Zimbabwe and the prohibition of child marriage.
4. Chapter four will focus on consent the child's evolving capacity.
5. Chapter 5 will conclude and provide an analysis based on the evolving capacity and the suggested legal prescripts on child marriage.

CHAPTER 2

2.1 International and Regional Developments Driving the Prohibition of Child Marriage

Child marriage relates to a marriage where one of the parties is below the age of eighteen years.[30]It is estimated that on an annual basis, almost 15 million girls are married before reaching the age of eighteen years, and that by 2050, about 1.2 billion women alive would have been married as children.[31] These large numbers have influenced global campaigns such as "Girls not Brides",[32] the United Nations Population Fund (UNFPA) and the United Nations Children's Fund (UNICEF) Programme which are all aimed at ending child marriage.[33] The aim of the latter is focused on discouraging child marriage amongst adolescent girls, and on encouraging them to pursue their goals through education and other available channels. [34] It has been recorded that in South Africa, Zimbabwe and Malawi, most of the child marriages which occur are entrenched within cultural practices[35]

Although not significantly high as compared to other countries, in South Africa during 2019, it was reported that across several years almost 90 000 girls in the country had entered marriages as child brides.[36] Zimbabwe has been ranked as number 41 amongst the countries where there is a high prevalence of child marriage.[37]

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[30] Mwambene 2018 *AHLJ* 18.
[31] "Girls Not Brides: The Global Partnership to End Child Marriage" https://www.sharednation.org/products/girls-not-brides?_pos=a53ofd082&ss=r (last accessed 27 May 2023).
[32] As above.
[33] UNFPA- UNICEF "Global Programme to End Child Marriage" https://www.unicef.org/protection/unfpa-unicef-global-programme-end-child-marriage accessed (last accessed 2023-05-03).
[34] As above.
[35] Mwambene (2018) *AHRLJ 18*.
[36] Grobbelaar and Jones (Eds) *Childhood Vulnerabilities in South Africa* (2020) 1.
[37] Sloth- Nielson "Child Marriage in Zimbabwe? The Constitutional Court Rules 'No'" 2016 *The International Survey of Family Law* 538.

It is against this backdrop, that this chapter will focus on some of the global and regional drivers that has led to the prohibition of child marriages, specifically in South Africa and Zimbabwe, and how such influences have led to the development of laws around child marriage in the two countries.

2.2 International and Regional Instruments Driving the Prohibition of Child Marriage.

Both South Africa and Zimbabwe are parties to a number of international instruments, which prescribe standards to ensure that the rights of the children are adequately protected. [38] These treaties include the Convention on the Elimination of All forms of Discrimination against Women (CEDAW)[39] and the Convention of the Rights of the Child (CRC). [40] The two committees monitoring compliance with these treaties, jointly adopted a General Recommendation which has been in the forefront of expounding on the issue of child marriage. [41] The recommendation is known as the General Recommendation 31 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the General Comment 18 of the Committee on the Rights of the Child on Harmful Practices (hereafter GR31/CG 18). [42] The document provides guidance to state parties in executing their obligations to ensure that there are policy and legislative measures in place that oust any form or harmful practices especially against women and the girl child. [43] The Committees stipulated that child marriage involves instances *where at least one of the parties is below the age of eighteen years.* [44] The views advanced by the Committees suggest that child marriage is linked to forced marriage, in that the one party, more particularly the child, is often

[38] Mwambene (2018) *AHRLJ*18 (See footnote 53 of the article).
[39] South Africa Ratified the CEDAW in 1995 and Zimbabwe ratified the CEDAW in 1997.
[40] South Africa ratified that CRC in 1995 and Zimbabwe ratified the CRC in 1990.
[41] Mwambene (2018) *AHRLJ Journal* 18.
[42] As above.
[43] CRC/C/GC 18 2014 para II.
[44] CRC/C/GC 18 (2014) para 20 - 24.

not mature enough to consent to marriage. [45] The Committees further attributed such a marriage to the fact the child has not fully expressed their consent, and that more frequently, girls are seen to be marrying much older men as opposed to their peers.[46] The Committees expressed that this type of marriage may also involve instances where a child is married into a family, without their consent, usually where the two families agree by themselves without the views of the child concerned, or in other instances, a person wishes to migrate, but due to stringent measures, is unable to do so, hence, they resort to this type of marriage. [47] While the Committees are adamant that child marriage is not preferred, the examples above, depict that in most instances there is no consent that it obtained from the child who desires to enter into marriage before reaching the age of 18 years. The GR31/GC18 provides an impression that if there are any practices amongst culture and religion that have sought to create or cause harm, then state parties are obliged to employ measures which will ensure that remedies are available that will protect those who have been harmed by the various practices. [48]

However, what is significant is the fact that Committees originally acknowledged the child's evolving capacity, and the exceptional circumstances in which children under the age of 18 could enter into marriages, and provided for an exception that marriage would be permissible from the age of 16 years, attaching a condition that the decision to enter into such marriage needs to be approved by a judge upon exceptional grounds being established. [49] Subsequent to GR31/18 further developments emerged, where according to CRC General Comment 20 (2016), the Committee reaffirmed that the minimum age of marriage should be set at eighteen years, this was based on associated risk and harm.[50] Although the original approach by the two Committees in GR31/GC18 provided for

[45] As above.
[46] As above.
[47] As above.
[48] Mwambene 2018 *AHRLJ*18 (See fn 59 of the article) and CRC/C/GC 18 (2014) para 31 – 36.
[49] CRC/C/GC 18 (2014).
[50] CRC/C/GC/20. At para 40 the Committee noted the following: *"It reaffirms that the minimum age limit should be 18 years."*

exceptions on child marriage, the notion was revised by the two Committees , the CRC Committee and the CEDAW Committee Joint General Comment 31 and No 18: Harmful Practices (2019). [51] According to Prof Skelton, there was minimal awareness outside of the Committees regarding the revised comment, and that this revision was not involved in any consultations with States or other stakeholders.[52] The revised General Comment no longer makes provision for exceptions, but determines that eighteen years is the appropriate age of marriage. [53] Evidently, the Committee changed the age of marriage to eighteen years, digressing from the original exception which conditionally permitted sixteen- and seventeen-year olds to enter marriage, to a hard and fast rule were eighteen is now recommended as the legal age for marriage. [54]

The current 2019 GC, is not the only driving force that has urged that the age of marriage should be strictly set at eighteen years, according to the United Nations General Secretary General's Report on child, early and forced marriage issued after the GR31/GC18, it was indicated that such marriages are marked by the inability of the child to express their views to marriage, and moreover by patriarchal influences, which have seen girls unable to raise their voices or concerns when it comes to child marriage. [55] The Secretary General's report makes reference to the cultural and religious norms which have had a greater influence of child marriage, and suggests that this should be addressed by further engaging religious leaders and social workers. [56] What can be mostly viewed as the common driver, is the fact that there is no consent that has been obtained from these children, and that culture and religion are the most common drivers that perpetuate the harmful practice, without necessarily considering instances where these children may have at least consented to this type of marriage.

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[51] Skelton "Children" (2022) 244-248.
[52] Ann Skelton (2022) 244-248.
[53] Ann Skelton (2022) 244-248.
[54] Skelton (2022) 244-248.
[55] United Nations Report of the General Secretary "Issue of Child, Early and Forced Marriage" A/75/262 2020 20.
[56] A/75/262 2020, para 52.

As long ago as 1954, the United Nations had adopted a resolution that was aimed at abolishing bride price, eliminating child marriages and the betrothal of young girls before they reach the age of puberty. [57]

In adopting this resolution, the General Assembly was influenced by practices that are related to the torture and abuse of the women, the Assembly in its resolution noted that:

(a) *Considering that, in certain areas of the world, women are subject to customs, ancient laws and practices relating to marriage and the family which are inconsistent with these principles;* [58]

(b) *Believing that the elimination of such customs ancient laws and practices would tend to the recognition of the human dignity of women and contribute to the benefit of the family as an institution.*[59]

While the various committees and movements have been the driving forces behind the prohibition of child marriage, it is important to note that CRC Committee's General Comment 20 of 2016 (hereinafter CRC/GC20), presents various objectives that include raising awareness around the challenges that have been faced by adolescents.[60] Further to this, there has been a rise in awareness around the evolving capacity of the child, but more importantly, understanding that the evolving capacities of these adolescents.[61]

Skelton acknowledges that children's rights ought to be protected, but argues that children should also be seen as participants of their own rights, while taking into account the evolving capacity of the child. [62] Therefore, the need to acknowledge evolving capacity is essential, as children have the ability to make their own

[57] United Nations General Assembly 1954 "Status of Women in Private Law: Customs, Ancient Laws and Practices Affecting the Human Dignity of Women *"A_RES_843 (IX).*
[58] As above.
[59] As above.
[60] CRC/C/GC 7.
[61] As above.
[62] Skelton (2022) p 244-248.

choices, and become increasingly involved in decisions that affect them as they grow and mature.

While global participants have been in the forefront of regulating the age of marriage, and part of the main drivers for the prohibition of child marriage, participation has not only been restricted at global level but there have also been drivers at the African Regional level which have looked at the prohibition of child marriage. An example is seen in the African Charter on the Rights and Welfare of the Child (ACRWC), where state parties are encouraged to eliminate any form harmful, social and cultural practices that may directly impair the dignity and growth of the child.[63] In further substantiating this view, the ACRWC discourages child marriage and have suggested that the minimum age be set at 18 years when it comes to marriage. [64] Article 21(2) of the ACRWC is grounded on the fact that child marriage and the betrothal of girls and boys should be prohibited, and the decisive action should be adopted by state parties to prohibit such actions, further probing state parties to regulate the age of marriage to eighteen years.[65] The suggested age of eighteen years at a regional level is perpetuated by the fact that children under the age of eighteen years are unable to provide free and full consent when it comes to marriage.[66] This notion was taken a step further, by the adoption of the Joint General Comment of the African Commission on Human and People's Rights (ACHPR)and African Committee on the Rights and Welfare Children (ACERWC) on ending child marriages in Africa, where the aim of the General Comment was to develop jurisprudence aimed at the prohibition of child marriages. [67]

The Joint General Comment by the ACERWC encapsulates that even though the views of the child are to be given due consideration, this cannot be raised as an

[63] Art21(1) (a) and (b) of ACRWC.
[64] Article 21 (2) of the ACRWC.
[65] As above.
[66] Joint General Comment of the African Commission on Human and People's Rights (ACHPR) and the ACERWC on *Ending Child Marriage* (2017) refer to para 6 under "Free and full Consent."
[67] Nanima "The ACHPR and ACERWC on Ending Child Marriage: Revisiting the Prohibition as a Legislative Measure" 2019 *ESR Review*.

exception for a child showing interest in marriage, and as such the exception to the minimum age of 18 cannot be tolerated. [68]

In *Association Pour le Progrès et la Defense Des Droits Des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA) (2016)* APDF case[69], the African Court reaffirmed the position that girl children should not be married below the age of eighteen years, encouraging state parties to disallow any form of discrimination related to the girl child.[70] This view of eighteen as the age of marriage is taken further by the Protocol to the African Charter on Human and People's Rights on the rights of Women in Africa (Maputo Protocol), wherein at article 6(a), (b) and 1 (b) which encourage state parties to regulate the age of marriage to eighteen, and for state parties to ensure the free and full consent of both parties when entering into a marriage. [71] The general approach even at Regional level is that the age of marriage should be regulated to eighteen years, this is of course due to concerns about harmful cultural and social practices referred to in article 21 of the ACRWC.

The Southern African Development Community (SADC) in their project of ending child marriage have highlighted that state parties are to adopt laws and legislation that promote the restraining and preventing of child marriage and have further urged state parties to remove children if necessary from environments that pose a risk of the children being potentially married off. [72] The development of this SADC model was also to assist the affiliated state parties to improve their legislation when it comes to child marriages, and impose harsh measures, including penalties for those state parties who fail to adhere to laws that prohibit

[68] Joint General Comment of the ACHPR and ACERWC 2017, para 14.
[69] *Association Pour le Progrès et la Defense Des Droits Des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHRDA)* 46 of 2016.
[70] Nanima 2019 *ESR Review* 20.
[71] As above.
[72] Equality Now "Ending Child Marriages in Southern Africa: Domestication the SADC Model Law on Child Marriage". https://www.equalitynow.org/resource/ending-child-marriages-in-southern-africa-domesticating-the-sadc-model-law-on-child-marriage/ accessed (last accessed 2023-05-27).

child marriages.[73] The model advocates for preventative measures to be implemented for both boys and girls not to get married if under the age of eighteen years, and for those that have been married, encourages state parties that such marriages should be made voidable. [74] In dealing with this systemic issue, the model also provides progress that has been made by the state parties in attaining the objectives as set in the model. According to the model which also focused on Zimbabwe, it is recorded that Zimbabwe has made progress through the 2016 constitutional judgment, that found marriage below the age of eighteen to be inconsistent with the constitution and further in 2022 promulgated laws which prohibit marriage under the age of 18 years. [75] The model correctly records that South Africa on the other end has not yet adopted laws which prohibit child marriage, however through initiatives with the Department of Education enacted programmes that would assist with the eradication of ending child marriage. [76]

Both the global and regional drivers have taken the forefront on ending child marriage, and regulating the minimum age of marriage to eighteen years, but what they fail to consider is the child's evolving capacity. The Commission on Human and People's Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare (ACERWC) of the Child on Ending Child Marriage, also recognises the child's evolving capacity, when it comes to sex, medical treatment and other acts, but disapproves children below the age of 18 (eighteen) entering into marriage, by making reference to the Maputo Protocol and the African Children's Charter, which mentions that *"children under the age of 18 are not*

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[73] Equality Now "SADC Model Law on Child Marriage" https://www.equalitynow.org/resource/ending-child-marriages-in-southern-africa-domesticating-the-sadc-model-law-on-child-marriage/ accessed (last accessed 2023-11-05).

[74] Equality Now "SADC Model Law on Child Marriage" https://www.equalitynow.org/resource/ending-child-marriages-in-southern-africa-domesticating-the-sadc-model-law-on-child-marriage/ accessed (last accessed 2023/11/05).

[75] Equality Now ''SADC Model Law on Child Marriage" https://www.equalitynow.org/resource/ending-child-marriages-in-southern-africa-domesticating-the-sadc-model-law-on-child-marriage/ accessed (last accessed 2023-11-05).

[76] Equality Now "SADC Model Law on Child Marriage" https://www.equalitynow.org/resource/ending-child-marriages-in-southern-africa-domesticating-the-sadc-model-law-on-child-marriage/ <Accessed again on 5 November 2023>accessed (last accessed 2023-11-05).

capable of giving full and free consent to marriage" this is despite the child's evolving capacity. [77]The concept of evolving capacity is essential when considering the exercise of the child's rights over the span of eighteen years of childhood, and it is therefore questionable that this can be limited to a single approach, where eighteen years is the regulated age of marriage. [78] Ann Skelton argues that the Committee's position demonstrates a conflict between balancing protection and the autonomy of the child. [79] The inconsistencies highlight that while it is important to protect the rights of the child, it is also important to acknowledge the evolving capacity of the child.

A more flexible approach needs to be adopted, and not necessarily impose stringent measures which provides for the total prohibition of marriage to those under the age of eighteen years. While there is a need to protect and create a safe environment for children, there is also a need to not disregard the evolving capacity of the child, especially those adolescents who may wish to enter into marriage. In the next chapters, an analysis of the prohibition of child marriages at domestic levels will be considered, further demonstrating the ability of the child to consent when it comes to various issues.

[77] Joint General Comment of the ACHPR and ACERWC 2017 para 6 under, Free and Full Consent.
[78] Skelton (2022) 244-248.
[79] As above.

CHAPTER 3

3.1 A Comparative Assessment of Issues Driving Child Marriage in South Africa and Zimbabwe

In a newspaper article by City Press, referring to the 2016 UNICEF data, it was depicted that 12 percent of girls were married at age fifteen, and 39 percent were married before reaching the age of eighteen years. [80] in South Africa, according to the Department of Home Affairs White Paper on Marriages, 2022, it was recorded that in 2017, 2 bridegrooms and 70 brides were registered for civil marriages.[81] 8 bridegrooms and 77 brides were registered for purposes of customary marriages, further highlighting that child marriage predominantly affects young girls as opposed to the boys. [82]

The prevalence of child marriage in Zimbabwe has also been in the forefront where it was previously estimated that one in three girls is married before the age of eighteen. [83] In a 2023 UNICEF publication, it is stated that child marriage remains high in Zimbabwe, where 20 percent of girls between ages fifteen and nineteen years are married and that two in five women who are currently between the ages of 20 and 24 years, were married before eighteen years, with a high recording in rural areas as opposed to the urban areas. [84]

Research further suggests that in the sub-Saharan regions, almost half of the women who are uneducated who are from rural areas, and those with limited

[80] Mbude "Shocking Child Marriage Stats Paint a Dire Picture" *City Press* (31 October 2017) https://cityp-press.news24.com/News/shocking-child-marriage-stats-paint-a-dire-picture-20171031 accessed (last accessed 2024-10-20).
[81] The Department of Home Affairs White Paper on Marriages in South Africa (2022), page 30.
[82] As above.
[83] Sloth- Nielsen "Child marriage in Zimbabwe? The Constitutional Court Rules 'No" 2016 International *Survey of Family Law* 538.
[84] UNICEF "Transforming Masculinities for Gender Equality to End Child Marriage" https: www.unicef.org/Zimbabwe/media/8542/file/Transforming%Masculinities accessed (last accessed 2024-10-20).

media resources are more predisposed to be married at such a young age.[85] Religious beliefs are seen to also have an impact when it comes to child marriage. [86] South Africa and Zimbabwe are some of the countries that have been affected by child marriage, and as such employed measures to curb child marriages.

Challenges faced around South Africa and Zimbabwe include ukuthwala, and other cultural practices such as kuzvarira,[87]which will be explained later in this chapter Although both these countries have sought to criminalise child marriages, this is mainly due to the practice of culture and tradition, and Mwambene opines that addressing the root cause of child marriage in the context of cultural and traditional practices will require in-depth understanding of the systems that govern cultural and traditional practices within these communities. [88]

In this chapter an analysis will be made on the different drivers that have led to the prohibition of child marriage in South Africa and Zimbabwe, and whether or not there is a logical connection in regulating the age of marriage.

3.2 Child Marriage in South Africa

3.2.1. The Practice of Ukuthwala

Ukuthwala has been a common practice, especially amongst the indigent communities and the practice has served as a challenge that has led to the regulation for the age of marriage. According to Lea Mwambene, in South Africa, child marriage has been mostly linked to ukuthwala[89], further highlighting that child marriage is a threat when it comes the protection of the child. [90]

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[85] Yaya, Odusina, and Bishwajit "The Prevalence of Child Marriage its Impact on Fertility Outcomes in 34 Sub- Saharan African countries" 2019 *BMC International Health Human Rights* 33.
[86] Yaya et al 2019 *BMC International Health Human Rights* 19, 33.
[87] As above.
[88] As above.
[89] As above.
[90] As above.

The custom of Ukuthwala is viewed as a practice of forcing the family of the girl to enter into negotiations with the aim of concluding a customary marriage. [91] Commonly, the bridegroom and two or three of his friends would visit the neighbourhood of the girl, most often late during the day, with the aim of taking the girl.[92] They will through applying force take the girl to the young man's home. [93] The families will then begin with the lobolo negotiations, and if they fail, the girl is returned back to her family.[94] There are instances where the girl does agree to the marriage, where she exercises her free and full consent, and it is in such instances that she will be privy to the marriage relationship she is about to embark on. [95] Another form of *ukuthwala* occurs in the absence of consent, this is both from the girl and the family of the girl, with this type of *ukuthwala* the young girl is taken by force from her family by the family of the intended groom in the hope of taking this young girl as a bride. [96]

While, in certain instances, the bride may show resistance, it has been suggested that in many of the cases, it is part of the plan for the girl to cry and show resistance, whereas there is consent on her side regarding the planned arrangement.[97]

In viewing the practice of ukuthwala, Karimakwenda makes an overview of the ukuthwala custom and how the practice is viewed and practiced particularly in the Eastern Cape. [98] One of the common practices described is the ukugcagca, which was most popular in the mid twentieth century. [99] It is a type of practice where the couple through their own consent and in the absence of their parent's

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[91] Mwambene and Sloth Nielsen "Benign accommodation? Ukuthwala, 'Forced Marriage' and the South African Children's Act" 2011 *AHRLJ* 11.
[92] As above.
[93] As above.
[94] As above.
[95] As above.
[96] As above.
[97] Konyana and Bekker "The Indomitable Ukuthwala Custom" 2007 *De Jure* 139 -144.
[98] Karimakwenda "Today it Would be Called Rape: A Historical and Contextual Examination of Forced Marriage Violence in the Eastern Cape" (2013) p339-356).
[99] Karimakwenda "A Historical and Contextual Examination of Forced Marriage Violence in the Eastern Cape (2013).

consent or resistance from the parents, embark on a journey to marry each other. [100]This is in instances where a girl would exercise her own choice, by deciding on a partner she wishes to marry. [101] This type of practice is mostly based around the autonomy and choices of the girl child, as opposed to other practices where consent is not obtained, and the girl is abducted from her family. [102] It is evident from the latter, that this is a type of practice that is then more flexible, in a sense that the parties in this regard are able to make their choices in relation to the marriage journey, as opposed to the other forms where the consent of the child plays a very minimal or no role at all. Contrary to the fact that the practice of ukuthwala may be an agreement between the parties, this was not the case in the Jezile judgement. In the case of *Jezile v S and others*[103] (hereinafter referred to as the Jezile judgement), The Appellant in this case had been convicted on counts of human trafficking, rape, assault with the intent to do grievous bodily harm and assault, after he had forcibly taken a minor girl who was fourteen years and married her. [104] The appellant's main argument during the appeal process was that the trial court ought to have considered the ukuthwala practice within the prescripts of customary law.[105] Arguing that it is common for the bride to display signs of objection in relation to this type of marriage. [106] However, Thandabantu Nhlapo, who is described as a renowned expert on customary law, has indicated that the practice of ukuthwala is not the conclusion of a marriage, but he highlights that it could be a process, wherein the respective families of the parties involved initiate the marriage process. [107] Through his expert opinion provided in the submissions of this judgment, he concluded that the lack of consent by the complainant, and the fact that there had been no lobola which had

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[100] Nyasha Karimakwenda *A historical and contextual examination of forced marriage violence in the Eastern Cape* (2013) *Acta Juridica*
[101] As above.
[102] As above.
[103] *Jezile v S and others* 2015 3 All SA 201.
[104] *Jezile v S and others.*
[105] *Jezile v S and others* 52.
[106] As above.
[107] *Jezile v S and others* 73.

been advanced, was indicative of the fact that there was then no proper conclusion of the ukuthwala practice. [108]

The approach embarked on by Jezile, would seem to be the casual link to the development of the draft bill by the South African Law Reform Commission (SALRC).

In addressing the issue, the SALRC drafted what is called the Prohibition of Forced Marriages and Child marriages Bill (Prohibition Bill), and according to the Bill, it aims to prohibit forced and child marriages by criminalising these types of marriages. [109]

The Prohibition Bill has sought to define what both child marriage and forced marriage is. According to section 1, child marriage is defined as:

"…A marriage relationship or a cognate union where one or both of the parties are children, and the marriage was without the consent and free will of one or both of the parties." [110]

A forced marriage on the other end is defined as:

"…A marriage relationship or cognate union entered into without the consent and free will of one of the parties and includes those marriage relationships or cognate unions purporting to be contracted in pursuit of such practices such as ukuthwala, shobediso, tjobediso, kutlhaka, thlakisa, kutaha and tshabisa, ukweba, umakoti or any similar practice."[111]

According to the definition, one of the requirements for the validity of the marriage, is free and full consent, which does not prescribe age, and this requirement is also viewed to be in line with the prescribed international

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[108] *Jezile v S and others* 75.
[109] Mwambene and Mgidlana "Should South Africa Criminalise Ukuthwala Leading to Forced marriages and Child Marriages?" 2021 *RH, PER/PELJ* 24.
[110] See s1 of the proposed Prohibition of Forced Marriages and Child Marriages Bill and Mwambene L and Mgidlana 2021 *RH PER/PELJ* 3.
[111] See Section 1 of the Prohibition of Forced Marriages and Child Marriages Bill and Mwambene L and Mgidlana 2021 *RH PER/PELJ* (24) 3.

standards. [112] This definition may provide some sort of protection for people who are over eighteen years, and does not necessarily address the issue of consent for children under the age of eighteen. [113].

In view of the above, the Prohibition Bill seems to be in support of criminalising those who practice ukuthwala as seen in Jezile. In criminalising ukuthwala, there are those who hold a dissenting view and do not observe any form of problem with the practice itself. While the SALRC has stated that ukuthwala is unlawful, only to the extent that it does not align to the community's perception,[114] there are does who still do not acquaint the practice to any form of criminal activity. Mwambene conducted consultative dialogues with the community, to record their views in relation to the Jezile judgment, and part of the community members share an opposing view with the complainant and her family, as it was perceived that actions of the complainant were to bring shame on the family, and leaning more towards sympathising the Jezile family who was the perpetrator in the case.[115] This is indicative that the practice of ukuthwala, is one that is deeply entrenched within culture and tradition, and community members have expressed that the practice is not linked to acts of criminal activity, but part of their culture and practice. [116] Under the circumstances, Mwambene and Mgidlana argue that ukuthwala is deeply entrenched in South African laws and customs, and as such due diligence should be applied in the criminalisation of ukuthwala, by impending an approach that will not focus only on criminalising ukuthwala, but rather criminalising aspects of the practice that have directly infringed in the rights of both women and children. [117]

This practice- ukuthwala has been one of the drivers for the prohibition of child marriage which led to the development of the Prohibition Bill. However, the Bill

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[112]As above and fn 12 of this article.
[113]Mwambene and Mgidlana 2021 *RH PER/PELJ* 3.
[114] South African Law Reform Commission "The Practice of Ukuthwala" 2015 Project 138 33.
[115] Mwambene and Mgidlana 2021 *RH PER/PELJ* 16.
[116]Mwambene and Mgidlana 2021 *RH PER/PELJ* 17.
[117] Mwambene L and Mgidlana 2021 *RH PER/PELJ* 120.

still recognises consent, as the definition of child marriage in the Bill recognises the element of consent, and views child marriage to be marriage where consent is lacking. The definition is silent on instances where consent could be obtained, and whether or not it this would still qualify as a definition of child marriage.

In a recent case of *Mbhamali v S*[118] the court dealt with an appeal regarding a conviction where the appellant was charged with contravening section 3 of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007. [119] According to the facts, the complainant who was 14, had been married to a 32-year-old man, through an arranged marriage. According the evidence by the *court a quo,* it would seem that one of the appellants, Mrs Phakathi, had arranged for the marriage between the parties, while the father to the complainant was of the view that he had not approved their marriage as he had no knowledge of the marriage.[120] The court, in looking at the issue of child marriage in South Africa, expressed certain observations regarding the Recognition of Customary Marriages Act, section 25 of the Marriage Act and the Jezile judgment. [121] In the judgement the learned judge referred to a research article by the Makhubele et al, where it was submitted that child abuse and neglect are often disseminated through religious practices and beliefs, and that the prevalence of such cases are often found in African and Asian countries.[122] According to the study as referred to in the judgement, child marriage in South Africa and Zimbabwe is often condoned by religion, and according to the research findings, young girls who

[118] *Mbhamali v S* 2022 1 All SA.
[119] *Mbhamal*i *v S*see para 1.
[120] *Mbhamali v S*see paras 4,6 and 9 of the judgment.
[121] Mbhamali v *S* see paras21 to 22.
[122] JC Makhubele, AP Chiremba, ET Mutema and V Mabvurira "The Religious Beliefs and Practices Contributing Towards Child Abuse and Neglect: The case of Johanne Masowe Yechishanu Apostolic Sect, Harare, Zimbabwe" 2016 *Journal of the South African Professional Society on the Abuse of Children* 17 (2).

were seen to marry older men was not seen as abuse, but an act that could be *"sanctioned by God"* .[123]

Although this judgement dealt extensively with the issue of child marriage and its effects on young children, the court dismissed the appeal by the appellant, and still upheld the decision by the court *a quo,* wherein the appellant was still convicted of rape. [124] The case in point addresses the act of rape and lack of consent by the victim, it encompasses what Mwambene has suggested, which is to criminalise aspects of aspects of ukuthwala, rather than taking a holistic approach of regulating the age of marriage. The *Jezile* and the *Mbhamali* cases both illustrate that instances where these young girls were forced into marriage, and not necessarily consented to the marriage. It can be acknowledged that part of the practice of ukuthwala incorporates instances where there is an abduction of the girl child, however there are still practices of ukuthwala that makes room for consent, especially where the girl child has agreed to the marriage. Consent is a critical issue when it comes to marriage, and South Africa has regulated laws were consent has been obtained from children on various aspects which will be discussed in the next chapter. It would therefore be crucial for legislature to consider this aspect of consent when it comes to children and marriage, as this could be fundamental before adopting a one fit approach when it comes to child marriage.

3.2.2. South African Legislation on Marriage

In South Africa, there are different legislations which regulate the types of marriages that can be concluded. These legislations include The Marriage Act ("the Marriage Act")[125] , the Civil Union Act ("Civil Union Act")[126] and the

[123]JC Makhubele et al, 2016 *Journal of the South African Professional Society on the Abuse of Children* 17 (2), further refer to para 28 and 30 of the *Mbhamali v S* paras 2 and 30.
[124] *Mbhamal v S*.
[125] The Marriage Act 25 of 1961, As Amended.
[126] The Civil Union Act 17 of 2006, As amended.

Recognition of Customary Marriages Act ("Customary Marriages Act"). [127] According to section 24 (1) of the Marriage Act, the Act provides that the marriage officer may not solemnise the marriage of a minor or between two minors, unless consent has been obtained in writing. [128] In subsection 2 of section 24, a minor is recognised as someone who is below the age of 21 years. [129] The Marriage Act at section 25 allows for instances where consent cannot be obtained from the parents or guardians, but does makes provision for the Commissioner of the child welfare, or the court to grant consent, if it is in the interests of the minor to do so. [130] However, section 26 of the Marriage Act regulates that no boy under the age of eighteen or girl under the age of fifteen years may enter into a marriage contract subject to the permission of the Minister. [131] The Marriage Act does recognise the subsistence of marriages between minors, but what is significant is the contrast in section 24 and 26, which allows marriage, but only to the extent in which consent is obtained, and this is mainly through a third party and not the children themselves. What is further interesting is the differences in age, as section 24 speaks to twenty-one years, whilst section 26 speaks to fifteen and eighteen years. The Civil Union Act on the other hand does not necessarily regulate the age of marriage, however, a requirement is that neither of the prospective spouses should not be prohibited from concluding a marriage, under the Marriage Act or the Customary Marriage Act. [132]

Whilst the Civil Union Act is silent on the issue of age, the Customary Marriages Act, regulates that for the validity of a customary marriage, part of the

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[127] Recognition of Customary Marriage Act 120 of 1998, As Amended.

[128] According to S 24 (1) of the Marriage Act it is stipulated that:
"No marriage officer shall solemnize a marriage between the parties of whom on or both are minors unless consent to the party of the parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing."

[129] S24(2) of the Marriage Act refers to children under the age of 21 years as minors.

[130] See S25(1-4) of the Marriage Act.

[131] See S26 (1-3) of the Marriage Act.

[132] S 8(6) of the Civil Union Act 17 of 2006 provides that:
"A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act."

requirements is that both parties must be over the age of eighteen years[133] and consent must be obtained from both parties.[134] It is clear that according to the latter, the rule is steadfast, and the age is set at eighteen years. However, due to the various ages prescribed by the legislations, and the international and regional drivers as discussed in chapter 2, law makers have gone a further step by introducing a draft bill which aims to regulate the age of marriage to eighteen years. According to the Children's Amendment Bill, it was proposed at section 12 that amendments should be effected which do not allow anyone below the age of eighteen years to get married. According to the proposed amendment, section 12 proposes that:

(a) *"Below the minimum age set by law for a valid marriage must not be given out in marriage or engagement."* [135]

Part of the proposed amendments were aimed at providing protective measures for children, that will ensure that challenges faced by children are adequately addressed. [136] Section 12 of the Bill aims to address issues around child marriage, wherein it has been suggested that child marriage should be forbidden in its totality, further addressing the issue by the Department of Home affairs that allows the Commissioner to grant permission for any child marriage.[137] It would seem that the proposed amendment has been incorporated in section 12 of the amendments to the Children's Act, but still fails to address the issue of consent by the Commissioner of welfare. [138] The current Children's Amendment Act 17 of 2022 (Children's Amendment Act), does not set out the age for marriage, but section 12 provides that:

[133] S 3(1)(a)(i) of the Customary Marriages Act.
[134] S 3(1)(a)(ii) of the Customary Marriages Act.
[135] Children's Amendment Bill Government Gazette No. 43656 of 26 August 2020 Vol 662.
[136] Parliament of the Republic of South Africa "The Children's Amendment Bill, B18-2020" https://www.parliament.gov.za/project-event-details/1707 accessed (last accessed 2023-06-28).
[137] As above.
[138] The Children's Act 38 of 2005.

(1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

(2) A child -

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

(b) above that minimum age may not be given out in marriage or engagement without his or her consent.

The Children's Amendment Act tried to remedy the situation of child marriages, by trying to regulate the age to eighteen years. However, it is evident from the amendments that minors are still capable of concluding marriages, where the necessary consent has been obtained. This should however not be the requirement, as the Children's Act makes provision for consent for children younger than eighteen years on various aspects which will be discussed in the next chapter.

To conclude, while in South Africa statistics suggest that the number of child marriages in is low, as compared to other African countries, but the concern has always been that there are no laws which regulate the minimum age of marriage, as the various acts provide different scenarios wherein child marriage can be enforced. Further to this, it has been said that the various cultural practices that are seen in South Africa, have also had a contributing factor to child marriage in South Africa. [139] In light of the above, a more stringent approach should adopted address the ill that is perpetuated by religion, culture and tradition as opposed to the total prohibition of child marriages.

3.3 Child Marriage in Zimbabwe

Turning to Zimbabwe, it has been recorded that child marriage is quite prevalent, as this type of practice is widely seen throughout the ten provinces of Zimbabwe.

[139] Collen Murray et al "*Vulnerable Children and Youth Studies*" 2019 *An International Interdisciplinary Journal for Research, Policy and Care* Vol 14 No 3 at page 169.

[140] It was previously estimated that one in three girls in Zimbabwe would be married before the age of eighteen. [141] In recent times, Zimbabwe has amended their marriage laws and in the Marriages Act, which commenced on the 16th of September 2022, it is stipulated that no marriage shall be concluded, unless the person is over the age of eighteen years. [142] Previously the Marriage Act 5.11 made provision for the marriage of a minor, with the exception that written consent would then have to be obtained from the legal guardians of the minor. [143] Further to this, section 22(1) of the Marriages Act 5:11, made provision for the conclusion of a marriage, eighteen as the regulated age for boys, and sixteen as the regulated age for girls.[144] This provision has been viewed as discriminatory, as some authors have submitted that the provision is unjustified. [145]

Due to the diverse legal norms around marriage, Zimbabwe becomes one the countries where child marriages are commonly witnessed, which then leads to more child marriages in the country, influenced by cultural practices such as

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[140] Bengesai et al "The Impact of Girl Child Marriage on the Completion of the First Cycle of Secondary Education in Zimbabwe: A Propensity Score Analysis" 2021 *PLOS ONE* 16(6) https: doi.org/10.137/journal.pone.0252413> accessed (last accessed 2022-08-10).

[141] Sloth- Nielsen 2016 The *International Survey of Family Law*.

[142] According to S 3(1) of the Marriage Act 5:15:

(1) No person under the age of eighteen years may contract a marriage or enter into an unregistered customary law marriage or civil partnership.

[143] S 20 of the Marriage Act 5.11 Section 20 (2) provides that:

(2) The marriage of a minor shall not be solemnized without the consent in writing of the persons who are, at the time of the proposed marriage, the legal guardians of such a minor or, where a minor has only one legal guardian, without the consent in writing of such a legal guardian: Provided that-

(i) If the consent of any legal guardian cannot be obtained by reason of absence or inaccessibility or by any reason of his being under any disability, a judge of the High Court may grant consent to the marriage, and the consent of the judge so given shall have the same effect as if it had been given by the legal guardian whose consent cannot be obtained;

(ii) If any legal guardian refuses his consent, a judge of the High Court may grant consent of the marriage, and the consent of the judge so given shall have the same effect as if it had been given by the legal guardian whose consent is refused.

[144] S22 (1) of the Marriage Act.

[145] Ndlovu and Olaborede "The Aftermath of Madzuru and Another v The Minister of Justice, Legal and Parlimentary Affairs and Others: Legal Mechanisms as Tools against Child Marriages in Zimbabwe" 2018 Journal *of Law Society and Development* 5 (1).

Kuripa Ngozi which refers to homicide bride and *Kuzvarira* (betrothal). [146] According to Dzimiri et al customary marriage is the greatest perpetuator of child marriages, as according to their research this was the biggest driver for child or forced marriages. [147] This has however been remedied by the incorporation of section 3(2) of the Marriage Act 5:15, where provision is made for the prohibition of child marriages. [148] What Dzimiri et al further unearth, is the fact that customary marriage is the biggest driver for a majority of the child marriages, as this type of marriage is not given full recognition according to the enabling legislations. [149]

It is further imperative that we look further at the judgement of *Mudzuru and Anor v Ministry of Justice, Legal and Parliamentary Affairs*,[150] wherein the judgment dealt with an application by two women, who sought a declaratory order that the minimum age of marriage in Zimbabwe should be set at eighteen.[151] The two applicants in the case, who were eighteen and nineteen respectively raised an argument that the Marriage Act 5:11 did not align with the values of the constitution as per section 81 (1) defined a child as a person under the age of eighteen, thus meaning that they are unable to conclude a marriage contract. A further contention by the Applicants was that section 22 (1) of the Marriage Act made provision for the conclusion of a marriage for a girl child who was younger than eighteen, thus exposing the girl child to early child marriage, which will as a result not protect the interests of the girl child concerned.[152] As such, the court

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[146] Ndlovu et al 2018 *Journal of Law Society and Development* 5 (1) and 2 wherein it is indicated that according to the United Nations Children's Fund, Ndlovu and Olaborede make reference to the (UNICEF State of the World's Children), whereby it is recorded that Zimbabwe is listed among the 41 countries with a high rate of child marriage.

[147] Dzimiri et al "Causes of Child Marriages in Zimbabwe: A Case of Mashonaland Province in Zimbabwe" 2017 *IRA- International Journal of Management and Social Sciences* 7(1).

[148] Section 3(2) of the Marriage Act 5:15 provides that:

(1) For the avoidance of any doubt, it is declared that child marriages are prohibited and under no circumstances shall any person, contract, solemnise, promote, permit, allow or coerce or aid or abet the contracting, solemnising, promotion, permitting, allowing or coercion of the marriage, unregistered customary law marriage or civil partnership, or the pledging, promise in marriage or betrothal of a child.

[149] Dzimiri et al 2017 *IRA- International Journal of Management and Social Sciences* 7(1).

[150] *Mudzuru and Anor v Ministry of Justice, Legal and Parliamentary Affairs* (2016) ZWCC 12.

[151] *Mudzuru and Anor v Ministry of Justice, Legal and Parliamentary Affairs* .

[152] *As above*.

in this instance declared that the section 78(1) of the constitution, should set eighteen as the minimum age for marriage, and further that the provisions of section 22 (1) be struck down, as they are inconsistent with the provisions of section 78 (1) of the constitution. [153]

Based on the two cases which have been used as points in reference, it is trite that law makers have incorporated these laws to ensure that children are protected. However, in carefully referring to the two judgments, it is evident that in both instances[154] , the direction by the courts was as a result of forced marriages on the minor children and not as a result of the decision by the minor children. In a study by Annah V. Bengesai et al, statistics are shared on the number of child marriages globally[155], and the claim is made that many girls are married against their will. [156] According to Bengesai religion in Zimbabwe also plays a critical role in the advancing child marriage in the country.[157] It is said that amongst the Johane Marange and the Johane Masowe groups[158], child marriage is widespread, wherein young girls are forced into marrying the older men, under the auspices and guidance of the "holy spirit".[159] The latter suggests that many of these marriages are against the will of the children, meaning that there is an element of coercion.[160] The further findings of the research are that child marriage is seen to hinder the development of the child and is a tool for gender inequality, and a further risk of children becoming victims of domestic violence. [161]

[153] *Mudzuru and Anor v Ministry of Justice, Legal and Parliamentary Affairs.*
[154] See *Jezile v S* and *Mudzuru v Minister of Justice, Legal and Parilamentary Affairs*.
[155] Annah et al, indicate that almost on a daily basis, an estimate of 39 000 child marriages occur globally. Annah Bengesai et al "2021 *PLOS ONE* 16(6). (accessed 24 September 2022).
[156] Annah Bengesai et al (2021) *PLOS ONE* 16 (6).
[157] As above.
[158] These are Apostolic church groups in Zimbabwe.
[159] Annah V Bengesai et al (2021) *PLOS ONE* 16 (6).
[160]As above.
[161] As above.

3.4 Conclusion

It can be acknowledged that there is a concern around child marriage in both South Africa and Zimbabwe, and this is due to the various factors that have been listed above. While it is imperative to ensure that children are protected, and that their interests are safeguarded, it is also important to see children as human beings who are capable of making decisions which affect them, and the question raised in this research is whether the total prohibition of child marriage is in line with the capacity of the child's evolving capacity. A majority of the studies advanced are suggestive of the fact that child marriage in most cases is perpetuated by culture and tradition. This is the case for both the countries included in the studies above. What is however significant is the fact that in all these case studies, the children are coerced as opposed to making the decision for themselves. Consent is a major factor, which needs to be considered before employing any stringent measures when it comes to child marriages and such will be demonstrated in the next chapter.

Further, the Maputo Protocol, which lists requirements that for marriage, highlights that there must be free and full consent of the parties that are involved.[162] It clearly demonstrates that while there may be measures implemented to protect the girl child from child marriage, there is still the continued debate on the African Continent regarding older children who consent to marriage and whether they are permitted to do so, this is despite the clear wording of the CRC, that encourages State Parties to regulate measures through parental guidance, taking into account the child's evolving capacity when exercising the rights of the child that are recognised in the CRC.[163] Further, article 12, encourages State Parties to allow a child who is capable of formulating his or her own opinion to do so, in

[162] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2005.
Art VI states that:
(a) No marriage shall take place without the free and full consent of both the parties.
[163] Art 5 of the UNCRC.

accordance to their age and level of maturity, allowing this child to be heard in line with the prescribed procedural laws at a national level. [164]

Indeed, the African continent is faced with the scourge of child marriages, and various campaigns are aimed at eradicating child marriages, however, it is evident that the approach employed is a blanket approach, which is suggestive of the fact that because culture and tradition are so deeply entrenched as a driver to child marriage. An outright ban, without considering exceptions, may be too rigid, and appears to be against the trend of allowing children to make informed decisions as they mature and move towards adulthood. The next chapter considers how the law has considered the issue of evolving capacity and informed consent in respect of other issues, in particular, medical decision making.

[164] Art 12 of the CRC.

CHAPTER 4

4.1 Children's Evolving Capacity and the Right to Consent

4.1.1. Article 12 of the CRC and the Rights of the Child to Formulate and Articulate His or Her Own Views

Sonia Human, makes an important analogy, with reference to Stories that Law tells[165], by indicating that:

"Children's rights cannot be studied in isolation. In giving meaning to children's rights, it is important to accommodate the status of the child as an individual and as a member of the family." [166]

This builds on article 12 of the CRC, which provides children with the right to express their views and those views given due consideration. [167] Lansdown, in viewing the implications of article 12 of the CRC opines that children as bearers of rights, ought to have their views taken into consideration and further to become participants in decisions that have an impact on their lives. [168] Lansdown looks at a very interesting example, which speaks to child labour, and indicates that through the rising campaigns both nationally and internationally that have aimed to halt child labour, an argument presented is that the failure by the relevant stake holders to address this problem from the working children and their families themselves, tends to make the situation worse instead of providing the solutions. [169] This then speaks to the fact that while child labour may not be ideal, what

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[165] Austin *Children: Stories the Law Tells* (1994) 147 – 148.
[166] Human "The Theory of Children's Rights" in 2nd Edition *The Child Law in South Africa,*2017 305.
[167] Article 12 of the CRC Provides that:
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and the majority of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

[168] Lansdown *Promoting Children's Participation in Democratic Decision-Making* (2001) 2.
[169] G Lansdown (2001) 5.

Lansdown encourages is for the different states to take into account the views of the children before adopting any legislation which affects the child. A research study conducted by D G Kassan interprets the meaning of article 12 and the right of the child to formulate his or her own views. [170] She submits that state parties in assuring that the obligation is fulfilled in terms of Article 12, have a duty to allow children to participate in matters that affect them, and not to be forced into making any decision. [171]

The participation of children under article 12, aims to ensure that participants to this treaty allow children to express their views freely and voluntarily, without any undue influence.[172] This is underscored by the Committee on the Rights of the Child's General Comment 12 on the right to be heard, which reiterates that no age limit can be attached to a child's right to express his or her view and that even young children are capable of expressing their views. [173]

It is therefore essential to acknowledge that children are deserving of having their autonomy respected and for them to be treated as people capable of making decisions which affect them. [174] Further, in as far as parents and other role players are concerned, they are encouraged to participate in decisions that affect the child, however in reference to article 5 of the CRC, parents are encouraged to take into account the evolving capacity of the child concerned.[175] The above is

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[170] Kassan *How can the Voice of the Child be Adequately Heard in Family Law Proceedings?* (2004) 8.

[171] Kassan (2004) 8.

[172] Moyo "*Child participation under South African Law: Beyond the convention on the rights child?*" (2015) *SAJHR* 173.

[173] Committee on the Rights of the Child, General Comment No12 *The Right of the child to be* heard (2009) CRC/C/GC/12 para 21.

[174] Human "The Theory of Children's Rights" in 2nd Edition *The Child Law in South Africa,*2017 305.

[175] Art 5 of the UNCRC Provides that:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present convention.

evident of the fact that children a capable of making decisions, in line with their evolving capacities. [176]

4.1.2 The African Charter on the Rights and Welfare of the Child, in as far as Children are Capable of Formulating Their Own Views and Making Their Decisions

While the CRC is a very important treaty when it comes to the rights of the children, Africa has also made great milestones when it comes to protecting the rights of the child. Such can be seen with the African Charter of the Rights and the Welfare of the Child (ACRWC). The African continent boasts greatly on this beautiful piece of legislation in that, as at 2020, ACRWC had been ratified by at least 50 African countries. [177] Part of this important milestone was to ensure recognition of the child's most important rights, considering the historical background of the African continent, and achieving the best attainable standards in line with the rights and welfare of the child. [178]

Similarly, as with the CRC, at article 4 of the ACRWC, when dealing with the best interest of the child principle, subsection 2 of the article makes reference to the fact that the views of the child are to be given due consideration especially in any judicial or administrative process.[179] In comparison to the CRC, it has however been highlighted that while the CRC provides an independent status to children,

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[176] Lansdown *Promoting Children's Participation in Democratic Decision-Making* (2001) where he expresses that adults, professionals and politicians are encouraged to allow children to participate in views that affect them.

[177] Murungi and Aman "*The Status of the Implementation of the African Children's Charter A Ten Country Study"* (2022) 1.

[178] Preamble of the ACRWC.

[179] Art 4 (2) of the ACRWC states that:

> 2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/ her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the appropriate law.

the ACRWC proposes the need to take into account the issues that affect the African child which *inter alia* include cultural values and experiences. [180]

The above is evident from the incorporation of Article 21, that impliedly expresses the prohibition of child marriage, and further regulating the age of the marriage to eighteen years. [181]

While the views of the child are to be given consideration under article 4 of the ACRWC, Article 21 of the ACRWC then provides much stringent measures in the context of marriage, this can be influenced by what Olowu proposes being the cultural and socio-economic backgrounds. [182]

Part of the main drivers for the re-enforcement of the age of eighteen as the minimum age, include the socio-economic backgrounds of most of the children and the fact that the children do not consent to these marriages. [183] highlights some of these factors to include religious and cultural beliefs, poverty, gender inequality, insecurity in the face of conflict, gaps in laws and enforcement. [184] According to UNICEF in a study on child marriage, it is recorded that child marriage is a violation of human rights. [185] This is based on the fact that such marriages are seen to perpetuate the risk of domestic violence, and further accelerates the development stages of children as children are then forced to become adults. [186] However, to counter the argument as seen in Jezile and Mudzuru and discussed in chapters 3, it is evident from both those case studies,

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[180] Olowu "Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child" 2002 *International Journal of Children's Rights* 127. Needs a date

[181] Article 21 (2) of the ACRWC provides:

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 eighteen years and make registration of all marriages in an official registry compulsory. "

[182] Olowu *International Journal of Children's Rights* 10 2002 date 127.

[183] Msuya, "Child Marriage: An Obstacle to Socio-Economic Development in Sub- Saharan Africa" 2020 *Journal for Juridical Science* -6-7.

[184] Msuya *Journal for Judicial Science* 2020 7-14.

[185] UNICEF "Child marriage" https://data.unicef.org/topic/child-protection/child-marriage/ accessed (last accessed 2022-11-05).

[186] As above.

that consent is lacking, and therefore what is viewed as child marriage is more forced marriage than it is child marriage.[187]

It is against this backdrop that Freeman suggests that children must still be safeguarded from the full liberation of making their own decisions, which in turn could be irrational, but an allowance must also be created where they remain independent in making their own decisions.[188]

While Msuya and Olowu highlight that the socio-economic backgrounds of the African continent can be seen as the main drivers of the stringent measures,[189] the approach by Freeman is still necessary to consider, especially in relation to the ACRWC, according to which children are considered able to participate in decisions that affect them.

4.2 An Analysis of South African Laws that Allow Children to Express Their Views and Make Decisions Regarding Matters Which Affect them

In South Africa, part of the enabling legislations that allow children to make decisions which affect them is the Children's Act 38 of 2005 (Children's Act). Section 10 of the Act stipulates that:

> *"Every child that is such of an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."*

It is trite that in terms of section 10 of the Children's Act, there is no determination or restriction that has been set in relation to age, but what the said provision

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[187] See *Jezile v S* and *Mudzuru v Minister of Justice, Legal and Parliamentary Affairs*.

[188] Sonia Human, Juta 2nd Edition *Child Law in South Africa* 2017, page 318, see footnote 121 where reference is made to Freeman and Alston, Parker and Seymour "*Children, Rights and the Law"* 66 – 69.

[189] Olowu *International Journal of Children's Rights* 10 2002 127; Msuya *Journal for Juridical Science* 2020.

requires is for the child to have reached an age of majority, wherein he or she is capable of understanding the decisions that he or she is making. [190] This empowering provision is in line article 12 of the CRC, which allows children the opportunity to express their views. [191] Skelton, in her study agrees that while it is essential that children deserve protection against harsh sanctions for crimes that they may have committed, it is also still essential that due regard is considered to their evolving capacities, as this will enable them to make decisions that affect them as they transition into becoming adults. [192].

This is further evident from the fact that children are able to participate in major decisions, that have a direct impact on their lives, with the exclusion of their parents who are often seen as the decision makers. [193] An example of this is encapsulated in section 129 (2) and (3) of the Children's Act, which allows for a child to decide concerning his medical treatment if he is over the age of 12 (twelve) or is mature enough to understand the consequences of the decision. [194] What this in turn means, is that before a child can embark on any medical procedure, such a child can make an informed decision regarding the said procedure, as long as the child is over the age of tweleve, this with the absence of the child's parents, with the exception of subsection 129 (3) where the child

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[190] Lutchman "Children, Autonomy and Statements: The need for a Bright Line Rule" 2021 *SALJ* 500.
[191] Moyo *"Child participation under South African Law: Beyond the convention on the rights child?"* 2015 *SAJHR* 173.
[192] Skelton "Balancing Autonomy and the Protection in Children's Rights: A South African Account" 2016 *Temple LR* 903.
[193] Lutchman 2021 *SALJ* 500.
[194] S 129 (2) of the Children's Act 38 of 2005 provides that:

2. A child may consent to his or her own medical treatment or to the medical treatment of his or her child if-
   (a) The child is over the age of 12 years; and
   (b) The child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.
3. A child may consent to the performance of a surgical operation on him or her or his or her child if-
   (a) The child is over the age of 12 years, and
   (b) The child is of sufficient maturity and has the mental capacity understand the benefits, risks, social and other implications of the surgical operation; and
   (c) The child is duly assisted by his parent or guardian.

can be assisted by the parents or the guardian, but the decision will still vests with the child even under such circumstances.

Further to this, children are in terms of the Children's Act, are also given the liberty to make decisions regarding contraceptives and condoms. This is witnessed in section 134 which clearly allows for children to be provided with contraceptives and condoms, if this is done at their request.[195]

As in South Africa, Fokala and Rudman, opine that it is important that age be determined in any health related decision, as this is an individual decision, which can then have an impact on the child's life. [196]

An example of a very important health decision is the Termination of Pregnancy Act, which confers upon a minor the power to decide whether or not to consult with her parents or guardian before embarking on any termination.[197] Moyo suggests that the decision by the minor child to terminate the pregnancy without the consent of the parents is also encapsulated in the child's constitutional rights, which includes the right to bodily integrity,[198] dignity[199] and privacy. [200] Moyo opines that through these rights, and in line with the autonomy of the minor, the

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[195] S 134 (1) and 2(2) of the Children's Act indicate that:

1. No person may refuse-
   (a) To sell condoms to a child over the age of 12 years; or
   (b) To provide a child over the age of 12 years with condoms on request where such condoms are provided or are distributed free of charge.
2. Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or any care-giver of the child if-
   (a) The child is at least 12 years of age;
   (b) Proper medical advice is given to the child; and
   (c) A medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.

[196] Fokala and Rudman, "Age or Maturity? African Children's Right to Participate in Medical Decision-Making Processes" 202) *AHRLJ* 667, refer to subtopic 4.1.

[197] S5(3) of the Choice on Termination of Pregnancy Act 92 of 1996.

[198] S12 of the Constitution of the Republic of South Africa 1996.

[199] S10 of the Constitution of the Republic of South Africa.

[200] S14 of the Constitution of the Republic of South Africa. See also Moyo 2015 *SAJHR* 173.

child is then able to make a decision regarding her reproductive health with the exclusion of the parent or the guardian to the child. [201]

Child participation in line with the child's evolving capacity is crucial in decisions which affect the child, as seen in the examples listed above. There have been instances where the views of the child have not been taken into account, and as such, have led to dire consequences, as a result of the failure to take into account the views of the child. A very interesting example that Lutchman refers to, are instances where children are unable to make their own choices and as a result the consequences of such decisions results in dire outcomes which are detrimental to the child concerned. An example of this is referenced in the Bishops Diocesan sex scandal. [202] The case involved serious allegations against an educator who had been accused of having sexual relations with children who were reported to be between the ages of twelve and eighteen.[203] However due to the parents of the children refusing their children to make statements, the internal investigation resulted in the overseeing body being closed against the said educator.[204] Failure by the parents to allow their children to make statements, may have resulted in a premature closure of the investigations, as the views and evidence of the children was not taken into account.

Another interesting example is the case of *Esanubor v Faweya*[205] , the case involved a child who was in need of a blood transfusion. Due to religious reasons, the mother refused to consent to the medical procedure. However, following an order by the court. This child was then provided with the necessary transfusion,

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[201] Moyo 2015 *SAJHR* 173.

[202] Lutchman 2021 *SALJ* 500. Also see Jenni Evans "Bishops Diocesan College Sex Scandal: Fiona Viotti's Case Closed as Witnesses Refuse to Testify" https://www.news24.com/news24/southafrica/news/bishopsdiocesan-college-sex-scandal-fiona-viotti-off-the-hook-as-witnesses-refuse-to-testify-20201212 (last accessed on 2022-10-29)

[203] As above.

[204] As above.

[205] *Esanubor v Faweya* 2009 ALL (FWLR) 380 (CA).

which turned out to save this child's life. [206] Fokala in line with this case posits that parents seem to adopt a more dictating role, with the view that this would be in the best interest of the child. [207] He however encourages for child participation in decisions which affect the child, and sets out some of the important factors to consider, but concludes by indicating that *"an effective child participation process will inevitably enable parents to give a balanced and rational due weight to the views of a child."* [208]

In the *case of The Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development*[209] dealt with the criminalisation of sexual conduct between children of a certain age, predominantly adolescents, who wish to engage in consensual sex. [210] The Constitutional Court, had to decide, whether or not the prosecution of adolescents, wishing to engage in consensual sex was an infringement on some of their constitutional rights. [211]

In determining the issues, the court highlighted that children also enjoy the fundamental rights as enshrined in the constitution, and that they are also bearers of important human rights like everyone else does. [212]

While it had been acknowledged that adolescents during such stages of their lives, are often engaged in sexual activity, the court was of the view that criminalising consensual sex between adolescents, is a form or stigmatisation, and an infringement on their constitutional right, specifically section 10 of the Constitution which speaks to the issue of human dignity. It is also so, that privacy is one of the rights enshrined in the South African Constitution, and in line with

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[206] *Esanubor v Faweya*. Also see Nwauche, "You may not Refuse a Blood Transfusion if you are a Nigerian Child: A Comment on Esanubor v Faweya" *Date AHRLJ* 309 – 310.
[207] Fokala ,"Calibrating Children's Right to Participate in a Family Setting 30 years after the Adoption of the Convention on the Rights of the Child and the Children's Charter" 2020 *Spec Juris* 199.
[208] Fokala *Spec Juris* 2020 200.
[209] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development* 2014 (2) SA 168 CC.
[210] As above.
[211] As above.
[212] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development* para 38.

such provisions, adolescents are also privy to consensual private relationships, and criminalising consensual sex is also further a part of the infringement, specifically the right to privacy as contained in section 14 of the Constitution. [213] The court had to also consider section 28 (2), which speaks to the best interests of the child. The court referred to the case of S v M[214], wherein it was stated that:

"section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put the children at increased risk. Similarly, in situations where rapture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.[215] How this was interpreted, was to indicate that the provisions which seek to criminalise adolescents, create an environment of breakdown between the adolescents involved and their respective families. [216] The argument presented by the Respondent, was to allow for prosecution to exercise discretion in cases of sexual penetration and sexual violation, however the court rejected this indicating that "*the existence of prosecutorial discretion cannot otherwise save unconstitutional provisions."* [217]

It was for this reason that the court was of the view that the provisions section 15 and 16 of the Sexual Offences Act, which seek to criminalise consensual sex between adolescents are found not to be protecting the best interests of the child, but have a rather harming effect of the children. [218]

Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development see para 63.

[214] *S v M Centre for Child Law as Amicus Curiae)* 2007 ZACC 18.

S v M (Centre for Child Law as Amicus Curiae) para 20 and *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development* par 73.

[216] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development* para 74.

[217] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development* para 76.

[218] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development* at para 79.

The above dealt extensively with the rights of adolescents, as bearers of constitutional rights and not as a separate entity extending to their parents. What this decision sought to highlight is the fact that children's constitutional rights are not exclusive to that of adults, but that as right holders, they are entitled to enjoy the same freedoms, and not to be limited by what is seen as parental preference.

The above examples are therefore suggestive of the fact that children are able to make decisions on matters which affect them, in line with their autonomy. It is also important to note, that these are not just minor decisions, but also very thoughtful decisions, which have an impact on the livelihood and future of the child concerned.

4.3 Consent by Children in Medical Decision Making

According to the Children's Act 38 of 2005, in South Africa, children who are over the age of twelve years are able to provide consent without parental involvement to any medical procedures and to receiving both condoms and contraceptives. It is trite that law makers have gone a step further by ensuring that in any medical procedure consent would have to be obtained [219] Although this paper is not concerned with informed consent when it comes to medical procedures, it is however imperative to look at what this concept entails, and how the courts have applied this doctrine, and then aligning same to the child's evolving capacity.

Moyo in his article postulates that in decisions related to medical health care, the courts have made a reliance on fact there should be informed consent in any decision that is related to medical treatment.[220]

An example for such a decision, which is further highlighted in the Commission for Gender Equality's investigative report on Forced Sterlisation,[221] is the case of

[219] See s7 of the National Health Act 61 of 2003.
[220] Moyo 2015 *SAJHR* 173.
[221] Commission for Gender Equality, Investigation Report on the Forced Sterilisation of Women Living with HIV/AIDS in South Africa 2015 Complaint reference Number 414/03/2015/KZN.

Castell v De Greef [222], what the court indicated is that in matters of medical procedure, the duty will lie with the patient to decide whether or not the patient will embark on the medical procedure, in line with his or her fundamental rights which will be determined by the patient concerned. [223] Informed consent entails that a person with the legal capacity to do so, should provide such consent, after having understood all the risks and benefits of such a procedure. [224] In line with this, cognisance should also be considered when it comes the autonomy and the dignity of the rights of the person so involved. [225]

In a decision of the England and Wales High Court in *Axon, R v Secretary of the State for Health and Another*[226] the court, basing part of its decision on the *Gillick* matter, indicated that in cases that involve contraception, sexually transmissible diseases and abortion, it is not a requirement for the parents of such to have knowledge or consent on the decision of the child, but what doctors should in turn do, is that if a child is under the age of 16, proper medical advice should then be provided from the medical professional that is concerned. [227]

To this end, in reaching a decision, part of what the court expressed was in reference to *Yousef v Netherlands (2003) 36 EHRR 345,* wherein the court quoted and indicated that: "*…in judicial decisions where the rights under article*

[222] *Castell v De Greef* 1994 (4) SA 408 (C).
[223] Commission for Gender Equality Report 420 (I).
[224] Commission for Gender Equality Report 31 where reference is further made at footnote 48 to section 6 of the National Health Act as well the National Patient's Rights Charter 2.8 Informed Consent (I am really not sure how to cite this- perhaps ask your supervisor; Appelbaum "Assessment of Patient's Competence to Consent to Treatment" 2007 *New England Journal of Medicine* 1834-1840.
[225] See further footnote 49 of the Commission's Report and Beuchamp and Childress "Principles of Biomedical Ethics 2001 *"Oxford University Press*."
[226] *Axon, R v Secretary of the State for Health and Another* EWHC 37.
[227] *Axon, R v Secretary of the State for Health and Another* para 154.

8[228] of the parents and those of the child are at stake, the child's rights must be the paramount consideration."[229]

Another decision which the Axon judgment referred to was *Kjeldsen and others v Denmark (1976) 1 EHRR 711*, where the court rejected an application by the parents of children who were under the age of eleven, after having received education on sex talk without the parents' consent. The court in this instance was of the view that under article 8, the views of the parents would have not superseded those of the child in disseminating this information regarding sex talk. [230]

It is evident that courts in other jurisdictions, have adopted a unique principle that allows the child to make decisions on issues that affect them. In these instances, parental consent plays a very limited role, as the approach is flexible, and also highlights the fact that children are capable of making their own decisions.

In further advancing the submissions, according to the doctrine of informed consent, it has been established that the risks and involvement of any procedure should first be discussed with the patient, to allow the patient to understand the consequences of his or her decision regarding the treatment. Under the South African context, the Children's Act further prescribes that in order for a child to be tested for HIV, the consent of that child is necessary, provided that the child is over twelve years old, and if under twelve, the requirement is that the child has the maturity to understand the consequence of such an action. [231]

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[228] Article 8 of the European Convention on Human Rights states:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the right to exercise of this right except such as in accordance with the law necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health morals, or for the protection of the rights and freedoms of others.

[229] Axon, R v Secretary of the State for Health and Another145.

[230] *Axon, R v Secretary of the State for Health and Another* 128.

[231] S130 of the Children's Act 38 of 2005 provides that:

The decision for a child to undertake an HIV test is based on his or her own decision, and not necessarily reliant on the consent of the parent. The test here is whether the child is above the age of twelve years, and if not whether the child has the maturity of understanding his or her decision. This is indicative of the child's evolving capacity as prescribed by international standards. [232]

In the case of *Christian Lawyers Association v National Minister of Health*[233] this was a case that dealt with minor children's informed consent when it comes to termination of pregnancy. [234] The court indicated that:

"the line of privacy decisions referred to above can be justified only on the presumption that decisions affecting marriage and childbirth are so intimate and personal that people must in principle be allowed to make these decisions for themselves, consulting their own preferences and convictions, rather than having society imposing collective decisions on them." [235]

The court further went on to indicate that the right for a woman to choose to terminate a pregnancy is not regulated by age, but rather on the woman's intellectual and emotional capacity to make that decision for herself. The court rejected the Plaintiff's argument that children under the age of eighteen are not capable of making such decisions for themselves, as the Act refers to women, and without the imposition of age. [236] This judgment follows from the premise that under the section 5 of the Choice on the Termination of Pregnancy Act[237], what

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1. Subject to section 132 (section 132 deals with counselling before testing), no child may be tested for HIV except when-
   (a) It is in the best interest of the child and consent has been given in terms of subsection (2)
2. Consent for a HIV – test on a child may be given by-
   (a) The child, if the child is-
      (i) 12 years of age or older; or
      (ii) Under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test.

[232] Moyo 2015 *SAJHR* 173.
[233] *Christian Lawyers Association v National Minister of Health* 2005 (1) SA 509 (T).
[234] *Christian Lawyers Association v National Minister of Health*.
[235] *Christian Lawyers Association v National Minister of Health* para 41.
[236] *Christian Lawyers Association v National Minister of Health case*, para 54.
[237] Choice on Termination of Pregnancy Act 92 of 1996.

the Act requires is the consent of the pregnant women involved and not any other person. [238]

It can be deduced that child participation is imperative especially in decisions that affect the child, and requires the child's full and proper participation when embarking on such decisions.[239] This follows that adults have a duty to ensure that they assess the child's evolving capacity, in line with child's age. [240]

In the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[241] it was established that privacy allows for individuals to enjoy intimacy, in line with their autonomy, free from any social or community interference. [242]Essentially the court indicated that if people can be able to express their sexuality where full consent has been obtained, involvement from the community would in turn mean breach of their right to privacy. [243]

Section 7[244] of the South African Constitution affords all people in the country an opportunity for their rights to be protected, these includes children. The notion in supporting the above as set out in the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [245] wherein the court indicated that:

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[238] S5 of the Choice on Termination of Pregnancy Act provides that:
1. Subject to the provisions of subsections (4) and (5), the termination of a pregnancy may only take place with the informed consent of the pregnant woman.
2. Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.

[239] Fokala and Rudman, "Age or maturity? African children's right to participate in medical decision-making processes" 2020 *AHRLJ* 667.

[240] Fokola and Rudman 2020 *AHRLJ* 667.

[241] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA para 6.

[242]*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* para 32.

[243]*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, para 32.

[244] S7 of the Constitution of the Republic of South Africa provides that:
"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity equality and freedom."

[245]*Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development.*

"*Privacy fosters human dignity insofar as it is premised on, and protects, an individual's entitlement to "a sphere of private intimacy and autonomy."* [246]

This can therefore be persuasive of the submission that children are right holders, whose rights ought to be safeguarded in line with the principles of the constitution.

The law does not earmark an age wherein children can consent as reflected in the scenarios above, but what is required is in line with the child's level of understanding and maturity, this is indicative that children are able to apply their minds and make proper decisions, even when marriage is also involved.

4.4 Conclusion

South Africa has applied a flexible approach when it comes to children on various aspects wherein they can make decisions which affect them. What this does is also recognise the evolving capacity of the child. In line with this evolving capacity, children are able to make major decisions such as the right to consent to medical treatment, termination of pregnancy, and decisions regarding their sexuality as adolescents. This demonstrates that children are able to apply their minds and consent where necessary. Adopting a blanket approach in relation to marriage where age is restricted, would therefore fail to balance the rights of the child against their evolving capacity. A less restrictive approach should be considered taking into account the ability of the child to consent when faced with the need to consent.

While international and regional drivers are in the forefront of regulating the age of marriage to eighteen years, it is important to highlight that an outright ban of child marriage may not be the plausible solution, especially for adolescents who wish to enter into marriage. Indeed culture, tradition and lack of consent have played a major role in this prohibition, but this is mainly due to the coerced cultural

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[246] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development* para 64.

behaviour that is entrenched in some cultural practices as described herein above. While the majority may be of the view that an outright ban is necessary, it is also important to recognise the child's evolving capacity, and the ability to consent, as discussed in this chapter, recognising the need that children when given an opportunity are able to make major decisions that affect their life and wellbeing. Instead of an outright ban, perhaps a more flexible solution should be implemented, where certain exceptions can be put in place, that will balance the rights of the children, and their evolving capacities, this is echoed by Melchiorre, who has firmly suggested that the approach should aim to balance protection and autonomy. [247]

[247] Melchiorre (2013).

CHAPTER 5

5.1 Conclusion

While it may be accepted that there are unpleasant effects of early or child marriage, there needs to be careful consideration regarding the total prohibition of these marriages without any exceptions. The international and regional drivers, as demonstrated are aimed at protecting the rights of children against any harmful practices, that are mostly linked to cultural and religious practices. While protecting children from harmful practices is essential and is required by the law, exceptions should also be put in place where two consenting adolescents wish to enter marriage.

When analysing the GR31/CG 18, Mwambene highlights that the Committees views child marriage as forced marriage, where children are seen as young and have not expressed full and free consent. [248] Skelton further argues that applying a universal approach of eighteen years in the application of rights, cannot be the correct approach. [249]She acknowledges that protection and autonomy of the child seems to be in tension with each other in children's rights, and that in other areas of decision making, children's rights favours the exercise of increasing autonomy as children mature towards adulthood.[250]

The ability to understand is one which subsists from the point of birth, and that overtime with the development of the mind, and in line with maturity, children are then capable of making their own decisions.[251] This follows that the parents and guardians responsible for the said child, must in line with the prescripts of article

[248] Mwambene 2018 *African Human Rights Law Journal* 18.
[249] Skelton (2022) 244-248.
[250] Skelton (2022) 244-248.
[251] Oluremi, Savage, Oyekunle and Nienaber Female Adolescents "Evolving Capacities in Relation to Their Right to Access Contraceptive Information and Services: A Comparative Study of South Africa and Nigeria" 2015 *COMP and INT'I LJ.S* AFR 98 104.

5 and 14(2) of the CRC provide guidance, in line with the child's evolving capacity on decisions that affect the child. [252]

In the case of *S v M*[253] the court in view of the rights of the children encapsulated this in the judgment:

"Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma." [254]

The above judgement in line with article 12 of the CRC confirm that children are able to make choices and decisions which affect them, and should therefore be provided an opportunity to do so. While the global approach is to regulate the age of marriage to eighteen years, article 5 and 14(2) of the CRC provides state parties and guardians with an opportunity to deliver guidance in line with the evolving capacity of the child, in decisions that affect the child.

In recent times where the globe was battling with COVID- 19, and according to an opinion piece regarding the vaccination of minors without parental consent, it was recommended that policies need to be developed which will allow minor children an opportunity to consent without the consent of their parents, in line with the autonomy of the child, having had due cognisance to the risks and benefits of such vaccination. [255] This then again demonstrates that children are capable

[252] Oluremi, Savage, Oyekunle and Nienaber 2015 *COMP and INT'I LJ.S AFR 98* 105.
[253] *S v M* (*Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).
[254] *S v M (Centre for Chihld Law as Amicus Curiae)* para 18.
[255] Morgan, Schwartz and Sisiti, "COVID- 19 Vaccination of Minors Without Parental Consent, Respecting Emerging Autonomy and Advancing Public Health" 2021 *JAMA Paediatrics* 995 – 996.

of making their own decisions, and where necessary adult supervision can then be encouraged.

The best interest principle as contained in section 28 (2) of the South African Constitution addresses the fact that the rights of the children are of paramount importance, and should therefore be considered in all decisions that involve the child.

In *Minister for Welfare and Population Development v Fitzpatrick and Others*[256] the court demonstrated that the interpretation of section 28 (2) should not only be restricted to the rights encapsulated in subsection 1, but that the said section must then be given with a wider interpretation on issues that involve the child. [257]

It is trite children are capable of making decisions that affect them and their wellbeing, and these are not just minor decisions, but life changing decisions. This is evident from the case studies discussed in this paper and further the different laws which do not require parental consent. Equally so, children should not be prohibited from making their own decisions regarding marriage in line with their evolving capacities and their level of maturity. Stringent measures should be employed, but only in circumstances where consent has not been obtained from the child involved. A blanket approach where child marriage is prohibited, may not be justifiable for adolescents wishing to enter into marriage, and as such may not be defensible especially where two of the adolescents have consented. As with other spheres of laws and legislation, lawmakers should perhaps review the stringent measure which have been proposed in line with marriage, taking into account the rights and the child's evolving capacity.

In conclusion Skelton further highlights that:

"The importance of recognising that childhood is a journey from birth to adulthood, spanning 18 years of rapid development was stressed. This is why the concept

[256] *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).
[257] *Minister for Welfare and Population Development v Fitzpatrick* para 17.

of evolving capacity is essential to span that period from birth to 18 years, and provide a coherent and flexible set of standards."[258]

Therefore, a less stringent approach should be considered when it comes to child marriage, which will assist in balancing the rights of the child to make decisions in accordance with the evolving capacity of the child, against the risks of marriage.

[258] Skelton (2022) 244-248.

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