

REPORTABLE ZLR(4)

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LOVENESS MUDZURU (2) RUVIMBO TSOPODZI

v

**(1) MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS N.O
(2) MINISTER OF WOMEN'S AFFAIRS, GENDER & COMMUNITY
DEVELOPMENT (3) ATTORNEY GENERAL OF ZIMBABWE**

CONSTITUTIONAL COURT OF ZIMBABWE

**CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC,
GOWORA JCC, HLATSHWAYO JCC, PATEL JCC & GUVAVA JCC
HARARE, JANUARY 14, 2015 & JANUARY 20, 2016**

T Biti, for the applicants

Mrs O Zvedi, for the respondents

MALABA DCJ: The two applicants are young women aged 19 and 18 years respectively. They have approached this Court in terms of s 85(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 ("the Constitution") which came into force on 22 May 2013. They complain about the infringement of the fundamental rights of girl children subjected to early marriages and seek a declaratory order in the terms that:

"1. The effect of s 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 is to set 18 years as the minimum age of marriage in Zimbabwe.

2. No person, male or female in Zimbabwe may enter into any marriage including an unregistered customary law union or any other union including one arising out of religion or a religious rite before attaining the age of eighteen (18).

3. Section 22(1) of the Marriage Act [*Chapter 5:11*] is unconstitutional.

4. The Customary Marriages Act [*Chapter 5:07*] is unconstitutional in that it does not provide for a minimum age limit of eighteen (18) years in respect of any marriage contracted under the same.

5. The respondents pay costs of suit.”

The application arose out of the interpretation and application by the applicants, on legal advice, of s 78(1) as read with s 81(1) of the Constitution. Section 78(1) of the Constitution is one of the provisions in Chapter 4 which enshrine fundamental human rights and freedoms. It provides:

“78 Marriage Rights

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same sex are prohibited from marrying each other.”

Section 81(1) of the Constitution enshrines the fundamental rights of the child.

The fundamental rights, the alleged infringement of which are relevant to the determination of the issues raised by the application, are:

“81 Rights of Children

- (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right –
 - (a) to equal treatment before the law, including the right to be heard;
 - (b)
 - (c) ...
 - (d) to family or parental care or to appropriate care when removed from the family environment;
 - (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;
 - (f) to education, health care services, nutrition and shelter;
 - (g) ...
 - (h) ...
- (2) A child’s best interests are paramount in every matter concerning the child.
- (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.”

The protection of the fundamental rights of the child is guaranteed under s 44 of the Constitution. The provision imposes an obligation on the State and every person, including juristic persons, and every institution and agency of the government at every level to respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4.

The applicants contend that on a broad, generous and purposive interpretation of s 78(1) as read with s 81(1) of the Constitution, the age of eighteen years has become the minimum age for marriage in Zimbabwe. They argued that s 78(1) of the Constitution cannot be subjected to a strict, narrow and literal interpretation to determine its meaning if regard is had to the contents of similar provisions on marriage and family rights found in international human rights instruments from which s 78(1) derives inspiration.

The applicants claimed the right to approach the court seeking the relief they seek under s 85(1)(a) and (d) of the Constitution. In para. 16 of the founding affidavit, the first applicant, with whom the second applicant agreed, states:

“16: The issues I raise below are in the public interest and therefore I bring this application in terms of s 85(1) (a) and (d) of the Constitution of Zimbabwe.”

In para. 21 of the founding affidavit, the first applicant states:

“21. The instant application is an important public interest application that seeks to challenge the law in so far as it relates to child marriages in Zimbabwe. It is motivated by my desire to protect the interests of children in Zimbabwe.”

At the time ss 78(1) and 81(1) of the Constitution came into force, s 22(1) of the Marriage Act [*Chapter 5:11*] provided that a girl who had attained the age of sixteen years was capable of contracting a valid marriage. She had to obtain the consent in writing to the solemnization of the marriage of persons who were, at the time of the proposed marriage, her legal guardians or, where she had only one legal guardian, the consent in writing of such legal guardian. A boy under the age of eighteen years and a girl under the age of sixteen years had no capacity to contract a valid marriage except with the written permission of the Minister of Justice, Legal and Parliamentary Affairs (“the Minister”). A child was defined under s 2 of the Child Abduction Act [*Chapter 5:05*] and s 2 of the Children’s Protection and Adoption Act [*Chapter 5:06*] to be a person under the age of sixteen years.

The applicants contend that since “a child” is now defined by s 81(1) of the Constitution to mean a girl and a boy under the age of eighteen years no child has the capacity to enter into a valid marriage in Zimbabwe since the coming into force of ss 78(1) and 81(1) of the Constitution on 22 May 2013. They contend further that s 22(1) of the Marriage Act or any other law which authorises a girl under the age of eighteen years to marry, infringes the fundamental right of the girl child to equal treatment before the law enshrined in s 81(1)(a) of the Constitution. The argument was that s 22(1) of the Marriage Act exposes the girl child to the horrific consequences of early marriage which are the very injuries against which the fundamental rights are intended to protect every child.

The respondents opposed the application and the granting of the relief sought by the applicants on two alternative grounds. They took as a point *in limine* the contention that the applicants lacked the right to approach the court claiming the relief sought. The argument made on behalf of the respondents was that although the applicants claimed to have approached

the court in terms of s 85(1)(a) of the Constitution, they did not allege that any of their own interests was adversely affected by the alleged infringement of the fundamental rights of the girl child.

The respondents pointed to the fact that none of the applicants alleged that she entered into marriage with the boy who made her pregnant. They said that the applicants alleged that they got pregnant, stopped going to school and went to live with the boys concerned at their parents' homes. The applicants did not suggest that they entered into unregistered customary law unions. The argument was that the applicants were no longer children protected from the consequences of early marriage by the fundamental rights of the child enshrined in s 81(1) of the Constitution.

On the question whether the applicants had *locus standi* to approach the court acting in the public interest under s 85(1)(d) of the Constitution, the respondents contend that the applicants failed to satisfy the requirements of standing under the relevant provision. They alleged in the opposing affidavits, that the applicants were required to give particulars of girl children whose fundamental rights had been infringed and on whose behalf they purported to act. It was common cause that the applicants made no reference in the grounds of the application to any particular girl or girls whose rights had been, were being or were likely to be infringed by being subjected to child marriage in terms of s 22(1) of the Marriage Act or any other law. The argument was that the applicants had not produced facts to support their claim to *locus standi* under s 85(1)(d) of the Constitution.

The grounds of opposition to the application on the merits are straight-forward. The respondents denied that s 78(1) of the Constitution has the effect of setting the age of eighteen years as the minimum age for marriage in Zimbabwe. Their reason for the denial was that s 78(1) gives a person who has attained the age of eighteen the “right to found a family”. The contention is that the meaning of s 78(1) of the Constitution is apparent from the grammatical and ordinary meaning of the language used in giving the “right to found a family”. The respondents contend further that s 78(1) of the Constitution does not give a person who has attained the age of eighteen years the “right to enter into marriage”. The minor premise on which the contention is based is that the “right to found a family” does not imply the right to marry.

The respondents supported their denial of the contention that s 78(1) of the Constitution sets the age of eighteen years as the minimum age of marriage by the argument, advanced on their behalf, that s 78(1) is not amenable to a broad, generous and purposive interpretation in the determination of its meaning. The argument was that it is only accommodative of a literal interpretation. The effect of the respondents’ argument was that the question of interpretation did not arise as the words used were clear and unambiguous.

Having denied the allegation that s 78(1) of the Constitution sets the age of eighteen years as the minimum age for marriage, the respondents went on to deny that s 22(1) of the Marriage Act or any other law which authorises a girl child who has attained the age of sixteen years to marry contravenes s 78(1) of the Constitution. They raised as a rationale for the difference in the treatment of a girl child and a boy child under s 22(1) of the Marriage Act, the old notion that a girl matures physiologically and psychologically earlier than a boy. They put forward the notion of the alleged difference in the rates of maturity in the growth and

development of girls and boys, as justification for legislation which condemns a girl child, under the pretext of marriage, to a life of sexual exploitation and physical abuse.

The respondents took the view that there was nothing unconstitutional about legislation which authorised child marriage. They suggested that the applicants were the cause of the problem. The argument was that they should have taken responsibility for getting pregnant. The contention is that instead of seeking to have legislation on child marriage declared unconstitutional, the applicants should have taken advantage of their painful experiences to embark on advocacy and educational programmes to share their experiences with girl children. In that way, the argument went, they would give the girl children the skills and knowledge necessary to enable them to make the right choices on matters of sexual and reproductive health.

Four questions arise for determination from the positions taken by the applicants and the respondents. They are:

- (1) Whether or not the applicants have, on the facts, *locus standi* under s 85(1)(a) or s 85(1)(d) of the Constitution to institute the proceedings claiming the relief they seek.
- (2) If they are found to have standing before the Court, does s 78(1) of the Constitution set the age of eighteen years as the minimum age for marriage in Zimbabwe.
- (3) If the answer to issue No. 2 is in the affirmative; did the coming into force of ss 78(1) and 81(1) of the Constitution on 22 May 2013 render invalid s 22(1) of the Marriage Act [*Chapter 5:05*] and any other law authorising a girl who has attained the age of sixteen to marry.

- (4) If the answer to issue No. 3 is in the affirmative; what is the appropriate relief to be granted by the Court in the exercise of the wide discretion conferred on it under s 85(1) of the Constitution.

LOCUS STANDI

The right to approach a court directly seeking appropriate relief in cases arising from alleged infringement of a fundamental human right or freedom enshrined in Chapter 4 of the Constitution is given to the persons specified under s 85(1) of the Constitution. Section 85(1) provides:

“85. Enforcement of fundamental human rights and freedoms.

- (1) Any of the following persons, namely –
- (a) any person acting in their own interests;
 - (b) any person acting on behalf of another person who cannot act for themselves;
 - (c) any person acting as a member, or in the interests, of a group or class of persons;
 - (d) any person acting in the public interest;
 - (e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.”

The applicants alleged that the fundamental rights of a girl child to equal treatment before the law and not to be subjected to any form of marriage enshrined in s 81(1) as read with s 78(1) of the Constitution have been, are being and are likely to be infringed if an order declaring s 22(1) of the Marriage Act and any other law authorising child marriage unconstitutional was not granted by the Court. What is in issue is the capacity in which the applicants act in claiming the right to approach the court on the allegations they have made. In

claiming *locus standi* under s 85(1) of the Constitution, a person should act in one capacity in approaching a court and not act in two or more capacities in one proceeding.

The respondents correctly submitted that, although the applicants claimed to have been acting in their own interests in terms of s 85(1)(a) of the Constitution, the facts showed that they had failed to satisfy the requirements of that rule. The rule requires that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom. The infringement must be in relation to himself or herself as the victim or there must be harm or injury to his or her own interests arising directly from the infringement of a fundamental right or freedom of another person. In other words the person must have a direct relationship with the cause of action.

The first part of the rule of standing under s 85(1)(a) of the Constitution needs no elaboration. Its content has constituted the meaning of the traditional and narrow rule of standing with which any common law lawyer is familiar. It is the rule which prompted CHIDYAUSIKU CJ to comment in *Mawarire v Mugabe NO and Others CCZ 1/2013* at p 8 of the cyclostyled judgment:

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

That is the familiar rule of *locus standi* based on the requirement of proof by the claimant of having been or of being a victim of infringement or threatened infringement of a fundamental right or freedom enshrined in Chapter 4 of the Constitution.

The second aspect of the rule is not so familiar. It needs elaboration. The Canadian cases of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 and *Morgentaler Smoling and Scott v R* (1988) 31 CRR 1 illustrate the point that a person would have standing under a provision similar to s 85(1)(a) of the Constitution to challenge unconstitutional law if he or she could be liable to conviction for an offence charged under the law even though the unconstitutional effects were not directed against him or her *per se*. It would be sufficient for a person to show that he or she was directly affected by the unconstitutional legislation. If this was shown it mattered not whether he or she was a victim.

In *R v Big M Drug Mart Ltd* (*supra*) a corporation was allowed to challenge the constitutionality of a statutory provision at a criminal trial on the grounds that it infringed the rights of human beings and was accordingly invalid. The corporation had been charged in terms of a statute which prohibited trading on Sundays. It did not have a right to religious freedom. The corporation was nevertheless permitted to raise the constitutionality of the statute which was held to be in breach of the Charter on the Rights and Freedoms (See *Ferreira v Levin NO and Others* 1996(1) SA 984 at 1102I). The corporation had a financial interest in the form of profits made out of trading on Sundays. The concept used in s 85(1)(a) of the Constitution is “own interests”, the broad meaning of which includes indirect interests such as commercial interests.

The corporation alleged that the statute was unconstitutional because it infringed the fundamental right to freedom of religion of non-Christians who did not observe Sunday as the day of rest and worship. In getting the statute declared unconstitutional, the corporation's primary purpose was the protection of its own commercial interests and freedom from criminal prosecution for alleged breach of an invalid statutory provision.

A similar issue arose in *Morgentaler's case (supra)*: Male doctors who were prosecuted under anti-abortion provisions successfully challenged the constitutionality of the legislation in terms of which they were prosecuted. The legislation directly infringed the rights of pregnant women who were the victims of the anti-abortion provisions. The rights, the infringement of which formed the basis of the constitutional challenge, were of pregnant women. The rights did not and could not vest in the male doctors. If pregnant women were free to consult the doctors for purposes of abortion, the doctors would benefit financially from charging for services rendered in performing the abortions. The doctors had their own financial and personal interests to protect in challenging the constitutionality of the anti-abortion legislation on the ground that it infringed the fundamental right of pregnant women to security of the person enshrined in s 7 of the Charter.

Mr *Biti* conceded that the applicants were not victims of the alleged infringements of the fundamental rights of girl children involved in early marriages. They failed to show that any of their own interests were adversely affected by the alleged infringement of the rights of girl children subjected to early marriages. They could not identify any girl child or girl children the infringement of whose rights could be said to have directly and adversely affected their own interests. Since the applicants were not victims of the infringements of the fundamental rights enshrined in s 81(1) of the Constitution as they are not

children, they could not benefit personally from a declaration of unconstitutionality of any legislation authorising child marriage.

The contention by the respondents that the applicants lack standing under s 85(1)(d) of the Constitution is based on an erroneous view of the requirements of the rule. The argument that the applicants were not entitled to approach the court to vindicate public interest in the well-being of children protected by the fundamental rights of the child enshrined in s 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest. Notwithstanding the allusion to acting under s 85(1)(a) of the Constitution, the founding affidavit shows that the applicants believed themselves to be acting in terms of s 85(1)(d) and had their hearts in that rule.

What the respondents accused the applicants of failing to allege is a fact required to be alleged by a person acting in terms of s 85(1)(d) of the Constitution. Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.

The rule of standing under s 85(1)(d) of the Constitution must be understood in the context of its purpose and the objectives it is intended to achieve. Section 44 of the

Constitution imposes the obligation on the State and every institution and agency of the government at every level to respect, protect, promote and fulfil the fundamental rights and freedoms enshrined in Chapter 4 of the Constitution. The constitutional obligation requires the State to protect every fundamental right and freedom regardless of the social and economic status of the right-holder.

Like a shepherd who cannot escape liability for a lost sheep by claiming ignorance of what happened to it, the State is expected to know what is happening to fundamental rights and freedoms enshrined in Chapter 4. It is under an obligation to account, in the public interest, for any infringement of a fundamental right even by a private person. The scheme of fundamental human rights and freedoms enshrined in Chapter 4 is based on the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights and freedoms to ensure that they are enjoyed in practice.

Section 85(1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights in the event of proven infringement. The right to a remedy provided for under s 85(1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined in Chapter 4. The right to a remedy enshrined in s 85(1) constitutes a constitutional obligation inherent in Chapter 4 as a whole.

The form and structure of s 85(1) shows that it is a product of the liberalisation of the narrow traditional conception of *locus standi*. The traditional rule of standing gave a right to approach a competent court for enforcement of a fundamental right or freedom to a person who would have suffered direct legal injury by reason of infringement or threatened infringement of his or her fundamental right or legally protected interest by the impugned action of the State or public authority. Except for a case where a person was unable to personally seek redress by reason of being under physical detention, no one could ordinarily seek judicial redress for legal injury suffered by another person.

The object of s 85(1) of the Constitution is to ensure that cases of infringement of fundamental rights which adversely affect different interests covered by each rule of standing are brought to the attention of a court for redress. The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society. The fundamental principle is that every fundamental human right or freedom enshrined in Chapter 4 is entitled to a full measure of effective protection under the constitutional obligation imposed on the State. The right of access to justice, which is itself a fundamental right, must be made available to a person who is able, under each of the rules of standing, to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.

The liberalisation of the narrow traditional conception of standing and the provision of the fundamental right of access to justice compel a court exercising jurisdiction under s 85(1) of the Constitution to adopt a broad and generous approach to standing. The approach must eschew over reliance on procedural technicalities, to afford full protection to

the fundamental human rights and freedoms enshrined in Chapter 4. A court exercising jurisdiction under s 85(1) of the Constitution is obliged to ensure that the exercise of the right of access to judicial remedies for enforcement of fundamental human rights and effective protection of the interests concerned is not hindered provided the substantive requirements of the rule under which standing is claimed are satisfied.

In *Ferreira v Levin N.O. & Others (supra)* at 1082G-H CHASKALSON P writing for the Constitutional Court of South Africa made reference to the need to adopt a broad approach to standing in constitutional cases in these terms in para. [165]:

“Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.”

Section 85(1)(d) of the Constitution is founded on the broadest conception of standing. Its primary purpose is to ensure effective protection to any public interest shown to have been or to be adversely affected by an infringement of a fundamental right or freedom. Whilst its purpose is to ensure that a person who approaches a court in terms of the procedure prescribed under the rule, has the protection of public interest as the objective to be accomplished by the litigation, s 85(1)(d) directs against the use of the procedure to protect private, personal or parochial interests. By definition, public interest is not private, personal or parochial interest. An infringement of a fundamental right may cause legal injury to an individual or prejudicially affect private interest without being of a nature that adversely affects the interests of the community at large or a significant section of the community. The cause of action must show that the proceedings are in the public interest.

Public interest is one of those value laden and amorphous concepts, the limits and substance of which is difficult to define with precision. Section 85(1)(d) of the Constitution does not define public interest. The reason is that it does not require a narrow approach which seeks to answer the question “what is public interest”. The courts in many jurisdictions have preferred to leave the definition of public interest open. They prefer to determine the question of public interest on the basis of the circumstances of each case. Given that most violations of fundamental human rights and freedoms are fact and context specific, it is appropriate to keep concepts such as “public interest” broad and flexible to develop in line with changing times and social conditions reflective of community attitudes.

The words “in the public interest” qualify the action to be taken to ensure that it is one intended to achieve the purpose for which *locus standi* under s 85(1)(d) is designed. The term “in the public interest” as used in s 85(1)(d) of the Constitution classically imparts a discretionary value judgment to be made by reference to undefined factual matters, as they change from case to case. The facts are confined only in so far as the subject matter, the scope and purpose of the fundamental right allegedly infringed enable.

There are many areas of national and community activities which may be subject to the public interest. Used in the context of s 85(1)(d) of the Constitution, public interest does not mean that which gratifies curiosity or merely satisfies appetite for information or amusement. It is also necessary to distinguish between “what is in the public interest” and what is of interest to the public. *R v Inhabitants of the County of Bedfordshire* [1855] 24 LJQB 81 at 84, *Lion Laboratories Limited v Evans* [1985] QB 526 at 553. *O’Sullivan v Farrer* [1989] 168 CLR 210 at 216.

The use of the words “the public interest” in s 85(1)(d) suggests that there are many categories or facets of public interest. The task is to ascertain, amongst others, the public interest to be served. As was observed by the Australian Federal Court in *Mckinnon v Secretary Department of Treasury* [2005] FCAFC 142 at para. [12], “the public interest is not one homogenous undivided concept”. Often quoted is LORD HAILSHAM’S dictum in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 230 where he said “The categories of public interest are not closed”. Matters of public interest that would affect fundamental rights and freedoms would include, for example, public health, national security, defence, international obligations, proper and due administration of criminal justice; independence of the judiciary, observance of the rule of law, the welfare of children, a clean environment, among others.

Public interest is a term embracing matters, among others, of standards of human conduct tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The paramount test should be whether the alleged infringement of a fundamental right or freedom has the effect of prejudicially affecting or potentially affecting the community at large or a significant section or segment of the community. The test covers cases of marginalised or underprivileged persons in society who because of sufficient reasons such as poverty, disability, socially and economically disadvantaged positions, are unable to approach a court to vindicate their rights.

Section 85(1)(d) of the Constitution was introduced with the view of providing expansive access to justice to wider interests in society, particularly the vulnerable groups in society, the infringement of whose rights would have remained unredressed under the narrow

traditional conception of standing. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals. A public interest action will usually involve foregoing personal benefit to benefit a greater good to achieve the goals of social justice. *Sinclair v Mining Warden At Maryborough* [1975] 132 CLR 473 at 480.

Whilst acting in the public interest is the imperative for standing under s 85(1)(d) of the Constitution, the meaning or content of public interest will vary from case to case depending on the facts and circumstances. Public responsibilities regarded as being in the public interest in one case may not be so regarded in a different context because facts and circumstances may differ. The facts may reveal more reasonable and effective methods of resolving the dispute than bringing the matter to court. The concept is elastic and relative rather than fixed and absolute. Whether a person is acting in the public interest is a question of fact. It is an objective test which does not depend for its answer on what the person says. In other words, the fact that a person says he or she is acting in the public interest is irrelevant to the determination of the issue. A person is on the facts and in the circumstances of the case either acting in the public interest or he or she is not.

There are factors by which a court should be able to decide whether or not a person is genuinely acting in the public interest. Asserting that an action is in the public interest involves setting oneself up in judgment as to whether the action will benefit the public overall. To act in the public interest is to act in favour of the broader rather than narrow interests. What is important is to set out factors or matters to be considered when deciding whether a person is genuinely acting in the public interest.

The adoption of the approach of testing the actions of the applicant against a set of factors as an objective standard, is necessitated by the elasticity and relativity of the concept of public interest which is an abstract notion. It is also necessitated by the fact that there can be a natural suspicion that the notion of acting in the public interest may be invoked as a smokescreen to garner support for something that actually is in the applicant's own interest. The factors to be considered do not only help the court to decide whether the action taken is genuinely in the public interest as to meet the requirements of s 85(1)(d) of the Constitution; they are important for the protection of judicial process against abuse for private interest. As was observed in *Stevenson v Minister of Local Government & Ors* 2001(1)ZLR 321(H) the factors ensure that "potentially viable public causes are not frittered away in frivolous, furtive, unfocused or self-serving private litigation", disguised as public interest. The factors relate to the key issues that a person facing the challenge of justifying the proceedings instituted as being in the public interest needs to address.

The judicial process is invoked for the purposes of achieving constitutional objectives. The court must be careful not to risk the credibility of its process by unwittingly associating its jurisdiction with proceedings that have nothing to do with the objectives of public interest litigation. Section 85(1)(d) of the Constitution guarantees standing to a person who institutes judicial proceedings seeking to achieve the objectives for which the remedy of acting in the public interest was designed. It is in the context of seeking to ensure that public interest litigation is used for its intended purpose and to prevent s 85(1)(d) procedure being abused by busybodies, merely meddling people for oblique motives unrelated to vindication of public interest, that courts developed factors that any person genuinely acting in the public interest has to satisfy. *State of Uttaranchal v Chauhal & Ors*, AIR (2010) SC 2550.

In a minority judgment which has received approval in subsequent decisions of the Constitutional Court of South Africa, O'REGAN J in *Ferreira v Levin supra* in considering the interpretation and application of s 7(4)(b)(v) of the Interim Constitution of South Africa, worded in terms identical to s 85(1)(d) of the Constitution, said in para. [234]:

“This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case.”

In *Lawyers for Human Rights & Anor v Minister of Home Affairs & Anor* 2004(4) SA 125(CC) YACOOB J in para [18] said:

“The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is objectively speaking in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'REGAN J (*Ferreira v Levin*) help to determine the question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected; the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis.”

In *SP Gupta v The Union of India & Ors* (1982) 2SCR 365 BHAGWATI J (as he then was) writing for the full bench of the Supreme Court of India, analysed in great detail the origin and rationale behind public interest standing adopted in many democratic legal systems. He concluded that fundamental to public interest standing provisions is the modern

conception of the role of law as a weapon for social change. There is also the conception of the judicial function as investing law with meaning primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public, whilst also directed at enforcement of individual rights.

In para. [18] of the *Gupta* judgment, the Indian Supreme Court highlighted the importance of affording *locus standi* to a person acting in the public interest for the vindication of the rule of law. BHAGWATI J (as he then was) said:

“But there may be cases where the State or a public authority may act in violation of a constitutional obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or there is no one who can complain and the public injury must go unredressed.

... If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress.

But if no specific legal injury is caused to a person or to a determinate class or group by the act or omission of the State or any public authority and the injury is caused only to public interest the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the Courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the constitution or the law, any member of the public acting *bona fide* and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can

maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddling interloper but who has sufficient interest in the proceedings. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice.”

It is not necessary for a person challenging the constitutional validity of legislation to vindicate public interest on the ground that the legislation has infringed or infringes a fundamental human right, to give particulars of a person or persons who suffered legal injury as a result of the alleged unconstitutionality of the legislation. Section 85(1)(d) of the Constitution requires the person to allege that a fundamental human right enshrined in Chapter 4 has been, is being or is likely to be infringed. He or she is not required to give particulars of a right holder. The reason is that constitutional invalidity of existing legislation takes place immediately the constitutional provision with which it is inconsistent comes into force.

Constitutional invalidity of legislation enacted after the constitutional provision has come into effect occurs immediately the legislation is enacted. Constitutional invalidity of legislation does not depend, in such circumstances, on when a fundamental human right is infringed.

Fundamental human rights and freedoms are guaranteed so that beyond the permissible limitations they are not infringed. Legislation which is inconsistent with a constitutional provision enshrining a fundamental human right of freedom becomes invalid before application. Application of the legislation is in the circumstances an unnecessary factor in the determination of its constitutional validity.

In the main volume of *ERASMUS SUPERIOR COURT PRACTICE Juta* at A2-27 the learned authors considered the meaning of s 38(d) of the Constitution of the Republic of South Africa, 1996. Section 38(d) is in identical terms as s 85(1)(d) of the Constitution. The learned authors made the observation that there are important policy reasons why the new ground of standing introduced in s 38(d) should not be interpreted restrictively. The learned authors said the reason is that standing accorded to persons to act in the public interest is “much broader than the other grants of standing contained in s 38”.

On the question whether a person challenging the constitutionality of legislation is required, under s 38(d) of the Constitution of the Republic of South Africa, to allege and prove infringement of a fundamental right of a particular person, the learned authors of *ERASMUS SUPERIOR COURT PRACTICE* said:

“In terms of this subsection, Chapter 2 litigation may be undertaken by a person acting in the public interest. All an applicant under this paragraph need essentially establish is that (I) objectively speaking, the challenged rule or conduct is in breach of a right enshrined in Chapter 2, (II) the public has a sufficient interest in an order of constitutional invalidity, and (III) that the applicant is in fact acting in the public interest (rather than for his or her own interests or some, ulterior motive). As explained by O’REGAN J in *Ferreira v Levin N O* 1996(1) SA 984(CC) at para [235] there is no need to point to an infringement of, or threat to, the right of an individual person. This flows from the notion of acting in the public interest: the public will ordinarily have an interest in the infringement of rights generally, not particularly. Moreover, as ACKERMAN J explained, in proceedings concerning the validity of laws, the issue of whether the law is invalid or not does not depend on whether, at the moment when the issue is being considered, a particular person’s rights are threatened or infringed by the offending law or not. This is because laws which are inconsistent with the Constitution become invalid upon the commencement of the Constitution (in case of pre-constitutional laws) or upon the date when they came into force (in the case of post-constitutional laws).”

The applicants had no personal or financial gain to derive from the proceedings. They were not acting *mala fide* or out of extraneous motives as would have been the case if they were mere meddlesome busybodies seeking a day in court and cheap personal publicity. The applicants were driven by the laudable motive of seeking to vindicate the rule of law and supremacy of the Constitution. It is a high principle of constitutional law that people should be in a position to obey laws which are consistent with constitutional provisions enshrining fundamental human rights and freedoms. They acted altruistically to protect public interest in the enforcement of the constitutional obligation on the State to protect the fundamental rights of girl children enshrined in s 81(1) as read with s 78(1) of the Constitution.

Children fall into the category of weak and vulnerable persons in society. They are persons who have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty, and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest.

The proceedings instituted by the applicants and the relief sought were the only reasonable and effective means for enforcement of the fundamental rights of the girl children subjected to early marriages. The remedy they sought was the only means for an effective protection of the public interest adversely affected by the alleged infringement of the girl children's fundamental rights. The respondents denied that there was infringement of the children's fundamental rights. They could not be heard to argue that there were other reasonable and effective methods for enforcing the children's fundamental rights and protecting the public interest adversely affected by the alleged infringement.

The interests of the girl children subjected to early marriages were properly identified as a public interest to be protected by the relief sought in the proceedings. Section 85(1)(d) of the Constitution underlines the principle that courts play a vital role in the provision of access to justice and protection of children. These are matters of public interest. A nation which is not concerned with the welfare of children cannot look forward to a bright future. *Murina & Ors v State of Uttar Pradesh & Ors* (1982) 1SCC 545.

MERITS

The respondents' case on the merits is that s 78(1) of the Constitution does not set the age of eighteen years as the minimum legal age of marriage. They argued that s 78(1) of the Constitution gives a person who has attained the age of eighteen the "right to found a family". The subsection does not in express terms give the person concerned the "right to marry". According to the respondents, s 22(1) of the Marriage Act or any law which authorises a girl child who has attained the age of sixteen to marry is not inconsistent with s 78(1) of the Constitution. The applicants took issue with the literal interpretation of s 78(1) of the Constitution by the respondents. They contend that the meaning of s 78(1) of the Constitution can only be determined on the basis of a broad, generous and purposive interpretation of its provisions.

INTERNATIONAL CONVENTIONS AND TREATIES

Context of Section 78(1) of the Constitution and Section 22(1) of the Marriage Act

The court is faced with the question of interpretation of s 78(1) as read with s 81(1) of the Constitution. It is also faced with the question of interpretation of s 22(1) of the Marriage Act and the effect of the application of s 78(1) of the Constitution on its meaning.

Section 46(1)(c) of the Constitution imposes an obligation on a court when interpreting any provision of the Constitution contained in Chapter 4, to take into account international law and all treaties and conventions to which Zimbabwe is a party. Both s 22(1) of the Marriage Act and s 78(1) of the Constitution were born out of provisions of international human rights law prevailing at the time of their respective enactment. The meaning of s 78(1) of the Constitution is not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions on matters of marriage and family relations at the time it was enacted on 22 May 2013.

In deciding whether s 22(1) of the Marriage Act or any other law which authorises child marriage infringes the fundamental rights of girl children enshrined, guaranteed and protected under s 81(1) as read with s 78(1) of the Constitution, regard must be had to the contemporary norms and aspirations of the people of Zimbabwe as expressed in the Constitution. Regard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a party, on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood.

The object of the interpretation of s 78(1) as read with s 81(1) of the Constitution and of s 22(1) of the Marriage Act should be to ensure that the interpretation resonates with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in s 3 of the Constitution, and regional and international human rights law. In considering the meaning of s 22(1) of the Marriage Act as a norm of behaviour towards children, the court has to take into consideration the current attitude of the

international community of which Zimbabwe is a party, on the position of the child in society and his or her rights.

Section 78(1), as read with s 81(1) of the Constitution, testifies to the fact that Zimbabwe is a signatory to the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). By signing these documents Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice. Section 78(1) as read with s 81(1) of the Constitution must be interpreted progressively.

Child marriage is defined by the United Nations Children's Fund (UNICEF)(2011) Child Protection from Violence, Exploitation and Abuse Report as "a formal marriage or informal union before age 18". The term "child marriage" covers marriages of persons under the age of 18 years. The minimum age of marriage was prescribed by the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW Committee) to be 18 years. This was a result of the definition of "child" by Article 1 of the CRC which came into force on 2 September 1990. Article 1 of CRC defines "a child" to mean "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

Section 22(1) of the Marriage Act was enacted in 1965 as a response to omissions and exceptions that existed in the international human rights provisions on the protection of children that existed at the time. The provisions that existed at the time were found in Article 16 of the Universal Declaration of Human Rights (UDHR) and the Convention

on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962 (the Marriage Convention).

The common feature of the many conventions was the failure to specify for States Parties the minimum age of marriage as a means of protecting children. They left the matter exclusively to domestic law. It is striking how poorly international human rights conventions addressed the practice of child marriage. Apart from their general lack of vision, the conventions, not being self executing, constituted promises by the adopting parties to enact domestic legislation and adopt other measures to achieve the desired objectives.

Until 1990, almost all the conventions which contained provisions on marriage avoided specifying a mandatory minimum age of marriage for the States Parties. While many conventions provided that marriage must be freely consented to by the bride and groom, there was no recognition of the special vulnerabilities of children where “consent” could be easily coerced or unduly influenced by adults. (See Elizabeth Warner: “*Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*”. *Journal of Gender, Social Policy & the Law*: Vol. 12 Issue 2(2004) Article 1 p. 247.

Under Article 16(1) of the UDHR, the United Nations General Assembly proclaimed that only men and women of full age, without any limitation due to race, nationality or religion, have a right to marry and to found a family. The United Nations General Assembly, by necessary implication, declared that a person who had not attained the age of majority could not exercise the right to marry and to found a family. Article 16(2) proclaimed that marriage shall be entered into only with free and full consent of the intending spouses. By necessary implication, a person below the age of majority was not capable of giving free and full consent

to marriage. Marriage was to be for adult persons only and consent to marriage given on behalf of the intending spouses was prohibited.

The problem with Article 16(1) and (2) of the UDHR was not only that it was a declaration with no binding force on Member States, it also did not specify what the age of majority should be. In 1962 the Marriage Convention was expected to resolve the issue of the standard age of majority for purposes of marriage. The Marriage Convention required States Parties to take legislative action to specify a minimum age for marriage. It stipulated that no marriage shall be legally entered into by a person under the minimum age, except where a competent authority granted a dispensation as to the age, for serious reasons in the interest of the intending spouses.

According to a non-binding recommendation accompanying the Marriage Convention, States Parties were directed not to specify a minimum age for marriage less than 15 years. States Parties were permitted to specify a minimum age for marriage by reference to what they considered to be the age of puberty.

The problem with the Marriage Convention is that it did not specify for States Parties a minimum age of marriage. It left States Parties free to set their own minimum ages for marriage. As a result States Parties set minimum ages of marriage as low as sixteen years for girls whilst setting different and usually higher ages for boys. The other problem was that the Marriage Convention created exceptions permitting marriages of girls below the minimum age where government officials approved of the marriages. The effect of these provisions was that once a girl was married, however young she was, she was treated under domestic law as an adult. Laws for the protection of children no longer reached her.

It was in the context of the omissions and exceptions in the provisions of international human rights law that the Marriage Act was enacted. Section 22(1) of the Marriage Act prohibited marriage of a boy under the age of eighteen and of a girl under the age of sixteen except with the written permission of the Minister when he or she considered such marriage desirable. The written permission which was intended to be granted prior to solemnization of the marriage could be granted after the solemnization where the Minister considered the marriage desirable and in the interests of the parties concerned.

Section 22(1) of the Marriage Act clearly permitted marriage of a girl who had attained the age of sixteen years. Section 20(1) required that consent in writing be given to the solemnization of the marriage by the legal guardians of the girl. Legal guardian was defined to include the mother of the girl where she and the father of the minor were living together lawfully as husband and wife or were divorced or were living apart and the sole guardianship of the minor had not been granted to either of them by order of the High Court or judge thereof. Consent to marriage could be granted by a judge of the High Court where the consent of the legal guardian could not be obtained by reason of absence, or inaccessibility or by reason of his or her being under any disability. Section 21(1) of the Marriage Act provided that where a marriage which required the consent of a legal guardian or legal guardians had been solemnized without such consent, it became a valid marriage if within a period of six weeks calculated from the date on which a legal guardian or legal guardians first had notice of such marriage, he or she or they did not make an application to the High Court for an order setting aside the marriage and declaring it void.

What is clear from the interpretation of the relevant provisions of the Marriage Act is that once a child got married with the written permission of the Minister and a girl who had attained the age of sixteen got married, they were treated as persons of full age to whom protection of the rights of the child was lost.

On 3 September 1981 the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) came into force. On the principle of equality of men and women, Article 16(1) provided that States Parties shall take all appropriate measures to ensure that men and women have the same right to enter into marriage and that each spouse has a right to enter into marriage only with his or her free and full consent. By necessary implication, Article 16(2) of the CEDAW reserved the right to marry and to found a family to men and women of full age.

Article 16(2) thereof provides:

“2. The betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation shall be taken to specify a minimum age of marriage and to make the registration of marriages in an official registry compulsory.”

Although Article 16(2) of the CEDAW prohibited child marriage, s 22(1) of the Marriage Act could not, at the time, be condemned for permitting child marriage in the absence of a specific provision in the international human rights law setting a minimum legal age for marriage. Article 16(2) of the CEDAW did not even define “child”.

The problem of lack of definition of “child” in Article 16(2) of the CEDAW was solved by the coming into force on 2 September 1990 of the Convention on the Rights of the Child (CRC). In Article 1 the CRC provided that:

“For the purposes of the present convention a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

The CRC makes provision for the protection of the rights of the child. Article 2 of the CRC prohibits “discrimination” of any form against children including on the basis of sex. Article 3 provides that “in all actions concerning children, the best interests of the child shall be a primary consideration” and that States Parties must “undertake to ensure the child such protection and care as is necessary for his or her well-being”. The CRC also provides that all children shall have the right to protection from all forms of physical or mental violence, injury, abuse, maltreatment or exploitation; the right to health; the right to education; the right to protection from abduction; sale, or trafficking; the right to rest and leisure; the right to protection from economic exploitation; and the right to protection from all forms of exploitation prejudicial to the child’s welfare. In Article 24.3 the CRC provides that States Parties shall take measures to abolish “traditional practices prejudicial to the health of children”.

Although the CRC did not specify the age of eighteen as the minimum age for marriage, in defining “a child”, it provided the CEDAW Committee and the CRC Committee with the basis for declaring the minimum age of marriage to be eighteen years. This is because Article 16(2) of the CEDAW provides in express terms that the “marriage of a child shall have no legal effect”.

Elizabeth Warner in the article referred to earlier at p 251 highlights the shortcomings of the CRC in these terms:

“The CRC intended as a comprehensive treaty on the rights of children, contains no explicit provision on marriage, which is odd, if not downright baffling (perhaps the drafters thought the subject was already covered by the Marriages Convention). Article 1 of the CRC provides that ‘a child means every human being below the age of eighteen years, unless under the law applicable to the child majority is attained earlier’. The word ‘majority’ is deliberately not defined in the CRC and is left to local law to determine. Consider how problematic this provision is in the case of a married female child.

In a society where a woman’s value is defined entirely by reference to her marital status and her ability to bear children, a married female is likely to be viewed as having attained adult, or ‘majority’ status regardless of her age, all the more so once she has borne a child of her own. One could therefore argue that the entire CRC becomes irrelevant to her at that point. And indeed, many domestic laws explicitly provide that a person attains majority upon marriage regardless of her age, thus creating an exception to the general ‘rule of 18’ that eviscerates the CRC mandate where it is most needed.”

The CRC has also been criticised for not applying to girls and boys equally in that it does not give due consideration to particularly harmful situations that may be specific to either girls or boys. *Askari, Ladan* in an article titled “*The Convention on the Rights of the Child; The Necessity of Adding a Provision to Ban Child Marriages*” (1998) 5 ILSA Journal of International and Comparative Law 123 explains that although the CRC was “designed to be gender blind” violations that primarily affect boys (i.e. child soldiers) are covered under CRC Article 38. The same consideration is not given to violations predominantly affecting girls in child marriage.

Askari points out that although the issue of child soldiers may at times impact upon the girl-child, the primary target of concern is the boy-child. Similarly, even though the issue of child marriage is of greater concern for girls it could also apply to boys. But the failure

of the CRC to protect the girl-child against a particular practice that is primarily of concern to her, is unfair in light of the fact that special consideration is given to an issue where boys are particularly vulnerable. Such a gap reveals discrimination against the girl-child in the sense that the reality of her situation is not taken into account or specifically addressed.

There is need to fully acknowledge that a child's gender can detrimentally affect the realisation of his or her right. The use of gender-neutral language throughout the CRC may have been intended to promote equality and the inclusiveness that was lacking when the language of human rights was written solely from a male perspective. Jewel Amoah in an article titled "*The World on Her Shoulders: The Rights of the Girl-Child in the Context of Culture & Identity*" Essex Human Rights Review Vol. 4 No. 2, September 2007 argues further that the inclusion of gender-neutral language on its own is also not an ideal final solution. She concludes at p 15 that:

"The failure to make specific reference to the girl-child and conditions that exacerbate her vulnerability is itself a form of discrimination against her ... It is not enough that the language simply be gender-neutral, but where there are specific gendered human rights abuses, then these, must be directly addressed."

Askari's solution to the CRC's failure to thoroughly consider gender specific rights violations is to have the concept of gender equality established as a peremptory norm.

She states:

"The problem of placing girls under the general category of 'child' is alleviated if gender equality is recognised as a peremptory and therefore non-derogable norm. Because it is gender-neutral, the term 'child' as used in the CRC, avoids certain additional violations that are specific to girls only. Thus, girls sometimes fail to be completely protected under the provisions of the CRC. By identifying gender equality as a *jus cogens* norm, the gender - neutral language of the CRC will no longer detrimentally affect girls' human rights. Instead girls' rights will be protected

irrespective of whether the treaty provisions are specific or general since gender equality will be the standard against which violations will be measured.”

It is, however, accepted by the critics that notwithstanding its shortcomings the CRC, as it stands, is in many ways a milestone in child and human rights. It was after the CRC guaranteed specific “Rights of the Child” that child marriage could be viewed as a social evil in terms of its consequences on the girl–child. Study after study began to define child marriage as marriage of “a child” as defined under Article 1 of the CRC.

The studies showed how child marriage infringed the fundamental rights of the girl–child guaranteed by the CRC particularly; the right to education; the right to be protected from all forms of physical or mental violence, injury or abuse, including sexual abuse; the right to be protected from all forms of sexual exploitation; the right to the enjoyment of the highest attainable standard of health; the right to educational and vocational information and guidance; the right to seek, receive and impart information and ideas; the right to rest and leisure and to participate freely in cultural life; the right not to be separated from parents against their will and the right to protection against all forms of exploitation affecting any aspect of the child’s welfare.

In 1990 the African Charter on the Rights and the Welfare of the Child (1990) came into force. Article 21 is significant enough to repeat here:

“Article 21. Protection against Harmful Social and Cultural Practices:

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 boys shall be prohibited and effective action including legislation, shall be taken to specify the minimum age of marriage

to be 18 years and make registration of all marriages in an official registry compulsory.”

In clear and unambiguous language, Article 21 of the ACRWC imposed on States Parties, including Zimbabwe, an obligation which they voluntarily undertook, to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. The Charter goes on to specifically target child marriage as such a harmful social and cultural practice affecting the welfare, dignity, normal growth and development of the child particularly the girl-child. The States Parties are placed under a positive obligation to take effective measures, including legislation, to specify the age of eighteen years as the minimum age for marriage. They are obliged to abolish child marriage.

Article 21(2) of the ACRWC avoided the omissions and exceptions that the other conventions on human rights relating to marriage had permitted States Parties to exploit through local laws that authorised child marriage.

Commenting on the provisions of Article 21(2) of the ACRWC, Elizabeth Warner in the article already referred to had this to say at p 257:

“This is the most explicit provision of any of the international treaties discussed herein. It unequivocally sets the minimum age of marriage at eighteen and brooks no exception for local religious or other cultural practices, nor does it allow for exceptions based upon the consent of a local authority or the parents or guardians of the children concerned. An Oxfam report optimistically states that this law is a reflection of changes in attitudes toward child marriages in recent years. The only drawback to this convention is that there are not more States that are parties to it. Again one longs for the ability to insert this provision into the CRC and the Marriages Convention where it so clearly belongs.”

The provisions of Article 21(2) of the ACRWC had a direct effect on the views on the validity of ss 20 and 22 of the Marriage Act. A review of States reports presented to the CRC Committee from 1997 to 2004 reveals that forty-four States specified a lower age for girls to marry than boys. In its concluding comments E/1996/22(1995) para. 159 the Committee on the International Convention on Economic Social and Cultural Rights (ICESCR Committee) indicated that differences in marriageable age between girls and boys violated provisions of international human rights instruments guaranteeing to girls and boys equal treatment before the law.

In its concluding comment on Zimbabwe A/53/40(1998) para. 214 the Committee on the Convention on Civil and Political Rights (ICCPR Committee) expressed the view based on the interpretation of s 22(1) of the Marriage Act that early marriage, and the statutory difference in the minimum age of girls and boys for marriage, should be prohibited by law. The Government of Zimbabwe was asked to adopt measures to prevent and eliminate prevailing social and cultural practices harmful to the welfare of children.

The comment by the CEDAW Committee in General Recommendation 21 para. 38 was to the effect that provisions such as those of s 22(1) of the Marriage Act, which provided for different ages for marriage for girls and boys, assumed incorrectly that girls have a different rate of intellectual development from boys or that their stage of physical and intellectual development at marriage was immaterial. The Committee recommended that these provisions be abolished.

The CEDAW Committee in making the comment in General Recommendation 21 para. 38 proceeded on the basis that it was common cause that the coming into effect of Article 1 of the CRC and Article 21 (2) of the ACRWC rendered provisions such as those contained in s 22(1) of the Marriage Act, and any other law authorising marriage of a person aged below eighteen years, inconsistent with the obligations of Zimbabwe under international human rights law to protect children against early marriage. The view held was that the abolition of the impugned statutory provisions would be consistent with the fulfilment by Zimbabwe of the obligations it undertook in terms of the relevant conventions and the Charter. The question was when the abolition would take place.

The adoption of legislative measures for the abolition of the offending statutory provisions such as s 22(1) of the Marriage Act became a compelling social need. There was overwhelming empirical evidence of the horrific consequences of child marriage. Study after study exposed child marriage as an embodiment of all the evils against which the fundamental rights are intended to protect the child. The studies showed that where child marriage was practised, it was evidence of failure by the State to discharge its obligations under international human rights law to protect the girl child from the social evils of sexual exploitation, physical abuse and deprivation of education, all of which infringed her dignity as a human being.

The facts set out here on the horrific consequences of child marriage, as part of the context for the determination of the question of the constitutional validity of s 22(1) of the Marriage Act, could not fail to have an impact on the conscience of any society that cares about the fundamental values of human dignity, freedom and equality.

Elizabeth Warner found that while the prevalence of child marriage cuts across many different countries with different cultural and religious traditions, certain factors pertaining to the practice were nearly universal. She found that the marriage of a girl child is almost always arranged by her parents or guardian whose desires take precedence over the wishes of the child. The marriage is a bartered transaction, accompanied by payment of a negotiated bride-price from the groom's family to the bride's family. In general, the younger the bride the higher the price she will fetch. Girls are usually married to much older men who can afford to pay the bride price. The marriage is immediately consummated and the girl made to start bearing children immediately.

A study by the Division of Policy and Practice of UNICEF titled "*Child Marriage and the Law*" (April 2007) at p 31–32 looked at the causes of child marriage. It states:

"Poverty is one of the main determinants of early marriage. In many countries in the Middle East, South Asia and Sub-Saharan Africa poverty drives families to give their daughters in marriage in the hope that this will alleviate the family's poverty and secure the family's honour when it is at stake. Although child marriage is seen as a way to escape the cycle of poverty, child marriage in fact worsens the cycle of intergenerational poverty. Although poverty is one of the underlying causes of child marriage as parents see this as an opportunity to receive money or save money, child marriage is not restricted to poor families. Child marriage is also one way of preserving wealth in families of a higher socio-economic class."

The horrific consequences of child marriage were set out in the UNICEF report in paras. 33–35 with such admirable clarity that it would be an injustice to the study to paraphrase the findings. They are set out as follows:

4.5. Consequences of Child Marriage

Although child marriage most often stems from poverty and powerlessness it only further reinforces the gendered notions of poverty and powerlessness stultifying

the physical, mental, intellectual and social development of the girl child and heightening the social isolation of the girl child.

Evidence shows that child marriage is a tool of oppression which subordinates not just the woman but her family. Not only does child marriage perpetuate an intergenerational cycle of poverty and lack of opportunity, it reinforces the subordinated nature of communities that traditionally serve the powerful classes by giving a girl child in marriage to an older male.

4.6. Domestic Violence

Child marriage often partners young girls with men who are much older. Girls find themselves in new homes with greater responsibilities, without much autonomy or decision-making power and unable to negotiate sexual experiences within the marriage. Economic dependency and the lack of social support also expose young married girls to other kinds of violent trauma during marriage. A child bride is often regarded as a wife-in-training and is considered to be docile and malleable. This assumption exposes child brides to the greater risk of domestic violence and sexual abuse by her in-law's family. Child brides are also forced into household labour in their husband's families which result in the exploitation of the girl child.

4.7. Trafficking in Women and Children

Since child marriages are contingent upon large amounts of money exchanging hands, child marriage amounts to trafficking in girls. Child marriage often facilitates the trade in women as cheap labour and has led to a rise in trafficking in women and children. Child marriage is also used as a means to conduct prostitution and bonded labour.

4.8. Health Costs

Child marriage reinforces the incidence of infectious diseases, malnutrition, high child mortality rates, low life expectancy for women, and an inter-generational cycle of girl-child abuse. Pregnancy-related death is a leading cause of death for girls between 15 and 19 years of age. The dangers of early marriage affect not only the girl child but the child born to her as well. Premature birth, low growth rate and poor mental and physical growth are some characteristics of babies born to young mothers.

The real costs associated with women's health and infant mortality are enormous. Child marriage can have devastating consequences on the sexual and reproductive health of girls: specifically increasing the risk of maternal mortality and morbidity and contracting sexually transmitted diseases, particularly HIV/AIDS. The risk of contracting STI's and HIV rises and married girls are unable to negotiate safe sex and are more likely to be married to older men with more sexual experience who are more likely than single men to be HIV positive.

Young girls particularly those below 15 years of age, face serious reproductive health hazards sometimes losing their lives as a result of early pregnancies. Those under the age of 15 are five times as likely to die as women in their twenties. The main causes are haemorrhaging, sepsis, pre-eclampsia/eclampsia and obstructed labour. When a young mother's vagina, bladder or rectum tears during child birth, it can cause

urine or faeces leakage known as obstetric fistula. This can happen when a young woman with underdeveloped physiology gives birth.

In addition to their lack of power in relation to their husbands or in-laws, girls are further exposed to sexual and reproductive health problems because of their lack of knowledge, information and access to sexual and reproductive health services, in particular family planning, ante-natal, obstetrics and post-natal care.

4.9. Education

Countless studies have proven that early marriage is universally associated with low levels of schooling. After marriage, young married girls' access to formal and even non-formal education is severely limited because of restrictions placed on mobility by domestic burdens, child bearing and social norms that view marriage and schooling as incompatible. Since in most cultures girls leave their parental home upon marriage, parents tend not to invest in the education of daughters because the benefits of their investment will be lost.

Child marriage and lack of access to continued educational opportunities also limit young women's access to employment opportunities. Child marriage is also associated with early widowhood, divorce and abandonment which often results in "feminization of poverty". Research has shown that girls with higher levels of schooling are less likely to marry as children.

Elizabeth Warner observed that regardless of how it occurs, early marriage takes a terrible toll on a girl's physical and emotional health. Because of her age, inexperience and vulnerability, she is likely to be dominated and controlled by her husband, who has the power to keep her a virtual prisoner. Rape, beatings and other forms of sexual and domestic violence are common and early and repeated pregnancies are life threatening. Young mothers also face far greater risks of complications in pregnancy because their bodies are not sufficiently developed and infant mortality is far greater among young mothers.

Enactment of Section 78(1) of the Constitution

Consideration of the changes in international human rights law on marriage and family relations over five decades, shows that s 22(1) of the Marriage Act was born out of lack of commitment to the protection of the fundamental rights of the girl child. Section 78(1) as read with s 81(1) of the Constitution is born out of commitment by the international community including Zimbabwe to providing greater and effective protection of the fundamental rights of the child.

Section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under Article 21(2) of the ACRWC to specify by legislation eighteen years as the minimum age for marriage and abolish child marriage. Under Article 18 of the Vienna Convention on the Law of Treaties which came into force on 2 January 1980, a State Party is enjoined to hold in good faith and observe the rights and obligations in a treaty to which it is a party. Zimbabwe had to see through its obligations under the conventions to which it is a party requiring it to specify eighteen years to be the minimum age of marriage and to abolish child marriage. As the obligations were specific in terms of what the States Parties had to do, the compliance by Zimbabwe was also specific.

Although the respondents contend that the nature and scope of the content of s 78(1) of the Constitution is ascertainable from the literal meaning of the language used all they did was to restate the terms of the provision. Mere restatement of terms of a provision is not an application of the Golden Rule of construction. The respondents overlooked the fact that even the literal rule of interpretation is based on the acceptance of the principle that words are

symbols by which ideas or thoughts are conveyed. Meaning is the totality of what the words signify. As JUSTICE HOLMES of the Supreme Court of the United States of America said in *Towne & Eisner* 245 US 418(1918) at p 425 “a word is ... the skin of the living thought”.

The respondents did not interpret the provisions of s 78(1) of the Constitution to determine its meaning because, had they done so they would have realised the absurdity of concluding that a family is not founded on marriage. They would also have realised the absurdity of concluding that persons who have attained eighteen years have a right to found a family but no right to marry. The absurdity would manifest itself in that their contention would mean that whilst persons under eighteen years would, according to them, have the right to marry they would not have the right to found a family.

Section 46(1)(a) of the Constitution obliges a court when interpreting a provision contained in Chapter 4 to give full effect to the rights and freedoms enshrined in the Chapter. The court is required by s 46(1)(d) to pay due regard to all the provisions of the Constitution, in particular, the principles and objectives set out in Chapter 2. The purpose of interpreting a provision contained in Chapter 4 must be to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in s 3 of the Constitution.

If the literal interpretation were applicable to the determination of the meaning of s 78(1) of the Constitution, its application would not give the fundamental right guaranteed and protected under s 78(1) the full measure of protection it deserves. The interpretation would fail to take into account the fact that the nature and scope of the content of the right to found a

family require, in many instances, that the persons who have attained the age of eighteen, who are desirous to found a family, enter into an agreement to live together as husband and wife which union forms the foundation and nucleus of the family. Entering into marriage is by definition one of the methods by which a family is founded.

The court agrees with Mr *Biti* that only a broad, generous and purposive interpretation would give full effect to the right to found a family enshrined in s 78(1) of the Constitution. In *Rattigan and Others v The Chief Immigration Officer and Others* 1994(2) ZLR 54 the Court held that the preferred constitutional construction “is one which serves the interest of the Constitution and best carries its objects and promotes its purpose”. See also *Smythe v Ushewokunze and Another* 1997(2) ZLR 544(S).

The interpretation of s 78(1) of the Constitution must take into account the provisions of subs(s) (2) and (3). Subsection (2) guarantees to the persons who have attained the age of eighteen years freedom to enter into marriage without compulsion and with free will. Section 26(a) which falls under Chapter 2 imposes an obligation on the State to take appropriate measures to ensure that no marriage is entered into without the free and full consent of the intending spouses.

For the persons who have attained the age of eighteen to enjoy the right to enter into marriage freely and with full consent as intending spouses, they must first have the right to enter into marriage. Similarly subs (3) which prohibits same sex persons from entering into marriage means that those with the right to enter into marriage are the persons mentioned in s 78(1) of the Constitution. It is the person mentioned in s 78(1) of the Constitution who is given

the right to exercise the right to enter into marriage with a person of the opposite sex who also has attained the age of eighteen years.

Both subs(s) (2) and (3) of s 78 of the Constitution do not guarantee the right to enter into marriage. The necessary implication leads to the conclusion that the right to enter into marriage is guaranteed to a man and woman who have attained the age of eighteen by s 78(1) of the Constitution. As the headnote states, s 78 of the Constitution is about “marriage rights”.

The Constitution does not specify the type or nature of marriage. A person can choose to enter into any kind of a marriage and found a family. The wide definition of marriage is that it is a union between a man and woman of full age who have freely and with full consent entered into an agreement to live together permanently as husband and wife, to have children and bring them up in a family. A family is a natural and fundamental group unit of society founded upon the union between a man and woman who have attained the age of eighteen years as provided for under s 78(1) of the Constitution.

Marriage is in fact the traditionally accepted way of founding a family. It is an important social relationship forming the foundation of a family entered into by free men and women in pursuit of happiness in family life. Entering into marriage is an exercise of the right to found a family. The right to found a family can, of course, be exercised by a single parent who lives with and brings up his or her children. A person can found a family in that respect, without necessarily getting married to the father or mother of the child with whom he or she lives as one household. Section 25(a) of the Constitution recognises a household in which a

father or a mother has charge of his or her children as a family deserving of protection by the State.

Section 78(1) of the Constitution means that everyone who has attained the age of 18 years has the right to enter into a marriage with a person of the opposite sex and found a family. See Mavedzenge and Coltart “*A Constitutional Law Guide Towards Understanding Zimbabwe’s Fundamental Socio-Economic and Cultural Human Rights*” 2014 p 146.

Section 78(1) of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe. Its effect is that a person who has not attained the age of eighteen has no legal capacity to marry. He or she has a fundamental right not to be subjected to any form of marriage regardless of its source. The corollary position is that a person who has attained the age of eighteen years has no right to marry a person aged below 18 years.

Section 81(1) of the Constitution puts the matter of the legal effect of s 78(1) of the Constitution beyond any doubt. It provides that a person aged below 18 years is “a child” entitled to the list of fundamental rights guaranteed and protected thereunder. That means that the enjoyment of the right to enter into marriage and found a family guaranteed to a person who has attained the age of 18 years is legally delayed in respect of a person who has not attained the age of eighteen years.

The effect of s 78(1) as read with s 81(1) of the Constitution is very clear. A child cannot found a family. There are no provisions in the Constitution for exceptional circumstances. It is an absolute prohibition in line with the provisions of Article 21(2) of the

ACRWC. The prohibition affects any kind of marriage whether based on civil, customary or religious law. The purpose of s 78(1) as read with s 81(1) of the Constitution is to ensure that social practices such as early marriages that subject children to exploitation and abuse are arrested. As a result, a child has acquired a right to be protected from any form of marriage.

Effect of Section 78(1) of the Constitution on Section 22(1) of the Marriage Act and Child

Marriage

The applicants contend that s 78(1) as read with s 81(1) of the Constitution had the effect of rendering s 22(1) of the Marriage Act invalid when it came into force on 22 May 2013. Mr *Biti* argued on behalf of the applicants that as s 78(1) of the Constitution contains an absolute prohibition of child marriage, s 22(1) of the Marriage Act cannot be construed to be in conformity with the Constitution.

The applicants contend further that as a result of the coming into force of s 78(1) as read with s 81(1) of the Constitution, child marriage has been abolished in Zimbabwe. The argument advanced on behalf of the applicants is that because the executive and legislative branches of government failed to take legislative measures to repeal s 22(1) of the Marriage Act, it has continued to provide the ghost of legitimacy to child marriages entered into after 22 May 2013. The factual basis of the applicants' contention is supplied by the findings of the Multiple Indicator Cluster Survey 2014. The findings of the survey were that 26.2 percent of young people aged 15-19 years were in marriage of which 24.5 per cent were females and only 1.7 per cent males.

The invalidity of existing legislation inconsistent with a constitutional provision occurs at the time the constitutional provision comes into force and not at the time a fundamental right is said to be infringed or when an order of invalidity is pronounced by a court. A statute which is enacted when the Constitution is in existence becomes invalid the moment it is enacted if it is inconsistent with a constitutional provision.

The rule of invalidity of a law or conduct is derived from the fundamental principle of the supremacy of the Constitution. Section 2(1) of the Constitution provides that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with its provisions is invalid to the extent of the inconsistency. A court does not create constitutional invalidity. It merely declares the position in law at the time the constitutional provision came into force or at the time the impugned statute was enacted. The principle of constitutionalism requires that all laws be consistent with the fundamental law to enjoy the legitimacy necessary for force and effect. It is for this Court to give a final and binding decision on the validity of legislation.

In *Ferreira v Levin supra* at para. 1006I-J ACKERMAN J remarked:

“The court’s order does not invalidate the law; it merely declares it invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court’s functions to determine and pronounce on the validity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation.”

At p 1007C the learned Judge said:

“A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect.”

Section 78(1) as read with s 81(1) of the Constitution sets forth the principle of equality in dignity and rights for girls and boys, effectively prohibiting discriminatory and unequal treatment on the ground of sex or gender. Consistent with Article 21(2) of the ACRWC, section 78(1) of the Constitution abolishes all types of child marriage and brooks no exception or dispensation as to age based on special circumstances of the child.

Section 78(1) of the Constitution permits of no exception for religious, customary or cultural practices that permit child marriage, nor does it allow for exceptions based on the consent of a public official, or of the parents or guardian of the child. When read together with s 81(1) of the Constitution, s 78(1) has effectively reviewed local traditions and customs on marriage. The legal change is consistent with the goals of social justice at the centre of international human rights standards requiring Zimbabwe to take appropriate legislative measures, including constitutional provisions, to modify or abolish existing laws, regulations, customs and practices inconsistent with the fundamental rights of the child. There was obvious social need to break with the past where a child aged sixteen could be turned into a wife.

Section 78(1) of the Constitution is based on the principle that only free men and women of full age should marry. When men and women marry, they assume important responsibilities. They must have reached the legal age of maturity when they have the capacity to freely choose their partners and be able to give free and full consent to marriage. Section

78(1) provides, in effect, that a person aged below 18 years has not attained full maturity and lacks capacity to understand the meaning and responsibilities of marriage.

The rights to marry and found a family are rights to be enjoyed by adults and not children. The Inter-African Committee on Traditional Practices Affecting the Health of Children states that early marriage is “any marriage carried out below the age of 18 years, before the girl is physically, physiologically and psychologically ready to shoulder the responsibilities of marriage and child bearing”.

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

In light of the overwhelming empirical evidence on the harmful effects of early marriage on girl children, no law which authorises such marriage can be said to do so to protect “the best interests of the child”. The best interests of the child would be served, in the circumstances, by legislation which repealed s 22(1) of the Marriage Act. By exposing girl children to the horrific consequences of early marriage in clear violation of their fundamental rights as children s 22(1) of the Marriage Act is contrary to public interest in the welfare of children. Failure by the State to take such legislative measures to protect the rights of the girl-child when it was under a duty to act, denied the girl children subjected to child marriages the right to equal protection of the law.

Surprisingly Mrs *Zvedi* for the respondents, sought to justify marriage under s 22(1) of the Marriage Act on the ground that a girl physiologically, psychologically and emotionally matures earlier than a boy. The contention is without scientific evidence to support it. The Zimbabwe Human Rights Bulletin Number 98, August 2014 states that the reason why eighteen years is specified under international human rights law and national constitutions as the minimum age for marriage, is that a person of that age is considered to be psychologically and physiologically developed enough for the responsibilities and consequences of marriage and is capable of giving free and full consent to marriage.

As a matter of fact the Inter-African Committee on Traditional Practices Affecting the Health of Children gives the rationale for international human rights law setting eighteen years as the minimum age for marriage, as being that a girl aged below 18 years is invariably, physically, physiologically and psychologically immature to shoulder the responsibilities of marriage and child bearing. The horrific consequences of child marriage are clear testimony to the flaw in the respondents' argument.

It is important to recall the comment by the CEDAW Committee in General Recommendation 21 para. 38 to the effect that s 22(1) of the Marriage Act assumed, incorrectly that girls have a different rate of intellectual development from boys or that their stage of physical and intellectual development at marriage is immaterial.

The respondents failed to appreciate that it is not the circumstance or condition of the child that is the determinant factor when the effect of s 78(1) of the Constitution on legislation is considered. Section 78(1) has the effect of protecting every child equally

regardless of his or her personal condition. The factor of a girl maturing earlier than a boy said to be the rationale for the differences in the treatment of girls and boys authorised by the impugned legislation, is of no consequence in the determination of the effect of s 78(1) of the Constitution on the validity of the legislation. Section 78(1) entitles a girl and a boy to equal protection and treatment before the law.

It is regrettable that the respondents failed to appreciate that the rationale they advanced in support of the difference in the treatment of girls and boys formalised by the impugned legislation, is the old stereotypical notion that females were destined solely for the home and the rearing of children of the family and that only the males were destined for the market place and the world of ideas. See *Stanton v Stanton* 421 US 7(1975). The contention by the respondents is contrary to the fundamental values of human dignity, gender equality, social justice and freedom which the people of Zimbabwe have committed themselves to uphold and promote through legislation governing the interests of children.

Fear was also expressed that, if s 22(1) of the Marriage Act and any other law or custom which authorises child marriage were declared unconstitutional and struck down, men would impregnate girls and not bear the responsibility of having to marry them. The short answer to the concern is that once it is accepted, as it should be, that ss 78(1) and 81(1) of the Constitution guarantee and protect the right to equality of treatment before the law to a girl and a boy without provision for exceptions, the circumstance of a girl getting pregnant does not disentitle her from the enjoyment of all the rights of a child enshrined in s 81(1) of the Constitution.

A girl does not become an adult and therefore eligible for marriage because she has become pregnant. The effect of the protection under s 78(1) as read with s 81(1) of the Constitution, is that a girl remains a child regardless of her pregnancy status until she attains the age of 18 years. Whilst she is a child all the fundamental rights of a child protect her from being subjected to any form of marriage. The pregnant girl is entitled to parental care and schooling just as any other child is entitled. This means that the parental obligation to care for and control the girl child does not cease because of her pregnancy.

Resistance to the liberation of the girl child from the shackles of child marriage and its horrific consequences based on conceptions of sex discrimination is against the best interests of the girl child served by the enforcement of the fundamental rights enshrined in ss 78(1) and 81(1) of the Constitution. Girl children are entitled to effective protection by the Court which is the upper guardian of the rights of children and whose duty it is to enforce the fundamental rights designed for their protection. The history of the struggle against child marriage sadly shows that there has been, for a long time, lack of common social consciousness on the problems of girls who became victims of early marriages.

There is a difference between making a man take responsibility for the pregnancy of a girl and the maintenance of the baby once it is born and compelling a girl child to get married because she got pregnant. The issue of early pregnancy is a social problem that needs cooperation amongst all stakeholders to solve. It would, in fact, be a form of abuse of a girl child to compel her to be married because she got pregnant. That in any case cannot happen without a contravention of s 78(1) as read with s 81(1) of the Constitution. What is clear is that pregnancy can no longer be an excuse for child marriage.

There cannot be a family founded by a child. Even under the provisions of s 22(1) of the Marriage Act, pregnancy was not regarded as a condition necessary for marriage. Of urgency is the prevention of the ongoing violations of the girl child's fundamental rights. Once the fact that child marriage has been abolished in Zimbabwe is known, the imperative character of the law shall be felt in the hearts and minds of many men and women so strongly that transformative obedience to it shall become a matter of habit.

APPROPRIATE RELIEF

The applicants have succeeded in showing that s 78(1) of the Constitution sets 18 years as the minimum age of marriage in Zimbabwe. They have also succeeded in showing that s 22(1) of the Marriage Act and any law, custom and practice which authorises child marriage is unconstitutional. That would include the Customary Marriages Act [*Chapter 5:07*] to the extent that it authorises child marriage.

The duty of the Court is to declare legislation which is inconsistent with the Constitution to be invalid. Section 175(6)(b) of the Constitution gives the Court a discretion to make an order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity. In the exercise of its discretion, the Court is cognisant of the immense disruption that a retrospective declaration of invalidity may cause on the persons who conducted themselves on the basis that the legislation was valid. The Court has found it in the public interest to make the order granted to have effect from the date of issue.

Notwithstanding the spirited opposition the respondents put up to the application for the relief to be granted, the Court finds that no good reasons were shown for an order of costs against the respondents. The application raised questions of national importance,

the answers to which were not so obvious. The litigation really concerned the ending of the problem of child marriage.

DISPOSITION

The court makes the following order:

1. The application succeeds.
2. It is declared that s 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 sets eighteen years as the minimum age of marriage in Zimbabwe.
3. It is further declared that s 22(1) of the Marriage Act [*Chapter 5:11*] or any law, practice or custom authorising a person under eighteen years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down.
4. With effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years.
5. Each party shall bear its own costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

HLATSHWAYO JCC: - I respectfully agree with the Honourable Deputy Chief Justice’s reasoning and conclusion that on a proper construction, the Constitution by necessary implication sets the minimum age of consent to marriage at eighteen years. I do so also for the additional reasons pertaining to the structure and scheme of the section, and to the legislative history of the provision which in my view one can fairly take judicial notice of.

The predecessor provisions to s 78 of the Constitution can be found in the Draft Constitutional Proposals 1 of the Parliamentary Select Committee (COPAC) of 26 January 2012 (hereinafter termed ‘Proposal 1’), the Draft Constitutional Proposals of 18 July 2012 (‘the 18 July 2012 Draft’) and the 2000 Draft Constitution of Zimbabwe.

Section 78 of the **Constitution states:**

“78 Marriage rights

- 1) Every person who has attained the age of eighteen years has the right to found a family
- 2) No person may be compelled to enter into marriage against their will
- 3) Persons of the same sex are prohibited from marrying each other.”

An equivalent provision in the earlier COPAC Draft, Proposal 1, stated as follows:

“4.25 Marriage

- 1) Everyone who has attained the age of eighteen years has the right to marry and found a family and no such person may be prevented from entering into marriage
- 2) No one may be compelled to enter into marriage against their will.” [emphasis added]

What is critical to note here is that the COPAC Proposal 1 formulation clearly linked the right to marry with the right to found a family and stipulated the minimum age of eighteen as a requirement for the enjoyment of the right to marry and/or found a family. The next COPAC Draft, the 18 July 2012 Draft, juxtaposes the minimum age of eighteen years with the concept of “marriageable age” in a most confusing manner, thus:

“4.35 Marriage rights

- 1) Every person who has attained the age of eighteen years has the right to marry a person of the opposite sex who is of marriageable age, and no such person may be prevented from entering into such a marriage
- 2) Every person who has attained the age of eighteen years has the right to found a family
- 3) No person may be compelled to enter into marriage against their will.”

It is not clear in this draft how the entitlement to marry upon attaining eighteen years can be attenuated by the concept of marriageable age. However, the Draft provisions show that when the drafters formulated the final provision in s78, they were fully cognisant of

the term “marriageable age” which may be deployed to leave the fixing of the age of marriage to separate legislation other than the Constitution itself. They chose not to do so and by necessary implication set the minimum age of eighteen in the Constitution. By contrast the equivalent provision in the 2000 Draft Constitution specifically relegates the fixing of the marriage age to separate legislation, thus:

“27 Marriage

The State must take appropriate measures to ensure that –

- a) Men and women of marriageable age are free to marry each other and found a family.” [emphasis added]

Section 78 is headed ‘Marriage rights’, yet the main provision (subsection (1)) does not contain the word “marriage”. The other subsections are all about marriage. It is thus necessary, as well as just and equitable, to construe subsection (1) of section 78 as if it read:

- “1) Every person who has attained the age of eighteen years has the right to marry and found a family.”

The legislative history of the provision, the general scheme of the section itself and a reading of the section in conjunction with the other provisions of the Constitution – all support the view that, by necessary implication, s 78 of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe.

Finally, while this judgment may have addressed the issue of child marriages, this is akin to the mending of the roof during the storm in the sense that a myriad of legislative and State resource mobilization measures have become urgent and imperative consequent upon this decision. One can but point out just a few imperatives:

The age of sexual consent which currently stands at sixteen years is now seriously misaligned with the new minimum age of marriage of eighteen years. This means that, absent legislative intervention and other measures, the scourge of early sexual activity, child pregnancies and related devastating health complications are likely to continue and even increase. The upside is that the new age of marriage might have the positive effect of delaying sexual activity or child bearing until spouses are nearer the age of eighteen. The downside is that children between sixteen and eighteen years may be preyed upon by the sexually irresponsible without such people being called upon to take responsibility and immediately marry them. Thus, there is an urgent need, while respecting children's sexual rights especially as between age mates as opposed to inter-generational sexual relationships, to extend to the under-eighteens the kind of protection currently existing for under-sixteens with the necessary adjustments and exceptions.

And when children beget children, the health, social and economic burdens on the children themselves, their babies and their parents or guardians becomes overwhelming. The provision of the Constitution relating especially to the protection of the family must be urgently activated to meet this challenge. Section 25 of the Constitution under the National Objectives states as follows:

“25. Protection of the family

The State and all institutions and agencies of the government at every level must protect and foster the institution of the family and in particular must endeavour, within the limits of resources available to them, to adopt measures for –

- a) the provision of care and assistance to mothers, fathers and other family members who have charge of children; and
- b) the prevention of domestic violence.” [emphasis added]

It is also hoped that international and non-governmental organisations – some of which commendably motivated this application – will show the same or even more enthusiasm in the raising of the huge resources noted above and in contributing to the refinement of the local laws both civil and criminal consequent upon this decision as they showed in advocating the abolition of child marriages in Zimbabwe.

Accordingly, I am of the view that the order outlined in the main judgment by the Honourable Deputy Chief Justice is, with respect, the appropriate order in the circumstances.

Tendai Biti Law, applicants' legal practitioners

Civil Division of the Attorney General's Office, respondents' legal practitioners