

EAST AFRICAN LAW JOURNAL
Special Issue: Marriage, Property and Equality:
Reflecting on a Decade of Family Law Reform in Kenya

2025

FACULTY OF LAW, UNIVERSITY OF NAIROBI



THE END OF CHILD MARRIAGES IN ZAMBIA? AN APPRAISAL OF THE MARRIAGE (AMENDMENT) ACT OF 2023 AND THE MATRIMONIAL CAUSES (AMENDMENT) ACT OF 2024

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Abstract

This article appraises the Marriage (Amendment) Act, 2023 and the Matrimonial Causes (Amendment) Act, 2024 (the new laws), which introduced a uniform age of marriage of 18 years and nullified as void any purported marriage with a person below this age. The paper argues that together with the 2016 constitutional amendment and the Children's Code Act 2022, the new laws represent a significant and commendable step towards ending child marriage in Zambia, but they are limited and their implementation potentially threatened by several challenges. These challenges range from a potential constitutionality challenge to ambiguities and gaps in the legal provisions, inadequate protection for certain categories of children, divergence between the new laws and people's living customary law within the context of legal pluralism, and poverty and impunity which call for solutions beyond law. The paper also attempts to make recommendations to counter these challenges, in order to achieve comprehensive reform of the law toward eradicating the scourge of child marriage in the country.

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I. Introduction

This article examines two recent legislative interventions that have amended the law to do away with the legal basis for solemnization of child marriages in Zambia. These legislative interventions are the Marriage (Amendment) Act, 2023¹ and the Matrimonial Causes (Amendment) Act, 2024², which will be referred to simply as the new laws. Prior to these laws, there was no explicit uniform minimum age for marriage. The Children's Code Act, enacted in 2022,³ defined a child as a person under the age of 18 years and prohibited child marriage.⁴ However, it did not provide for legal consequences following annulment of a purported child marriage, and at the time of its enactment, the law on marriage permitted marriage of persons under the age of 18. Although this law on children will be referred to in appropriate cases, this article's central focus are the new laws of 2023 and 2024.

Historically, both the received law (also referred to as the civil law) and customary law permitted child marriage. The civil law provided that 16 years was the minimum age for marriage, while customary law used the attainment of puberty as the proxy for minimum age for marriage.

A 2016 amendment of the Constitution of Zambia introduced the age of 18 years as the age of majority for all legal purposes, by defining 'child' under article 266 as a person of the age of 18 years and below.⁵ Prior to 2016, the age of majority was based on the received English common law, which set it at 21 years.⁶ Thus, until the new laws of 2023 and 2024, Zambian law conferred legal capacity on individuals to marry before they attained the legal age of majority of 21 years.

The new laws have changed this position by introducing 18 as the uniform minimum age for both civil and customary marriages, aligning with the Children's Code Act and the constitutional age of majority of 18 years. Therefore, any marriage between parties either of whom is below the age of 18 years is considered child marriage.

This article appraises these new laws, arguing that while the good intentions and potential benefits of the new laws are beyond question, their social reach is limited, and their implementation may face an uphill challenge on account of several issues.

1 Marriage (Amendment) Act 2023 (Zambia), <<https://zambialii.org/search/?q=Marriage+%28Amendment%29+Act+2023>> accessed 9 July 2025.

2 Matrimonial Causes (Amendment) Act 2024 (Zambia) <<https://zambialii.org/search/?q=Matrimonial+Caus+es+%28Amendment%29+Act%2C+2024>> accessed 9 July 2025.

3 Children's Code Act, 2022 (Zambia).

4 Ibid, s 18(2)(a)(b).

5 See Constitution (Amendment) Act No. 2, 2016 (Zambia) (hereafter, Constitution of Zambia).

6 N.V. Lowe and G. Douglas (eds), *Bromley's Family Law* (9th edn Butterworths 1998) 288; See also Chuma N. Himonga, 'Family and Succession Laws Zambia', *International Encyclopedia of Laws, Family 108* (Wolters Kluwer 2025) [65].

First, the new laws, as far as they apply to customary marriages, are susceptible to a constitutionality challenge founded on Article 23(4) of the Constitution,⁷ which exempts customary family law from the anti-discrimination provision of the Constitution.

Second, some provisions of the new laws have given rise to ambiguities which undermine the internal coherence of the legal framework. They also leave gaps in legal protection, limiting the substantive rights of children upon the nullification of child marriages under customary law.

Thirdly, the new laws risk suffering a legitimacy deficit on account of their incongruity with living customary law.

Fourthly, the laws' effectiveness will need concerted investment in improving the institutional measures that are indispensable to enforcing a ban on child marriage, such as universal registration of births and marriages.

Fifthly, the overall context of poverty that permits child marriage to be perceived as inevitable in difficult socio-economic circumstances feeds impunity for child marriage and calls for investment in measures beyond legal reform.

These issues not only have potential to undermine effective implementation of the law but also to limit Zambia's initiative and quest to achieve comprehensive legal and social reform toward ending child marriage.

The article consists of five sections. After this introduction, section 2 situates the reforms in their legal and social contexts, in view of the prevalence of child marriage in Zambia. Section 3 examines the new laws' alignment with regional human rights standards. Section 4 elaborates on the potential challenges headlined above and discusses measures that may be taken to counter these challenges. The fifth section presents the conclusion and synthesizes the article's recommendations.

⁷ Constitution of Zambia, 2016.

II. Social and Legal Context of the Legislative Reforms

A. Prevalence of Child Marriage in Zambia

Zambia is reported to be among the countries with the highest incidence of child marriage. As of 2023, 29% of females were married by the age of 18.⁸ Child marriage rates for girls are ten times higher than those of boys: only 3% of males were married by the age of 18 in the same period. Thus the impact of child marriage on girls is disproportionately greater. This has been attributed to limited or curtailed access to education, patriarchal norms that perpetrate gender discrimination, often justified on cultural and religious beliefs, driven by a context of poverty.⁹

The phenomenon of child marriage is not unique to Zambia. It is a global problem cutting across different historical periods of human existence. Studies have reported on the prevalence of child marriage, even in modern times, in South Asia, West and Central Africa, Latin America, the Caribbean, the Middle East, North Africa, East Asia, the Pacific, Central and Eastern Europe and the Commonwealth of Independent States.¹⁰ Globally, over 700 million women between the ages of 20 and 49 years are reported to have married when they were under the age of 18 years.¹¹ While UNICEF has noted a steady decline in child marriage globally over the past decade, it acknowledges that this harmful practice 'remains widespread, with approximately one in five girls married in childhood across the globe.'¹²

8 See UNICEF, 'The State of the World's Children, 2024: Statistical Compendium', (UNICEF 2024) <<https://www.unicef.org/reports/state-of-worlds-children/2024#downloads>> accessed 16 May 2025; In 2020, the country was reported to have a total of 1.7 million child brides, 400,000 of whom were married before the age of 15, see UNFPA-UNICEF, 'Global Programme to End Child Marriage, Country Profile, Zambia', (2020) <<https://www.unicef.org/media/111416/file/Child-marriage-country-profile-Zambia-2021.pdf>> accessed 10 July 2025. This source has also reported that 'The practice has become less common in the past decades, with 29 per cent of all young women aged 20–24 married before 18 years old, and 5 per cent before turning 15, in 2018, compared with 46 and 10 per cent, respectively, in 1993. However, the progress observed is not enough to eliminate child marriage by 2030 as set out in the Sustainable Development Goals (SDGs) – if the progress observed over the past 10 years continues, 22 per cent of all girls in Zambia will still be married in childhood at the end of this decade, and even if the rate of progress is doubled, 16 per cent of all girls will still be child brides in Zambia in 2030.' See UNFPA-UNICEF, 2.

9 See Equality Now, 'Illegal to Marry Below 18 -Zambia Passes the Landmark Marriage (Amendment) Act, 2023' (*Equality Now* 19th January 2024) < <https://equalitynow.org/news/press-releases/illegal-to-marry-below-18-zambia-passes-the-landmark-marriage-amendment-act-2023/> > accessed 10 July 2025; Plan International, 'Plan 18+Programme on Ending Child Marriage in Southern Africa Policy Brief Ending Child Marriage in Zambia: Gaps and Opportunities in Legal and Regulatory Frameworks' [3] (Plan International 2016) <https://www.girlsnotbrides.es/documents/506/PLAN_18_policy_brief_zambia_final.pdf> accessed 10 July 2025.; Population Council Zambia 'Ending Child Marriage in Zambia: Implications and Considerations for Accelerating Progress in the Context of Zambia's Marriage (Amendment) Act No. 13 of 2023 Policy Brief 2 2024 <https://zambia.unfpa.org/sites/default/files/pub-pdf/ecm_policy_brief_zambia_2024_1.pdf> accessed 14 April 2025.

10 For example, Amber Pariona, 'Prevalence of Child Marriage Around The World - World Atlas; 10 Modern Countries Where Child Marriage Still Occurs (*World Atlas, Society* April 25 2017) <<https://www.worldatlas.com/articles/prevalence-of-child-marriage-in-various-regions-of-the-world.html>> accessed 23 June 2025.

11 Ibid.

12 UNICEF 'Child Marriage, Child Marriage threatens the lives, Well-being and futures of girls across the world' (UNICEF) 2023 <<https://www.unicef.org/protection/child-marriage>> accessed 10 July 2025.

In Zambia, policy-level commitment to eradicating child marriage is evident in several initiatives of the government and various other stakeholders, summarized here in chronological order. In 2013, the Government, through the 'Ministry of Chiefs and Traditional Affairs, launched a campaign to end child marriage, which focused on engaging traditional leaders to support the government in reforming the law'.¹³ The Government and stakeholders on ending child marriage engaged with the media to report regularly on child marriage in support of the 2013 campaign.¹⁴ In the same year, the Government of Zambia partnered with the Government of Canada to co-sponsor the first UN General Assembly (UNGA) resolution on child, early and forced marriage. The resolution was preceded by 'the very first UNGA panel discussion which considered the implications of child marriage for the post-2015 development agenda'.¹⁵

In July 2014, eight Zambian Government ministers, including the Minister of Justice, made a commitment to address child marriage at the Girl Summit held by the British Government and UNICEF to 'mobilize commitments for ending early and forced marriage within a generation'.¹⁶ Zambia hosted the First African Girls' Summit to End Child Marriage in November 2015.¹⁷

Zambia was one of the countries that spearheaded the enactment of the Southern Africa Development Community (SADC) Parliamentary Forum Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage, adopted on 16th June 2016 (hereinafter SADC Model Law).¹⁸

13 Girls Not Brides, 'Zambia adopts national strategy to end child marriage by 20230', (*Girls Not Brides* 22 April 2016) <<https://www.girlsnotbrides.es/articulos/zambia-adopts-national-strategy-to-end-child-marriage-by-2030/#:~:text=It%20follows%20the%202013%20launch,children's%20vulnerability%20to%20child-%20marriage>> accessed 8 April 2025.

14 Plan International (n 9) [3].

15 Girls Not Brides, 'Zambian Government steps up efforts to end child marriages in Zambia', (*Girls Not Brides* 28 July 2024) <<https://www.fillespasepouses.org/articles/zambian-government-steps-efforts-end-child-marriage-zambia/>> accessed 8 April 2025.

16 Ibid.

17 Plan International, (n 9) [3].

18 Zambia is not only a member of SADC but it was also at the forefront of drawing up the Model Law See Zambia National Assembly Debate 29 July 2015 <https://www.parliament.gov.zm/node/4548> accessed 7 April 2025 - (there are no page numbers for the debates on the Parliamentary website; consequently, only the date of the debate and the relevant links are cited for all references to the debates in this article) in which Ms. Imenda MP indicated that she was the one who, as the chairperson of the Committee on Human and Social Development and Special Programmes of SADC-PF, moved a Motion on the issue of ending child marriage, and that the expert drafts person for the model was a Zambian; For detailed discussion and guide to the use of the Model (hereinafter Zambia Parliamentary Debates), see, Southern African Development Community Parliamentary Forum (SADC-PF); Girls Not Brides, and United Nations Population Fund (UNFPA) *A Guide to Using the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage For Parliamentarians, Civil Society Organisations and Youth Advocates* (2018) < <https://www.girlsnotbrides.org/learning-resources/resource-centre/a-guide-to-using-the-sadc-model-law-on-eradicating-child-marriage-and-protecting-children-already-in-marriage/>> accessed 14 April 2025.

The National Plan of Action for the National Strategy on Ending Child Marriage 2016 – 2021 was launched in December 2017.¹⁹

UNICEF developed the National Advocacy and Communication Strategy on ‘Ending Child Marriage in Zambia (2018-2021) Movers and Models for Change on Ending Child Marriage in Zambia,’ which was aimed at enhancing the implementation of the National Strategy on Ending Child Marriage 2016 – 2021.²⁰

These initiatives no doubt laid the groundwork for the legislative amendments that were enacted in 2023 and 2024.²¹

B. Contemporary Studies, the Media, and Parliamentary Debates

Contemporary studies, the media and parliamentary debates reveal the social context for the enactment of the new laws.

Studies have shown the harmful effects of child marriages on the children in these relationships, including robbing them of their childhood; disrupting their education; exposing them to different kinds of vulnerability, such as death due to complications in pregnancy and childbirth; physical, economic, sexual and gender-based violence; abuse and discrimination²² and, generally, violating their international human rights enshrined in treaties that States, including Zambia, have ratified.²³

The following story reported in the media is an example of the plight of some children in child marriages, including experiences of beatings from husbands on account of their inexperience as spouses:

‘He [the husband] used to beat me up on a daily basis on account that my parents did not teach me properly, that I am very dirty and childish. But my parents would console me, saying “men are like that’ and [he] would eventually stop.” Now that

19 See UNICEF, *National Advocacy and Communication Strategy: Ending Child Marriage in Zambia (2018–2021)* <<https://www.unicef.org/zambia/reports/national-advocacy-and-communication-strategy-ending-child-marriage-zambia-2018-2021>> accessed 2 April 2025.

20 Ibid.

21 There is no single source in which the role played by these initiatives is discussed, but the literature in which each one is discussed indicates the advocacy role they played in ending child marriage.

22 See, for example, Population Council Zambia n 9 [1]; UNFPA, Population Council, and Government of the Republic of Zambia ‘Child Marriage in Zambia,’ Policy Brief 2017 [2]. <https://zambia.unfpa.org/sites/default/files/pub-pdf/Child%20Marriage%20in%20Zambia.pdf> <accessed 22 July 2025>.

23 These include the: United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 2 (CRC) (hereinafter the United Nations Convention on the Rights of the Child); United Nations Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) (hereinafter CEDAW); African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) (hereinafter African Charter on the Rights and Welfare of the Child) ; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (Maputo Protocol) (hereinafter Maputo Protocol).

I have been retrieved from marriage, I am looking forward to going back to school as promised.’²⁴

The media also carried stories associating child marriage with poverty in families in Zambia. One media commentor stated:

‘[C]hild marriages in Zambia are associated with high levels of poverty. “When a parent has a girl child, all they see is ready cash to be fetched from a ‘bride price’, ranging from K6,000 (\$570) to K10,000 (\$980). This has been subjecting children to not only being parents at a tender age but also to many health complications, including maternal mortality.’²⁵

In the same media report, a mother explained her experience of child marriage in the context of poverty: she had been ‘approached to marry off her 15-year-old daughter to a wealthy man in the district -- something which would help solve the family’s financial problems.’²⁶ She later regretted ‘seeing her daughter in a marriage where she was repeatedly exposed to pregnancies and childbirth before she was physically and psychologically ready.’²⁷

The connection between poverty and child marriage was also a major concern of some members of Parliament (MPs) during the debate on the Motion introduced in Parliament in 2015 to urge the government to expedite the enactment of the law to end child marriages, and to come up with punitive measures for perpetrators of child marriage (hereafter referred to as the Motion). The following excerpts provide examples from the debate on the Motion addressing poverty as a trigger of child marriage:²⁸

There is a positive correlation between poverty and child marriages. Even as we strengthen the laws, we must also deal with the attendant factors that drive these marriages. The poorer provinces have higher levels of child marriages. Hence, dealing with poverty can also help us to deal with child marriages.

‘[These] are the exact realities of life that procreation mixed with poverty is an ingredient enough for early marriages because, now, even the minds of parents are blocked and they cannot take their children to school, they will sit and say, “target that one.” Just make sure that you are safe by using condoms. Give it to him in exchange for money.’

‘A few people are living very well while many are becoming poor and, therefore, the poor have devised other methods of survival. Sometimes they take child marriages

24 Francis Maingaila ‘Zambian Tribal Chiefs Fighting Against Child Marriage’, (*Anadolu Agency 07/06/2026 updated 08/06/2026*) <<https://www.aa.com.tr/en/africa/zambian-tribal-chiefs-fighting-against-child-marriage/585443>> accessed 8 April 2025.

25 Ibid.

26 Francis Maingaila (n 24).

27 Ibid.

28 Zambia Parliamentary debates (n 18).

as an avenue for survival. We must deal with poverty strongly. Institutions tasked with dealing with poverty must begin to deliver. We must go beyond just talking. If we do not reduce poverty and just legislate and put the best laws in place, we will not reduce child marriages because the underlining driver of these marriages is poverty.'

'[T]hey say that no one is above the law and it is true, but human beings are more important than the law. That is the issue here. Therefore, where people are squeezed in the shackles of poverty and their only means of survival is to break the law, then, they will break the law [...] Let us deal with poverty strongly to augment the strong legislation that my colleagues are calling for.'

The MPs also expressed numerous other social issues in their debate, including those identified by contemporary studies above, showing how serious they considered the problem of child marriage to be and the need to legislate against it.²⁹

It is noteworthy that the MP who seconded the Motion characterised it as "non-political," meaning, because of the importance of the Motion, all MPs, regardless of their political affiliation, should support it. Indeed, a perusal of the debates on the Motion, as well as subsequent debates on the second reading of the Marriage (Amendment) Bill in 2023,³⁰ revealed no opposition to the enactment of the Bill *per se*, although some MPs raised concern about potential challenges to the implementation of the new law.

The legal context did not escape the scrutiny of MPs. They raised the concern that both customary law and statutory law sanctioned child marriage. This legal context is discussed in the next section.

C. Legal Context: Culpability of Both Customary Law and Civil Law for Child Marriage

Like other Anglophone and Roman-Dutch African countries, Zambia has a pluralistic family law system, consisting of civil law and customary law.³¹ Customary law comprises both the oral, living customary laws of about 73 ethnic groupings (divided into matrilineal and patrilineal groups) and official customary law found mainly in judicial precedents.³² The important point for present purposes is that all these components of the Zambian pluralistic legal system have contributed, in different degrees, to the legal environment responsible for the high rates of child marriage in the country.

29 Ibid.

30 See Zambia Parliamentary Debates 2 November 2023 <<https://www.parliament.gov.zm/node/4548>> accessed July 10 2025.

31 The difference among the different countries is the degree to which customary law is recognised as part of the legal system, on one hand, and the integration of customary marriage law and the civil law of marriage, on the other hand.

32 For discussion of the distinction between 'living' and 'official' customary law see Himonga (n 6) [24]-[26] and the references therein.

Customary law contributed in two main ways to the creation of an environment in which child marriages took place: the definition of the age for marriage and the exclusion of criminal liability for sexual offences against children if they were in customary marriages.³³

Traditionally, customary law does not define the age for marriage in numerical terms. Rather the attainment of puberty, manifested in girls by the commencement of menstruation, and other sociological indicators, such as “withdrawal from or failure to complete school; engagement in sexual relationships, full-time labour or wage employment and the development of capacity to care for oneself and others,”³⁴ define a person’s capacity and readiness for marriage. A girl may attain puberty at a very young age (for example, 9-13³⁵) and, therefore, become eligible for marriage. In boys the age of puberty is determined by the maturity of the boy, evidenced by his relative ability to support a family.³⁶

This proxy definition of the minimum age for marriage under customary law was implicitly endorsed by criminal law, which excluded customary marriages from the definition of certain crimes against children. For example, the Penal Code³⁷ creates the offence of indecent assault or carnal knowledge of a child. It sets the relevant age as 16 for girls and 14 boys. The courts have historically interpreted these provisions as excluding the application of the offence of carnal knowledge of a child to parties in a customary marriage, as the following two cases show.

In the High Court decision of *R v. Chinjamba*,³⁸ a man had been married by customary law to a girl under the age of 16 years. He was charged with the offence of having carnal knowledge of a girl under the age of 16 years, contrary to the Penal Code. The court held that the marriage to the girl, although invalid under the Marriage Ordinance, was perfectly valid under customary law. Consequently, the husband could not be accused of having unlawful carnal knowledge of a girl who was lawfully married to him under customary law. The accused was acquitted. Similarly, in *R v. Majoni*,³⁹ the court held, *obiter*, that the accused would not have been convicted of defilement if he had been able to establish the existence of a customary marriage with the girl.

33 The proposition is based on deductions from the literature, legislation and case law that defines the capacity of boys and girls to marry under customary law, some of which are cited in this part of the paper.

34 UNFA, Population Council and Government of the Republic of Zambia (n 9) [2].

35 *Ibid.*

36 See Himonga (n 6) [85]; Chief Chamuka, ‘The Marriage Amendment Act no. 13 of 2023: Implications on the offence of child marriage and defilement in Zambia,’ Paper presented at the National Prosecution Conference, Lusaka, Mulungushi Conference Centre, 16th to 18th September 2024, 2 <<https://www.npa.gov.zm/wp-content/uploads/2024/09/Royal-Highness-Chief-Chamuka.pdf>> accessed 11 July 2025 [1].

37 Penal Code (Chapter 87 of the Laws of Zambia), ss. 137(1) (2), 138(1) (2) and 157. There should be no confusion here about the age of majority which is set at 18 years by the Constitution.

38 *NRLR* 5 (1949), 384.

39 *R v. Majoni* R&NLR [1963], 143.

In sum, the lack of a defined minimum age for marriage under customary law contributed directly to the continued existence of child marriages, which were insulated from the criminal law aimed at protecting children from sexual assault.

In civil marriage law, the marriage of a person under the age of 16 years was prohibited and it was void *ab initio*.⁴⁰ The minimum age of marriage under the civil law was therefore 16 years. However, a person below the age of 16 could be permitted to marry with the consent of a judge of the High Court.⁴¹ The marriage of a person over the age of 16 years but below the age of majority of 21 years was also permitted if the parents of the minor gave written consent.⁴² The scope of this provision was extended by a High Court decision in 1976, which held that the marriage of a person aged above 16 but below 21 was valid even if there was no parental consent.⁴³ The court also held that the mere presence of the parent or guardian at the marriage ceremony of the party concerned would be construed as consent.⁴⁴ Furthermore, the law permitted the subsequent remarriage of minors who were widowed or divorced while still minors, requiring neither parental consent nor judicial approval.⁴⁵

The new laws essentially seek to withdraw legal cover for child marriages under both customary law and civil law explicitly. Both the 2023 amendment to the Marriage Act and the 2024 amendment to the Matrimonial Causes Act insert a new definition of 'child' under section 2 by adopting the definition in the 2016 Constitution (a person below the age of 18 years). The 2023 amendment repeals section 33 of the Marriage Act which dealt with void marriages and replaces it with an explicit declaration that any marriage that involves a child is void. The original section 33 contained a proviso recognizing as valid the marriage of a person below the age of 16 with the permission of a High Court judge. Section 34 is substituted by wording that gives legal recognition to customary marriages but subjects them to the new section 33, effectively rendering void any customary marriages that involve children.⁴⁶ Prior to the 2023 amendment, the Marriage Act did not make any stipulations concerning customary marriage of persons below the then statutory minimum marriage age of 16 years.

Besides adopting the constitution's definition of a child, the 2024 amendment to the Matrimonial Causes Act (MCA) only amended section 27(1)(a). The original section dealt with decrees for nullity of marriage, and it referenced the proviso under section 33 of the Marriage Act, which recognised child marriage with the permission of a High Court judge. The 2024 amendment effectively seals this loophole, thus

40 Marriage Act (Cap.50 Laws of Zambia), s 33(1). For detailed discussion, see Himonga (n 6) [90].

41 Marriage Act ((Cap.50 Laws of Zambia), s 33(2). For detailed discussion, see Himonga (n 6).

42 Marriage Act (Cap.50 Laws of Zambia), section 17. For detailed discussion, see Himonga (n 6).

43 *Muyamwa v. Muyamwa* (1976) ZR 146. For detailed discussion, see Himonga (n 6).

44 *Ibid.*

45 Section 17 of the Act does not include a divorced person among the exceptions.

46 See Marriage (Amendment) Act 2023 (Zambia), ss 3 and 4.

invalidating all marriages in which either party was a child at the time of celebration of the marriage.⁴⁷

D. Stakeholders' Response to the Amendments

The responses of selected key stakeholders are presented here, to give a sense of the variety of responses nationally, regionally and internationally. The responses, for the most part, signal a commitment to making the goal of the new laws of ending child marriage a reality. The research for this paper did not find any overt opposition to the enactment of the new laws.⁴⁸

The Marriage (Amendment) Act 2023 in particular, has been praised as a landmark and promising piece of legislation by stakeholders, including gender equality advocates and, most unexpectedly, traditional leaders. There is also evidence of commitment by some of these stakeholders to take measures to implement the Act. For example, Equality Now applauds the Act as:

'a momentous stride towards safeguarding children's rights... This landmark legislation unequivocally sets a significant shift in the nation's commitment to eradicating child marriage. Research shows that robust laws prohibiting the practice have a positive influence on lowering rates of child marriage and adolescent pregnancy, and children's general welfare improves.'⁴⁹

The Population Council of Zambia and other collaborating partners have also issued a policy brief, which not only acclaims the Marriage (Amendment) Act as a historic and 'promising legal tool to counter the harmful practice of child marriage and bring hope to the girl child'⁵⁰ but also makes recommendations on its enforcement as part of 'an urgent need to accelerate elimination of child marriage.'⁵¹ The policy brief represents the responses of other national and international organisations that collaborated in its development, including the Gender Division under the Office of the President, the Civil Society Organisations' Network on Ending Child Marriage, UNFPA and UNICEF.⁵² Significantly, after evaluating the provisions of the 2023 amendment, the Population Council of Zambia concluded, 'Zambia's legislative framework now offers robust protection of all children, in diverse contexts, from the practice of child marriage.'⁵³

47 See Matrimonial Cause Act 2007, (as amended in 2024), Section 3 of the 2024 amendment, which added child marriage as a ground for nullity of marriage in terms of s 27(1)(a) of the MCA.

48 It must be acknowledged that the research for this article relied on textual sources, both primary (such as records of parliamentary debates) and secondary commentary and analysis. Further it is too early in the history of the new laws to evaluate the responses of a broader range of stakeholders.

49 Equality Now (n 9).

50 See Population Council Zambia (n 9) [1].

51 Ibid.

52 Population Council Zambia (n 9) [1].

53 Ibid [5].

The next response to be considered is that of traditional leaders, who come across as unexpected supporters of initiatives aimed at ending child marriage. Some traditional leaders are reported to have enacted bylaws relating to child marriage even before the new laws were enacted. Furthermore, many chiefs committed to the eradication of child marriages after the enactment of the Children's Code Act in 2022. For example, at a meeting hosted by the National Assembly's Parliamentary Caucus on Children with the support of UNICEF on 19 May 2015, fifty members of the House of Chiefs unanimously agreed to endorse a resolution on ending child marriage as provided for by the Children's Code Act. At this meeting, the Chair of the House of Chiefs, Chief Chisunka, was quoted as saying: 'Today we are making history by endorsing a resolution to end child marriage in Zambia. The dialogue has helped us reflect and understand better its root cause and the areas that need to be addressed to ensure children and youth develop to their full potential [...].'⁵⁴

The enactment of the new laws has evidently given fresh momentum to the chiefs' support to ending child marriage. One traditional leader who has emerged as a prominent voice is His Royal Highness Chief Chamuka of Chisamba District. His chieftdom had already enacted bylaws outlawing child marriage and requiring registration of all marriages, before the new laws were enacted.⁵⁵ Since then, he has galvanized the support of fellow traditional leaders for the implementation of the new laws.⁵⁶ Community-level initiatives such as this are an illustration of what has been termed a multisectoral approach to ending child marriage.⁵⁷ Examples of the elements of a multisectoral approach (which are currently being implemented in the Chamuka chieftdom) include:

- Alignment of the chieftdom bylaws on ending child marriages and defilement with existing child protection laws and policies.
- Putting in place a fully functional village-led one-stop anti Gender-Based Violence (GBV) Community Development Centre which is providing various services, including basic legal services and psycho-social counselling.
- GBV data recording and management, information dissemination, registration of all customary marriages and formation of a Youth Palace Council.
- Working with higher learning institutions and other stakeholders in research

54 Smart Eagles Zambia, 'The House of Chiefs Commits to End Child Marriage in Zambia (Facebook Post, May 19, 2023) <<https://www.facebook.com/SmartEagelsZambia/posts/the-house-ofchiefs-commits-to-end-child-marriage-in-zambia-this-resolution-is-t/664936645675598/>> accessed 11 April 2025.

55 See Chamuka Royal Establishment, *Chieftdom Bylaws on Ending Child Marriage, Teenage Pregnancies, Child Defilement and Child Labour* (n.d but certainly before 2015 since the bylaws were included in a presentation at the African Girls' Summit to End Child Marriage, n 17).

56 See Tinaye Agere, 'Traditional Leaders Fight Child Marriage', (*Sunday Mail Lusaka*, 26 January 2025) <<https://www.heraldonline.co.zw/traditional-leaders-fight-child-marriage/>> accessed 02 May 2025.

57 See Equality Now, *Ending Child Marriages in Eastern and Southern Africa: A Multisectoral Approach* (with UNFPA & Spotlight Initiative), December 2023 <https://equalitynow.org/resource/ending-child-marriage-in-eastern-and-southern-africa/> (accessed 02 May 2025).

on cases surrounding child marriages.

- Encouraging community members and children to take advantage of policies such as reeducation, keeping girls in schools, reentry into education after childbirth, bursaries, skills training, empowerment funds, and social cash transfer programs to support girls affected by child marriage.
- Working with partners and well-wishers to implement climate smart agriculture to ensure that the people in the chiefdom have alternative income livelihoods as a way of eradicating poverty which is the underlying cause of child marriage.⁵⁸

Finally, the appraisal of responses to the new laws in Zambia must include existing developments in the region concerning the eradication of child marriages, most important of which for present purposes is the SADC Model Law. The advantage for Zambia of this development is that, as a member of SADC, Zambia will benefit from the strategies already adopted by various stakeholders to implement the new laws. For example, stakeholders, such as Equality Now, in collaboration with UNFPA, and the SADC Parliamentary Forum have developed policy briefs concerning the eradication of child marriages.⁵⁹

In sum, these new laws have seen Zambia make significant inroads into the eradication of child marriages in the country. However, as one of the stakeholders rightly observes, more than legislation is required⁶⁰ to effectively implement the new laws to achieve their objectives. There is need to address several challenges to the implementation of these laws.

As a prelude to considering these challenges in the penultimate section, the next section assesses how the new laws align with regional human rights standards.

III. Alignment with regional human rights standards

By stipulating 18 years as the minimum age for marriage, Zambia's legislative framework is now aligned with regional human rights standards. The regional standards define child marriage as a formal or informal union between an adult and a child under the age of 18 years or between children who are both under the age of 18 years.⁶¹

The 1990 African Charter on the Rights and Welfare of the Child (the African Children's Charter) was the first human rights treaty to explicitly set 18 years as

58 Chamuka Royal Establishment bylaws, n 55.

59 Equality Now n 57.

60 Ibid.

61 African Commission on Human and Peoples' Rights and African Committee of Experts on the Rights and Welfare of the Child, *Joint General Comment on Ending Child Marriage* 2017, <https://www.acerwc.africa/sites/default/files/2022-09/Joint_General_Comment_ACERWC-ACHPR_Ending_Child_Marriage_March_2018_English.pdf> accessed 10 July 2025. (Adopts this definition).

the minimum age for marriage.⁶² This was followed by another African regional treaty, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)⁶³. None of the international human rights treaties prior to that specified 18 as the minimum age for marriage.⁶⁴

Zambia's Children's Code Act aspires to domesticate relevant international human rights instruments, including the 1989 United Nations Convention on the Rights of the Child (CRC) and the 1990 African Children's Charter.⁶⁵ The Children's Code Act has, indeed, incorporated numerous human rights concepts and principles from these treaties, such as the principle of the best interests of the child. However, it does not provide for wholesale domestication of these treaties, and therefore, there is as yet no legislative framework for the direct application of entire treaties relevant to child marriages by the courts in Zambia.⁶⁶ Nonetheless, prevalent views on the law of treaties support the principle that Zambian law must be interpreted in light of the legal obligations created under the treaties it has ratified.⁶⁷

Against this backdrop, this section briefly discusses the alignment of the new laws with two important regional human rights instruments Zambia has ratified - the Maputo Protocol⁶⁸ and the African Children's Charter.

The alignment of the new laws with the two regional human rights instruments and the SADC Model Law is clearly established in the areas of prohibition of child marriages,⁶⁹ minimum age of marriage,⁷⁰ consent of both parties to the marriage,⁷¹ non-discrimination,⁷² elimination of harmful cultural practices,⁷³ promotion of the

62 African Union, *Ratification Table: African Charter on the Rights and Welfare of the Child* (Zambia ratified on 2 December 2008) <<https://www.acerwc.africa/en/member-states/ratifications>>accessed 10 July 2025.

63 African Union, *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Maputo Protocol). <https://www.maputoprotocol.up.ac.za/countries/countries-table> accessed 8 July 2025 (Zambia ratified the Maputo Protocol on 2 May 2006).

64 Neither the United Nations Convention on the Rights of the Child (CRC) nor the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) specified a minimum age for marriage, even as they called upon states to eliminate child marriage. See article 16 of CEDAW. There is no express mention of marriage in the CRC. See also CEDAW and CRC Committees, *Joint General Recommendation/Comment on Harmful Practices* (14 November 2019) UN Doc CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1.

65 See Children's Code, 2022 (Zambia), Preamble.

66 For detailed discussion of domestic application of treaties in Zambia, see Himonga, (n 6) [34].

67 See B.A. Rwezaura, 'Domestic Application of International Human Rights Norms', in W Ncube (ed), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate, Dartmouth, 1998) 28; See also *Sara Longwe v. Intercontinental Hotels* 1992/HP/765, Musumali J.

68 African Union (n 63).

69 Africa Children's Charter, art 2; Maputo Protocol art 6; SADC Model Law art 7.

70 African Children's Charter art 21(2), Maputo Protocol art 6; SADC Model Law art 7.

71 Maputo Protocol art 6; SADC Model Law s 16; On article 6 of the Maputo Protocol, see Celestine Nyamu Musembi, 'Article 6 Marriage' in Annika Rudman, Celestine Nyamu Musembi and Tresor Muhindo Makunya (eds), *The Protocol to the African Charter on Human and Peoples' Rights of Women in Africa: A Commentary* (Pretoria University Law Press PULP 2023) 135, 150-152.

72 African Children's Charter art 3; Maputo Protocol art 2; SADC Model Law ss 4, 5.

73 African Children's Charter art 21(2); Maputo Protocol art 5; SADC Model Law, s 7.

best interests of the child⁷⁴ and financial and proprietary consequences of nullity of marriages.⁷⁵ These alignments are briefly explained below.

Firstly, by providing for the minimum age of marriage of 18 years for both men and women marrying under customary law and civil law and eliminating child marriages, the new laws are in line with the standards of the regional human rights instruments and the SADC Model Law. All of these regional instruments stipulate the minimum age of marriage or majority of 18 years, as well as non-discrimination between men and women with respect to marriage.

The provisions of the new laws also align with human rights provisions requiring the consent of both parties to marry. A person under the stipulated minimum age has no legal capacity to consent to their purported marriage.⁷⁶

Secondly, while the new laws make no direct reference to the best interests of the child, they reference the Children's Code Act, which encodes the principle of best interests of the child in all matters concerning the child.⁷⁷ The principle of the best interests of the child must therefore inform efforts made by the State and everyone involved in the implementation of the new laws for the elimination of child marriage in the country.

Thirdly, the new laws' provisions on grounds of nullity of marriages and the legal consequences of void marriages are aligned with the SADC Model law with respect to the financial and proprietary consequences of child marriage by making explicit reference to part VIII of the MCA. This part of the MCA provides for readjustment of property and financial rights of the parties to the marriage upon the dissolution or nullification of a marriage to the benefit of the parties and their children. By extending the concerned provisions of the MCA to void child marriages, the new laws guarantee parties to a child marriage and their children financial and proprietary rights upon the annulment of the purported marriage.

However, there are four glaring areas in which the new laws are not fully aligned with regional human rights instruments and the SADC Model Law. The first concerns the constitutional exemption of aspects of personal law from application of the human rights principles of equality and non-discrimination, which leaves the new laws' ban on child marriage in customary law marriages open to a constitutionality challenge. The second area of non-alignment is the uncertainty as to whether the guarantee of protection of financial and proprietary rights under part VIII of the MCA apply following annulment of customary marriages, thus potentially leaving children in such relationships without the protection of the law. The third area is

74 African Children's Charter art 4; SADC Model Law, s 3.

75 Maputo Protocol art 6; SADC Model Law s 20. On article 6, see Musembi n 71, 157-158.

76 For detailed discussion of the concepts of minimum age of marriage and the consent of the parties to the marriage under Article 6 of the Maputo Protocol, see Musembi n 71, 150-152.

77 See Children's Code Act 2022 (Zambia) s 3.

absence of universal registration of births and marriages, which is indispensable in enforcing a ban on child marriage, as recognized by the African Children's Charter, the Maputo Protocol and the SADC Model Law.⁷⁸ The fourth area of concern is inadequate institutional mechanisms for enforcement of the new laws, which fall short of the standard set in the SADC Model Law.⁷⁹ These areas of non-alignment are discussed together with other potential challenges to the implementation of the new laws in the next section.

IV. Potential challenges to the implementation of the new laws

A. Constitutionality challenge

This potential challenge relates only to application of the new laws to customary child marriages, not to all child marriages.

Article 23(1) of the Constitution entrenches the right to equality and non-discrimination by stating that no law 'shall make any provision that is discriminatory either of itself or in its effect.' However, article 23(4) limits the application of the equality and non-discrimination principle when it comes to matters of personal law, which include customary family law. The provision exempts:

'any law so far as that law makes provisions- ... (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race or tribe, of customary law ...'

This Article potentially blocks or preempts any law (legislation or case law) that seeks to apply the principle of equality and non-discrimination contained in article 23(1) to the specified areas of personal law. The new laws, in so far as they limit the scope of customary marriage so as to exclude child marriage, get caught in this net. Enacting legislation to fix the same minimum age of marriage for both males and females at 18 years is, by definition, an anti-discrimination move. The conventional customary marriage practice of gauging readiness for marriage based on the onset of puberty invariably results in a lower age of marriage for girls than boys. That some governments have sought to affirm customary practice and justify a lower legal age of marriage for girls based on the reasoning that girls mature earlier than boys is an indication of how much this gender differentiation is taken for granted.⁸⁰

78 See African Children's Charter arts 6, 14; SADC Model Law, s 14; Maputo Protocol art 6(d).

79 See SADC Model Law, Part XV para 5.8.

80 See, for example, the argument by the government of Mali in *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) & The Institute for Human Rights and Development in Africa (IHRDA) -v- Republic of Mali* (2018), Vol.2 African Court Law Report (2017-2018) 380 [66]; See also the argument made by the government of Tanzania in *Attorney-General v Rebecca Gyumi* (Civil Appeal No.204 of 2017, Court of Appeal, Dar es Salaam) 17, 30-31; For a detailed discussion of the Gyumi case see I Warioba, 'Child Marriage in Tanzania: A Human Rights Perspective' (2019) Issue 23 Journal of Law, Social Justice and Global Development Issue 23, <<http://www2.warwick.ac.uk/research/priorities/internationaldevelopment/lgd/>> accessed 11 July 2025.

What we see in Zambia is a contradiction in legislating against child marriage without tackling the constitutional insulation of customary marriage law from scrutiny for discrimination. Arguably, to the extent that the amendments challenge a discriminatory aspect of the customary law of marriage, namely, its gender-differentiated definition of the minimum age for marriage, the new laws ought to have been preceded by an amendment to introduce a balanced co-existence of customary law and the Bill of Rights. Without such amendment, the new laws stand on shaky constitutional ground.⁸¹ Several African states which inherited similar constitutional provisions from independence-era constitutions have replaced the exemption with a clause that states that the application of personal laws will be subject to their compatibility with the constitution.⁸²

The new laws are, therefore, potentially entangled in a constitutional human rights quagmire relating to the application of customary law in a country where the Bill of Rights shields the application of customary law from scrutiny for discrimination. Zambia could not hope to enact a comprehensive legal framework to eliminate child marriage, including (indeed, especially) with respect to customary law, with the personal law exemption clause still intact in its Bill of Rights. Even assuming that an actual petition before the Constitutional Court is unlikely, it is necessary to work toward internal coherence in the constitutional and legislative framework. Courts can play a partial role in achieving this internal coherence by piecemeal interpretation of the new laws as well as the Children's Code in such a manner as to align them with the Constitution. Ultimately, clear legislative action will be needed.⁸³

A further complication is that article 23(4) falls within the Bill of Rights under the Zambian Constitution, which is specially entrenched, since 1991 and therefore cannot be amended without holding a referendum. Understandably, a referendum is costly and demanding, and this may very well deter or delay action, but it must ultimately be considered in order to achieve a comprehensive constitutional and legal framework for ending child marriage.

81 For detailed discussion of the implications of article 23(4) on the reform of customary family law in Zambia, see Chuma Himonga and Tinenenji Banda, 'Customary law in Zambia's New Constitutional Dispensation: A Tale of Lost Opportunities' in Caesar Cheelo, Marja Hinfelaar and Manenga Ndulo (eds) *Inequality in Zambia* (Routledge 2022), 233; Himonga (n 6) [14-18, 52-58].

82 Examples of African states that have reviewed their constitutions and removed personal law exemption clauses include Ghana (1992), Uganda (1995) Kenya (2010). In addition to Zambia, African states whose constitutions still retain exemption clauses include Botswana, Eswatini, Lesotho, and Mauritius.

83 For a detailed picture of various aspects of family law in Zambia connected to the applicability of customary law vis a vis the Bill of Rights and the limits of a judicial piecemeal approach to reform, see Himonga (n 6) [52-58].

B. Systems for registering births and marriages

Musembi has argued that '[i]n ... implementing a minimum age for marriage, a birth registration system is indispensable, as is a system of registration of marriages, preferably decentralised and accessible.'⁸⁴

The primary responsibility for the registration of the birth of a child in Zambia rests upon the parents of the child.⁸⁵ The registration must be done within one month of the date of birth of the child or, in exceptional circumstances, within twelve months of the date of birth of the child.⁸⁶ The Registrars of Births and Deaths and their deputies in the districts are responsible for the registration of births in their districts,⁸⁷ while the office of the Registrar-General in Lusaka is the central registration office for the whole country. All registrations are sent to this office, which issues birth certificates.

The challenge is that this system is highly centralised and is not accessible to most people, especially those from rural areas. Other documents, such as ante-natal clinic records and hospital records issued upon the birth of the child may, of course, be used to determine the child's birthdate for the purpose of implementing the new laws, but this will depend on whether such records are kept by hospitals or the child's family. Not all children are born in clinics or hospitals, but are delivered by midwives in home births, especially in rural areas.

Registration of marriages is also limited. Only civil marriages are registered under the Marriage Act. Customary marriages are not required to be registered by law, although some people register them at local courts on a voluntary basis.⁸⁸

The certificate of marriage is prima facie evidence of the existence of a valid marriage that meets the age and consent requirements. The absence of a requirement for registration of customary marriages means that the state has limited opportunity to ensure compliance with the legal requirements, and therefore limited ability to monitor progress toward ending child marriage. Implementation and monitoring of the impact of the new laws will be greatly boosted by a decentralized and accessible system of universal registration of marriages.⁸⁹

84 Musembi (n 71) 148.

85 The registration of births is regulated by the Births and Deaths Registration Act (chapter 51 of the Laws of Zambia).

86 Births and Deaths Registration Act Regulations (Chapter 51 Laws of Zambia) (Subsidiary legislation) regulation 24.

87 Births and Deaths Registration Act (chapter 51 of the Laws of Zambia), s 4.

88 See Himonga (n 6) [93].

89 On the importance of registration of marriages and the unintended vulnerabilities in respect of protection of women's rights non-registration creates in practice, see Monica De Souza 'When Non-Registration Becomes Non-Recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa' 2013, *Acta Juridica* 239-272; For lessons on what it will take to operationalize registration of customary marriage, see discussion based on Kenya's experience over the last decade in V. Nyokabi Njogu and E. Gatura Wameru, 'Registration of Customary Marriages in Kenya: A Legal Solution for a Social Problem?' [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 89.

Zambia's effort toward comprehensive legislation to end child marriage, including customary marriage, would no doubt be enhanced by amending the law to introduce a nationwide system for registration of customary marriages. The bylaws made by some chiefs for compulsory registration of marriages in their chiefdoms⁹⁰ will go some way to fill the existing gap in the registration of customary marriage, but a mandatory national marriage registration system would strengthen these piecemeal efforts and give them a legal mandate.

C. Ambiguities and gaps in the new laws

Some existing laws need to be harmonised with the new laws for the avoidance of ambiguity, while gaps left by the new laws need to be filled. These issues are discussed below.

1. Ambiguities

Addressing ambiguities is important for effective and easy implementation of the law without costly resort to the courts for interpretation.

The ambiguities in the new laws discussed in this section relate to sexual offences under the Penal Code, the anomaly relating to section 17 of the Marriage Act and the retrospective application of the new laws.

The first ambiguity is that there is no evidence on record of amendment of the Penal Code to explicitly state that its provisions on sexual offences apply to purported child marriages under customary law. Such an amendment is necessary, in order to remove the customary marriage exception that courts have created in their interpretation of the Penal Code's provisions on sexual offences, as was discussed in section 2.3 above. Those judicial precedents are still binding. Arguably, repeal of the exception is implied from the abolition of child marriage by the new laws, but the absence of an explicit provision in the Penal Code raises the question whether prosecutors have instructions to prosecute offenders of sexual offences against children in customary law marriages. For coherence in the legal framework and clarity among law enforcement officers, such a provision is needed so that all loopholes are sealed.

The second ambiguity relates to section 17 of the Marriage Act. This provision requires the consent of a parent or guardian for the marriage of any person below the age of 21 years. The provision still refers to the common law age of majority rather than the constitutional age of majority of 18 years enacted through the 2016 amendment, the Children's Code Act, and the new laws which have ushered in 18 years as the new age of marriage. The 2023 amendment to the Marriage Act should have repealed section 17. Arguably section 17 has been implicitly ousted by the new laws. However, it should be repealed explicitly to address the ambiguity.

⁹⁰ See the example of the Chamuka Royal Establishment, n 55.

Another issue that calls for reflection on ambiguities in the law is retrospective application of the nullification of child marriage. Before the new laws, section 33(2) of the Marriage Act, stated: 'Nothing in this section [i.e. section 33] shall affect any marriage already solemnised or contracted before 20th May, 1949.' This provision ensured that nullification of a marriage (on any ground) would not have retrospective application with respect to marriages that were solemnised before the Marriage Act became operational in 1949. In repealing section 33, the 2023 amendment removed this provision. The effect of this is to invalidate existing marriages involving parties who entered marriage when at least one of them was a child. Although, demographically, very few existing marriages would fit within this category, there is a broader concern. Removal of the non-retrospectivity clause has the legal effect of altering rights and duties flowing from such a marriage, thus potentially affecting the rights of a broader cross-section of society, beyond the parties to the marriage.

To resolve this ambiguity, the new laws should have followed the pattern set in the SADC Model Law, which acknowledges the injustices that could result from retrospective nullification of child marriages. The SADC Model Law provides in article 19 that a child marriage entered into before the commencement of the law should be treated as voidable, not void. This means that the marriage is valid until it is annulled by a court of law upon application by an interested party. Even then, the model law contains saving clauses which guarantee that rights with respect to property, citizenship or child custody accruing from such a marriage are not lost, the decree of nullity notwithstanding.⁹¹

2. Gaps

The issue of gaps left by the new laws relates to the limited protection offered by the MCA to parties in child marriage.

The new laws have nullified child marriage, but the MCA contains saving clauses with respect to financial and proprietary consequences of marriage.⁹² For financial and proprietary purposes, such as securing spousal and child support and matrimonial property, a void child marriage is treated as having the same legal consequences as a valid marriage. This is to avoid adverse outcomes for the under-age party to a void marriage, and any children resulting from that relationship. For all other purposes a void marriage does not give rise to any rights or obligations.

These saving clauses, however, do not benefit those in customary marriages. Section 3 of the MCA excludes customary marriages from the application of the entire MCA.⁹³ This means that the financial and proprietary consequences of a void

91 See SADC Model Law, ss 18, 20 and 21.

92 Matrimonial Causes Act 2007 (Zambia) part VIII (as amended 2024).

93 Matrimonial Causes Act 2007 (Zambia) (as amended 2024) s 3, states: 'The provisions of this Act shall apply to marriages solemnised in accordance with the Marriage Act or the law of a foreign state and shall not apply to marriages contracted in accordance with customary law.'

marriage under Part VIII of the MCA do not apply to a void child marriage under customary law. The 2024 amendment should have included amendment of section 3 so that the saving clauses in Part VIII of the MCA become applicable to customary marriages to safeguard the financial and proprietary interests of children affected by child marriages.

Section 117 of the Children's Code Act may offer a measure of relief through affiliation proceedings to secure maintenance for a child born out of a void marriage. The section provides:

'A court may, on the application of a child's mother who has given birth to a child, make an affiliation order on proof that before the birth, the child's mother was a party to a marriage which would have been valid except for the fact that the child's mother or the other party were under the age at which either party might have legally contracted a marriage.'

Section 130 states that a court may, at the time of making an affiliation order, also make an order for maintenance of the child.

There is, however, a class dimension to the safeguards contained both in the MCA and in the Children's Code Act. Part VIII of the MCA contains standard provisions on obtaining judicial orders on division of property and spousal and child support as between the parties to the marriage. The Children's Code Act directs the court order of child support to the putative father. The safeguards will therefore only benefit those child brides or child mothers who are able to access the courts, and whose 'spouses' have marital assets. This is not the situation for most Zambians, least of all those likely to find themselves in need of financial support following nullification of a child marriage. The socio-economic context of Zambia is that most people, especially those in rural areas, live in abject poverty.⁹⁴ This emphasises the fact that the law, though significant, must be accompanied by investment in dealing with the socio-economic context in which child marriage occurs.

In sum, the ambiguities and gaps in the new laws constitute significant potential challenges to their implementation, which must be addressed to deal more effectively with the scourge of child marriage.

D. Incongruity with living customary law

Living customary law consists of customs or practices that emerge from relatively widespread social practices that regulate the day-to-day lives of a "customary law

94 In 2022, the country had a poverty rate of 64.3% of the population. See the World Bank, 'The World Bank in Zambia' (*The World Bank* October 8th 2024) < <https://www.worldbank.org/en/country/zambia/overview> > accessed 13 April 2025; The Zambia Statistics Agency estimates the poverty rate to be 60%, see Zambia Statistics Agency, 'Highlights of the 2022 Poverty Assessment in Zambia', (UNDP 2023) < <https://www.undp.org/sites/g/files/zskgke326/files/2023-10/highlights-of-the-2022-poverty-assessment-in-zambia-2023.pdf> >; In 2022, the rate of extremely poor people was estimated at 48% of the population of the country. See, Zambia Statistics Agency (n 94).

community.”⁹⁵ It exists whether the state imbues it with its authority or not. Thus, the system draws its origin and legitimacy from the people whose customary law is under consideration and not from recognition by the state.⁹⁶ Living customary law norms are not static. They change by adapting to changing social, economic and political conditions in the country, albeit unevenly and sometimes over a long period of time.⁹⁷

Living customary law stands in contrast to official customary law. As the name indicates, an official version of customary law is created by state institutions and lawyers when they apply customary law at the various levels of the official state institutions in the legal system. The main characteristic of this form of customary law is its rigid rule-oriented approach and inflexibility in application due to the fact that it is based on the doctrine of precedent, in much the same way as this doctrine exists in the received law. By its nature, official customary law is often divergent from living customary law,⁹⁸ which means that it is often alien to the people who are subject to customary law in a given community, but parties to a dispute may very well latch on to it if it advances their position.

In Zambia, it is debatable whether living customary is taken into account by the constitutional provision⁹⁹ that recognises customary law as a source of law in the legal system. Nevertheless, from the legal theoretical perspective of strong or deep legal pluralism, living customary law co-exists with state law and operates in a relationship of semi-autonomy with the formal legal system to regulate the conduct of the people who are subject to the customary law concerned. The concept of semi-

95 See generally J Hund ‘Customary Law is What People Say It Is’ in Ian Hamnett (ed), *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (Routledge and Kegan Paul 1975); Chuma Himonga and Fatimata Diallo, ‘Third Integration Report: Reforms in Management of Relationships between Indigenous and Non-Indigenous Legal Systems’ in *The State and Indigenous legal cultures: law in search of legitimacy* (University of Ottawa Research Chair on Legal Diversity and Indigenous Peoples, Research Report, 2018); T. W. Bennett ‘Official Living Customary Law: Dilemmas of Description and Recognition’ in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (JUTA, 2008); Himonga, (n 6), [24-27].

96 For detailed discussion of the concept of living customary law as it is emerging and manifested in Zambia, see Himonga (n. 6) [25]-[29].

97 However, a customary norm or practice may change instantly through a “legislative” action of the community subject to the system of customary law concerned, see *Shilubana and Others v. Nwamitwa and Other* 2009 2 SA 66 (CC) (South Africa) in which the customary practice of succession to traditional leadership was changed instantly by the tribal Council, in order to appoint a woman to the position of *Hosi* in response to the Constitutional imperative of gender equality in the country. See also Himonga, (n 6) [26] for detailed discussion of instant change of a tribe’s customary law of succession to chieftdom in Zambia, in order to advance the community’s socio-economic development.

98 Arguably, the divergence between official and living customary law should not be overemphasised as living customary law may, in its adaptation process resemble (or mimic) norms of official customary law or other forms of state law (on hybridisation of law in pluralistic legal systems, see Fatimata Diallo and Chuma Himonga, ‘Interactional Pluralism in Africa: Judges as Proxies of Legal Hybridisation in Southern Africa’ in Otis Ghislain (ed), *La rNcontre DesSystèmes Juridiques Autochtones et étatique : Confrontation Ou Coopération/ The Intersection of Indigenous Laws and State Law : Confrontation or Cooperation* (Presses de l’Université Laval 2019).

99 Constitution of Zambia 2016 Art 7. This contrasts with the position in South Africa with respect to that country’s 1996 Constitution. See Himonga and Banda (n 81).

autonomy is used by Sally Falk Moore to explain the interaction between state law, official and living customary law and other normative orders in a given polity. She defines a semi-autonomous social field as one that has the capacity to generate its own rules and customs internally but 'is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded'.¹⁰⁰

Explaining the concept of strong legal pluralism, Griffiths states that it occurs where 'laws and institutions are not subsumed within one system but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another'.¹⁰¹ Thus, strong legal pluralism 'recognises the fact that even the indigenous [or customary law] norms and values that have no state recognition continue to be part of the legal system in almost all post-colonial states'.¹⁰²

Badejogbin and Mnisi-Weeks explain the co-existence of state law and non-state laws, including living customary law, and their interactions:

'[T]he empirical reality is more akin to strong legal pluralism. In other words, the state's laws are just another source of law among a plethora of semi-autonomous socio-legal fields that exert some normative authority on each individual. Precisely because the processes of generation, legitimation and enforcement of living customary law in the area of marriage are removed from the state, the operation of the official system of law on the ground, in the day-to-day realities of people's lives, is largely beyond state scrutiny, monitoring and policing. Thus, sometimes people act in a manner according to the pressure exerted by state law, whereas at other times the social and coercive pressure exerted by non-state authorities is greater.'¹⁰³

Arguably, within the strong legal pluralism framework of the co-existence and interaction of living customary law and the new (state) laws, living customary law has the potential to absorb and endorse, or to undermine and frustrate the implementation of the new laws. The relationship is therefore one of simultaneous harmony and tension.¹⁰⁴ The degree of convergence and divergence between living customary law and state law on the matter of defining the minimum age for marriage may vary across different segments of society.

The crux of this argument is that within the framework of the Zambian legal system, characterised by the concepts of living customary law and strong legal pluralism, the new state laws must compete for legitimacy amidst the norms and values prevailing at the local level. The challenge for state officials and advocates of a Zambia free of child marriage is to sustain engagement with the institutions that have influence

100 Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) *Law and Society Review* 720.

101 John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 3.

102 See Fatimata Diallo and Himonga (n 98) 376.

103 See Chuma Himonga and Thandabantu Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 2d ed. (2024) 77 ('legal pluralism').

104 See generally Moore, (n 100).

over norms at the local level to ensure that the new laws and the norms of living customary law do not run parallel to each other.

This underscores the need for a partnership approach through community level engagement, harnessing existing spaces such as Parent-Teacher Associations, forums convened by traditional leaders, faith-based networks and other community collective action forums. Such sustained engagement will, hopefully, yield a synergy between the new laws and dynamic living customary law that can overcome the legitimation of negative practices such as child marriage.

D. Weak enforcement mechanisms

The legislative reforms of 2023 and 2024, being amendments to existing laws rather than new enactments, rely on enforcement mechanisms in the existing laws. The weaknesses in these mechanisms are worthy of note.

First, the limitation imposed on the Penal Code by cases that have upheld the customary marriage exception to sexual offences against children has been discussed. In the absence of a legislative or judicial pronouncement to the contrary, this aspect of implementation of the new laws is made questionable.¹⁰⁵

Second, Part VII of the Marriage Act creates offences and stipulates penalties, which can be relied upon to enforce the ban on child marriage. Section 45 of the Act states:

*'Whoever goes through the ceremony of marriage, or any ceremony which he or she represents to be a ceremony of marriage, knowing that the marriage is void on any ground and that the other person believes it to be valid shall be liable on conviction to imprisonment with or without hard labour for a period not exceeding five years.'*¹⁰⁶

The wording highlighted raises a key concern: is the belief of the other person crucial to the proof of the offence? Arguably, a child who is party to a purported marriage has no legal capacity to make any decision regarding the validity or otherwise of their marriage, so their "belief" is of no consequence. The framing of the offence needs to be detangled from the element of belief.

Third, as already indicated, the Children's Code Act prohibits the subjection of a child to marriage.¹⁰⁷ In its enforcement mechanism in section 27, it states:

'Except as otherwise provided in any other written law, a person who willfully or negligently infringes a right of a child specified in this Act commits an offence and is liable, on conviction (a) to a fine not exceeding one million penalty units or to imprisonment for a term not exceeding ten years, or to both; or (b) depending on the facts of the case, to community service.' (Emphasis mine)

¹⁰⁵ Organisations leading the campaign to end child marriage affirm this view. See policy brief by Population Council, (n 9).

¹⁰⁶ Emphasis mine.

¹⁰⁷ Children's Code Act 2022 (Zambia). It also states that the child in a child marriage may be taken into care if this is in their best interests. See s 170(1)(g).

Subjection of a child to a marriage is, therefore, punishable under this section. However, the opening sentence of the section admits exceptions recognized by ‘any other written law.’ This exception is open and broad and may limit the scope of the ban on child marriage. For example, sanctions against offences such as child marriage may in future find themselves subjected to legislation that may invoke the personal law exemption clause in article 23 (4) of the Constitution to preempt prosecution of child marriage under customary law.

Fourth, section 18 of the Education Act¹⁰⁸ prohibits the marriage of a learner who has not attained the age of sixteen years.¹⁰⁹ The age stipulation needs to be aligned with the Constitution, the Children’s Code Act and the new laws. The Act then makes it a criminal offence for any person to marry or marry off a learner or prevent or stop a learner who is a child from attending school for the purpose of marriage. A person who contravenes this section commits an offence and is liable, upon conviction, to imprisonment for a period of not less than fifteen years and may be liable to imprisonment for life. These are significant penalties, but their scope, is limited to the education context.

The weaknesses identified in these mechanisms suggest need for a stronger approach for enforcing breaches of the new laws: section 27 of the Children’s Code Act could be repealed and replaced by a provision creating offences, penalties and civil remedies for violating the provisions of the Children’s Code Act and the new laws, any law to the contrary notwithstanding, but subject to the Constitution.

III. Poverty and impunity

The challenges of poverty and constrained access to justice are interlinked. As was shown in section 2, poverty ranks high among the issues identified as drivers of child marriage. With a national poverty rate that exceeds 60%,¹¹⁰ livelihood choices, particularly for girls, are limited. The implication of such a high poverty rate for the new laws is that they must be accompanied by serious strategies and programmes to reduce the rate of poverty in the country. Such strategies and programmes must aim to improve economic empowerment and independence, especially of girls and women, so that child marriage is no longer considered a livelihood option.

Coupled with poverty is a culture of impunity, which compounds the legal enforcement challenge. Poverty plays a role in feeding impunity because it makes child marriage seem inevitable in impoverished socio-economic circumstances. This calls for solutions beyond law if child marriage is to be effectively addressed in Zambia. Indeed, the SADC Model Law calls for multisectoral collaboration to ensure that children affected by child marriage and their families, particularly those living in rural or peri-urban areas, have access to adequate health care, social security

108 Education Act 2011 (Zambia).

109 Ibid ss 2 and 18.

110 See estimates by the Zambian Statistical Agency (n 94); see also World Bank (n 94).

programmes, education, extension services, cooperatives and self-help groups for economic opportunities, and inputs such as land, credit and appropriate technology. Initiatives such as that of the Chamuka Royal Establishment that not only take legal measures such as compulsory registration of customary marriages, but also seek out partnerships to create livelihood opportunities for the youth provide a good model.

Thus, while legal measures are no doubt indispensable, especially in addressing the culture of impunity, they must be accompanied by initiatives at the socio-economic level that address the drivers of child marriage.

IV. Conclusion and recommendations

Zambia has taken a significant and commendable step toward eradicating child marriage by making changes to the law of marriage. The Marriage (Amendment) Act, 2023, and the Matrimonial Causes (Amendment) Act, 2024 have resulted in the introduction of a uniform minimum age for marriage for both civil and customary marriages, with no exceptions. This legislative reform has been celebrated by diverse stakeholders, including traditional leaders, some of whom already had initiatives at the grassroots level toward ending child marriage.

However, this article has demonstrated that the Legislature still has some work to do in delivering a constitutional and legal framework that is comprehensive and internally coherent. Ambiguities and gaps must be resolved through appropriate amendments highlighted in the article.

The article has noted the continuance of the inconsistency between the new laws, specifically their application to customary marriage, and the personal law exemption clause in article 23(4) of the Constitution. The personal law exemption clause arguably exposes the new laws to the risk of a constitutionality challenge, in so far as their effect is to put an end to gender differentiation in the age of customary marriage which invariably translates into a lower age of marriage for girls. An amendment to Article 23(4) is necessary for coherence in the constitutional and legislative framework. Amendment should also ensure a constitutional framework that balances between recognising Zambia's reality of legal pluralism, and the prominent position that living customary law occupies in people's lives, on the one hand, and constitutional protection of human rights and the equal dignity of all persons, on the other.

The article has also highlighted gaps in equal protection of the law. The saving clause in Part VIII of the MCA that secures financial and proprietary rights of a child following nullification of a civil marriage does not extend to marriages under customary law. In addition, judicial precedents that have interpreted the sexual offences provisions of the Penal Code to exempt sexual relations with a child in a customary marriage are still in place. These gaps call for legislative reform to ensure equal protection of the law for all children.

Zambia must also invest in earnest in the legal and institutional infrastructure needed to effectively enforce a ban on child marriage. This includes nationwide decentralised and accessible systems for registering births and marriages, and justice institutions (formal and informal) that facilitate child protection for the most vulnerable. Registration of births and marriages should be devolved to the village level, including harnessing existing administrative structures, for example, chiefs. With regard to the registration of marriages, the registration system at the district level should be linked to records of customary marriages made by chiefs in their jurisdictions, thereby integrating local level innovations like those of Chief Chamuka and other chiefs, whose bylaws require registration of all customary marriages.

The on-going engagement with traditional authorities is commendable and must be sustained. This is crucial for narrowing the gap between lived customary law and the new laws, toward synergized action to chip away at the culture of impunity and achieve a comprehensive end to child marriage.

The process of implementing the new laws must be accompanied by robust investment in a strategy to educate and sensitise the public and officials on the content and import of the new laws. The sensitisation of officials should target diverse sectors such as health, education and social protection. This would align with a multisectoral approach to ending child marriage. Sensitisation is indispensable in ending the culture of impunity that allows cases of child marriage to go unreported. Some sensitisation campaigns are already underway, thanks to the initiative of civil society organisations.¹¹¹ These need to be stepped up.

Ultimately, an important driver to child marriage- poverty- must be addressed. As the SADC Model Law emphasises, sustainable programmes aimed at economic and social development must be central to any policy on ending child marriage. Local initiatives in this direction, such as those of the Chamuka Royal Establishment discussed in this article, are commendable. However, they rely heavily on the support of external donors. Government effort needs to build onto these local initiatives and scale them up to ensure sustainability. Zambia must get to the point where marrying off a young girl is no longer seen as any family's livelihood strategy.

Finally, while it is too early to empirically evaluate the implementation of these new laws, the recommendations made here should assist the government and other stakeholders in taking the necessary steps to anticipate and avoid the identified challenges or mitigate their impact. It will be useful, though, to periodically conduct appropriately designed empirical, scientific socio-legal assessment of the operation of the new laws, so as to document, learn from and respond to the actual challenges that are identified in the operation of the laws. The temptation for the government

111 Examples of civil society organisation involved in sensitisation initiatives include Population Council, Zambia; Women and Law in Southern Africa (WLSA); see Girls Not Brides Coalition 'Zambia coalition,' <<https://www.girlsnotbrides.org/our-partnership/national-partnerships-coalitions/zambia/>>; Francis Maingaila reporting (n 24).

to rely on short-term consultancies by non-governmental organisations (NGOs) or individuals to evaluate the operation and impact of the new laws should be resisted. This is important because these evaluations may not be designed to take the long view and yield an in-depth understanding of the implications and operation of family law reform in the context of Africa's plural legal systems.¹¹² Such short-term consultancies also tend to be project-driven, time-bound, and on a small scale that cannot achieve the required depth of analysis. Their findings may, therefore, lead to distortion of information on the lived realities of the operation of the new laws, to the disadvantage of the people that the laws seek to protect and empower.

112 This assertion is not based on research on the nature of consultancy and academic socio-legal research as such, but is deduced from, firstly, the nature of consultancy and academic socio-legal research and their respective research methodologies, and secondly, from findings of socio-legal research in personal laws, such as Fatima Osman, 'The Administration of Customary Law Estates Post the Enactment of the Reform of the Customary Law of Succession Act: A case study from Rural Eastern Cape South Africa,' (2019) (Unpublished PhD Dissertation), University of Cape Town; Chuma Himonga & Elena Moore *Reform of Customary Marriage, Divorce and Succession in South Africa : Living customary Law and Social Realities* (2015) (Juta and Co Ltd); Diallo and Himonga n 98).

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