

Recent developments

Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review

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Summary

This article reviews the recent judgment of the Constitutional Court of Zimbabwe in Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others, which has been hailed with acclaim worldwide. The review highlights three areas where the judgment makes a significant jurisprudential contribution: first, with respect to the issue of standing to bring a constitutional challenge under the Zimbabwean Constitution; second, with respect to the use of international treaty law and foreign case law; and third, in its purposive approach to the interpretation of the relevant constitutional provisions relating to child marriage. The regional impact of the decision is also considered in relation to recent litigation in Tanzania.

Key words: locus standi; international law; marriage; children's rights; constitutional interpretation

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1 Introduction

In 2013 Zimbabwe enacted a new Constitution. The new Zimbabwean Constitution has a strong bias towards the protection and promotion of human rights. Chapter 4 of the Constitution is entitled 'Declaration of Rights' and enshrines the rights of Zimbabwean citizens and residents. The article discusses the constitutional advances brought about by the finding in *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others*.¹ Three areas where the judgment arguably makes a significant jurisprudential contribution are highlighted, namely, (i) with respect to the issue of standing to bring a constitutional challenge under the Constitution of Zimbabwe; (ii) with respect to the use of international treaty law and foreign case law; and (iii) its purposive approach to the interpretation of the relevant constitutional provisions relating to child marriage.

The case revolved around a constitutional challenge to the Marriage Act² and to the Customary Marriages Act.³ The former, in section 22(1), prohibited the marriage of a boy under the age of 18 and a girl under the age of 16 years, except with the written permission of the Minister of Justice if he or she considered such a marriage desirable. This entailed permitting child marriages and establishing a different marriage age for boys and girls. The Customary Marriages Act sets no minimum age for a customary marriage, thus, according to received wisdom, the minimum age for marriage is the attainment of puberty. A constitutional challenge was brought by two Zimbabwean women who had been in a union since an early age. They sought to have child marriage under both civil and customary law declared in violation of various sections of the Zimbabwean Constitution. Based on an analysis of the consequences of child marriage, and relying on treaty law and foreign case law in its interpretation of the applicable constitutional sections, the Constitutional Court found that from the date of the judgment, no marriage of a person below the age of 18 years would be legal. The ruling applies equally to girls and boys.

2 *Locus standi* to pursue a constitutional case

The *Mudzuru* matter is an example of litigation instituted in the public interest. Public interest is defined as⁴

1 CCZ 12/2015, <http://www.lrfzim.com/wp-content/uploads/2016/01/Landmark-ruling-on-child-marriages.pdf>.

2 Cap 5:11.

3 Cap 5:07.

4 *Black's law dictionary* (1994).

something in which the public, the community at large, has some pecuniary interest or some interest by which their legal rights or liabilities are affected. It does not mean anything as narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government ...

A 2009 paper⁵ describes public interest litigation as 'an expression for the sufferers of silence' as well as 'a blessing to the downtrodden, oppressed sections of society'. Acting in the public interest requires that the applicant in the case has adequate *locus standi*. *Locus standi* refers to standing or the right to approach a court directly to seek appropriate relief in cases arising from an alleged infringement of a fundamental human right or freedom enshrined in Chapter 4 of the Constitution. How public interest litigation widens the interpretation of the *locus standi* principle is discussed later in this section. Persons specified under section 85(1) of the Constitution have the right to approach a court directly. Section 85(1) provides:⁶

- (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 *Mudzuru* judgment sets out the applicant's cause of action based on a claim⁷

that the fundamental rights of a girl child to equal treatment before the law and not to be subjected to any form of marriage as enshrined in section 81(1) as read with section 78(1) of the Constitution have been, are being and are likely to be infringed if an order declaring section 22(1) of the Marriage Act and any other law authorising child marriage unconstitutional was not granted by the Court.

The first *locus standi* issue the bench had to decide was in which capacity the applicants acted in claiming the right to approach the court in relation to the allegations they had made.⁸ In claiming *locus standi* under section 85(1) of the Constitution, a person should act in

5 IK Walia 'Public interest litigation: An expression of voice for the sufferers of silence' 20 November 2009) <http://ssrn.com/abstract=1510271> (accessed 10 October 2016).

6 This section finds an equivalent in sec 38 of the South African Constitution.

7 *Mudzuru* (n 1 above) 9.

8 As above.

a single capacity when approaching a court, and not in two or more capacities in one proceeding, as the applicants in this matter had attempted to do when they based their application on both sections 85(1)(a) and 85(1)(d).⁹

The respondents (the Minister of Justice, Legal and Parliamentary Affairs) correctly submitted that, although the applicants claimed to have been acting in their own interests in terms of section 85(1)(a) of the Constitution, the facts showed that they had failed to satisfy the requirements of that provision. According to the respondents, the rule requires that a person claiming the right to approach the court using section 85(1)(a) must show on the facts that he or she is the victim, or there must be harm or injury to his or her own interests, arising directly from an infringement of the fundamental right or freedom of another person. In other words, the respondents sought a narrow interpretation of *locus standi*, an interpretation which required that the applicant must have a direct relationship with the cause of action.

Both applicants in the *Mudzuru* matter fell pregnant before the age of 18. Having fallen pregnant, they proceeded to live with the families of their respective partners, but neither of their pregnancies led to any of the applicants entering into a formal or customary marriage. In other words, neither of the two applicants was a victim of child marriage (strictly construed), which was the reason why they could not prove a direct relationship to the cause of action. Moreover, when they approached the court, they were no longer under 18 years of age and, therefore, were no longer children (as constitutionally defined in section 81(1)). The applicants thus failed to meet the standard of *locus standi* based on the requirement of proof by the claimant that he or she had been or was a victim of infringement, or threatened infringement, of a fundamental right or freedom enshrined in Chapter 4 of the Constitution. The applicants' papers further did not refer to any particular girl or girls whose rights had been, were being, or were likely to be infringed by being subjected to child marriage, whether such marriage was concluded in terms of section 22(1) of the Marriage Act or any other law.

In legal matters heard under the previous Zimbabwean Constitution, standing usually was interpreted in the traditional narrow manner, and no one could ordinarily seek judicial redress for legal injury suffered by another person, the only exception being when a person was unable to seek relief because they were in detention. However, the Zimbabwean Constitution liberalised and gave the *locus standi* principle a much more generous interpretation. This means that a court exercising jurisdiction under section 85(1) of the Constitution could adopt a broad and generous approach to standing. In the *Mudzuru* matter, the bench chose a wider interpretation of *locus standi*. This wide interpretation followed Canadian case law,¹⁰ which effectively states that an applicant may

9 As above.

act even in instances where he or she has only an indirect interest in the outcome of the matter. This interpretation was a step forward in implementing the current constitutional provisions related to standing. A wider interpretation means that the standing rule no longer serves as an overly-restrictive tool used for 'narrowing the road to litigation'.¹¹ Instead, the *locus standi* principle, when widely interpreted, gives anyone with a sufficient direct and indirect interest in a matter the right to be heard before an appropriate court of law.

While it was held that the applicants had failed to meet the requirements for establishing *locus standi* based on section 85(1)(a), the Court held that the applicants could nevertheless act in terms of section 85(1)(d) of the Constitution. The respondents' 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 section 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose welfare constitutes a category of public interest. Actions brought in terms of section 85(1)(d) of the Constitution seek to protect the public interest adversely affected by the infringement of a fundamental right. According to the Court:¹²

The right to a remedy provided for under section 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.

Hence, in the event of a proven infringement of a fundamental right, the right to a remedy provided for by section 85(1) of the Constitution becomes an effective tool for the protection of fundamental rights and freedoms enshrined in Chapter 4. Section 85(1) of the Constitution in its current form ensures that formal defects in the legal system are overcome, thereby guaranteeing¹³

real and substantial justice to every person, including the poor, marginalised, and deprived sections of society. The fundamental principle behind section 85(1) of the Constitution is that every fundamental human right enshrined in Chapter 4 is entitled to effective protection under the constitutional obligation imposed on the state. The right of access to justice, which is itself a fundamental right, must be availed 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.

10 The bench quoted the cases of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 and *Morgentaler Smoling & Scott v R* (1988) 31 CRR 1.

11 GN Okeke 'Re-examining the role of *locus standi* in the Nigerian legal jurisprudence' (2013) 6 *Journal of Politics and Law* 210.

12 *Mudzuru* (n 1 above) 13.

13 *Mudzuru* 14, referring also with approval to *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC).

According to the Court, the section 85(1)(d) procedure should, however, never be used 'to protect private, personal or parochial interests since, by definition, public interest is not private, personal or parochial interest'.¹⁴ This requirement is necessary to guard against frivolous and *mala fide* applications brought before the courts, not in an attempt to seek justice, but to waste time or actually impede the carrying out of justice. It is imperative, therefore, for the applicants' cause of action to show that the proceedings are in the public interest. However, it does not need to be shown that a significant section of the community is affected.¹⁵ Public interest is a value-laden concept which is not defined in section 85(1)(d) of the Constitution. The courts have preferred to leave the definition of public interest open, instead preferring to determine the question of public interest on a case-by-case basis. Since 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 concept is elastic and relative rather than fixed and absolute. Whether a person is acting in the public interest is a question of fact.¹⁶

This approach to section 85(1)(d) of the Constitution does not mean that public interest is 'that which gratifies curiosity or merely satisfies appetite for information or amusement'.¹⁷ There is a difference between 'what is in the public interest' and what is of interest to the public. Matters of public interest that affect fundamental rights and freedoms 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; and a clean environment, among others.¹⁸ On the other hand, matters that are of interest to the public are often matters that arouse the public's curiosity, for example, a scandal involving a person widely known in that society. Whereas matters in the public interest involve the protection and promotion of fundamental rights of a section of society, matters of interest to the public do not revolve around the protection or promotion of any rights.

According to the Court, the paramount test in public interest cases 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 segment of the community. The test covers cases of marginalised or underprivileged persons in society who, because of reasons such as poverty, disability, socially or

14 *Mudzuru* 15.

15 *Mudzuru* 16.

16 *Mudzuru* 18.

17 *Mudzuru* 17.

18 As above.

economically disadvantaged positions, are unable to approach a court to vindicate their rights. A public interest action will usually involve forgoing personal benefit to benefit a greater good to achieve the goals of social justice.¹⁹ Children fall squarely in this category of potential beneficiaries.

The broad interpretation given to *locus standi* in *Madzuru* bodes particularly well for future actions brought to further the interests of vulnerable groups based on alleged constitutional infringements. These could include advancing women's rights, children's rights, the rights of the elderly, persons with disabilities and veterans of the liberation struggle, all of whom have dedicated provisions attaching to them in Part 3 of Chapter 4 of the Constitution. Other vulnerable groups, such as migrants, cannot be left out of the equation either. This has also introduced certainty in the role played by public interest litigation in relation to breathing life into the provisions of the Zimbabwean Constitution, in that anyone with a direct or indirect interest can move to have constitutional rights protected and upheld.

3 Reliance on international treaty law and foreign law

3.1 Treaties

In the three years following the enactment of the Constitution, the courts have already relied on international law and treaties to deal with alleged violations of a Chapter 4 right. For example, in the case of *S v C (A minor)*,²⁰ the Court relied on international law and treaties, excerpts of which are quoted at length in the judgment, to test the constitutionality of a sentence of corporal punishment imposed upon a juvenile offender. In this case, corporal punishment was found to be a violation of the international law principles protecting children's rights, such that the court held that corporal punishment was an unconstitutional method of punishing juvenile offenders. This led the court to strike down the offending provision of the Criminal Procedure and Evidence Act.²¹ (In an *obiter dictum*, the Court also held that the constitutional prohibition against corporal punishment extended to that imposed by parents or those acting *in loco parentis*.) In the recent case of *Makoni v Minister of Justice, Legal and Parliamentary Affairs*,²² a sentence of life imprisonment without the possibility of judicial review or parole was ruled to be unconstitutional. The Court cited, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR), General Comment 21 of the United National Human Rights Committee, and Resolution 70/175 of the UN General Assembly,

19 *Mudzuru* 18.

20 2015 ZWHHC 718.

21 Cap 9:07.

22 CCZ 46/15 (judgment of 13 September 2016).

titled United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), in support of its finding.

Deputy Chief Justice Malaba's judgment in *Mudzuru* also presents a commendable example of how the courts can make effective use of international law and treaties in their reasoning. The applicants had in fact relied on the UN Convention on the Rights of the Child (CRC)²³ and the African Charter on the Rights and Welfare of the Child (African Children's Charter)²⁴ in support of the argument that allowing children under the age of 18 years to be married entails subjecting them to maltreatment, neglect and abuse which is proscribed in section 81(1)(e) of the Constitution.²⁵ The argument is bolstered by constitutional provisions requiring courts to take international law, treaties and conventions into account when interpreting constitutional rights,²⁶ by the provision enjoining courts to interpret legislation in a manner consistent with international customary law,²⁷ and the provision requiring the adoption of an interpretation consistent with any treaty or convention that is binding on Zimbabwe.²⁸

In *Madzuru* the Constitutional Court held that, by ratifying the CRC and the African Children's Charter, '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'.²⁹ A reading of section 78(1) of the Constitution, dealing with marriage rights,³⁰ and of section 81 (dealing with children's rights) indicates that these sections were formulated with international treaties in mind, as aptly noted in the *Mudzuru* case.³¹ This gave rise to the inference that these constitutional provisions must, therefore, be read progressively. The constitutionalisation of the applicable international human rights norms, and the influence they consequently exerted on the reasoning of the Court in this case, indicate that these treaty rights may be

23 Ratified by Zimbabwe in 1990.

24 Ratified by Zimbabwe in 1995.

25 Sec 81(1) provides: '(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; (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. (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.'

26 Sec 46(1)(c).

27 Sec 326(2).

28 Sec 327(6).

29 *Mudzuru* (n 1 above) 27.

30 Titled 'Marriage Rights', sec 78(1) provides: '(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.'

31 *Mudzuru* (n 1 above) 42.

directly applicable in domestic jurisprudence. This point has previously been made with regard to the jurisprudence of the South African Constitutional Court in the sphere of children's rights.³²

In this regard, the Court held that the meaning of section 78(1) could not be ascertained without having regard to the context of the obligations undertaken by Zimbabwe under international conventions and treaties on matters of marriage and family relations at the time of the enactment of the Constitution in May 2013. 'Regard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a part on how children should be treated.'³³ Noting that most earlier conventions do not provide a minimum age for marriage (cited were the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Marriage Convention of 1962,³⁴ which do not specify a minimum age for marriage,³⁵ and the CRC),³⁶ the Court narrowed its focus to article 21 of the African Children's Charter, which was quoted in full in the judgment.³⁷ In 'clear and unambiguous language', article 21 imposes on state 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'.³⁸ According to the Court, these positive measures entail that state parties are obliged to abolish child marriage.

Not mincing its words, the Court found that article 21 of the African Children's Charter had a 'direct effect' on the validity of the impugned sections of the Marriage Act.³⁹ Hence, the contention by the respondent Minister that the provisions of section 78 dealing with marriage rights should be read literally to mean that a person of 18 years or older has the right to found a family (but that it does not in express terms impact on their right to marry when younger than this age, as provided for in the Marriage Act) was rejected. The Court stated that it would lead to an absurd position, namely, that a family is not founded on marriage and, conversely, that a person under the

32 J Sloth-Nielsen & H Kruuse 'A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007-2012?' (2013) *International Journal on Children's Rights* 646-678. Also see A Skelton 'South Africa' in J Doek & T Liefwaard (eds) *Litigating the rights of the child* (2015) 15.

33 *Mudzuru* (n 1 above) 26-27.

34 Convention on Consent to Marriage, Minimum Age and Registration of Marriages.

35 The Recommendation which accompanied the Marriage Convention directed state parties to specify a minimum age of not less than 15 years.

36 See the definition of 'child' in art 1, that is, every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. Marriage, of course, is one way in which majority would be obtained earlier. As the judge notes, the CRC does not contain a specific provision on child marriage.

37 *Mudzuru* (n 1 above) 36.

38 *Mudzuru* 37.

39 As above.

age of 18 years would have the right to marry but not to found a family.⁴⁰ A literal interpretation of section 78(1) would, in addition, not give the fundamental right guaranteed the full measure of protection that it deserves. The nature and scope of the right to found a family (not always, but in many instances) require an agreement to live together as husband and wife, which union forms the foundation and nucleus of the family.⁴¹ Furthermore, the Court held that, read in the context of section 78(2),⁴² which enshrines the guarantee that persons who have attained the age of 18 years must give free consent to marriage without compulsion, section 78(1) clearly entails restricting marriage to those of 18 years and above. This leads to the conclusion that those below the age of 18 years have no legal capacity to marry.

The use by the Court of international human rights law, and in particular the African Children's Charter, is to be welcomed.⁴³ The judgment sets an important standard for the other 47 state parties to the Charter,⁴⁴ insofar as it delineates the expectation for domestic statutes on marriage and child protection law. Further, it accords primacy to treaty obligations which were voluntarily undertaken.

3.2 Foreign law

The Constitutional Court judgment is also commendable for the wide variety of foreign cases cited in support of various assertions and conclusions. Deputy Chief Justice Malaba drew on jurisprudence from Canada, South Africa, Australia, various cases from the United Kingdom, and from India. Although none of the foreign cases cited directly involved child marriage, it is to be welcomed that the Zimbabwean Constitutional Court is willing to seek support in foreign law for advancing principles of constitutional interpretation which resonate with international best practices.⁴⁵

40 *Mudzuru* 43. See also *dicta* to this effect at 45 and 46.

41 *Mudzuru* 44. The Court subsequently does not privilege this view of the nuclear family to the exclusion of other family forms, but acknowledges that the right to found a family may be exercised by a single person who lives with or brings up his or her children (46). Further, at 45, the Court notes that the Constitution does not specify the type or nature of marriage contemplated and, therefore, that a person can choose to enter into any kind of marriage and found a family according to sec 78(1).

42 Sec 78(3) contains a prohibition on persons of the same sex entering into marriage.

43 For an earlier discussion of the use of the African Children's Charter and the CRC in jurisprudence, see A Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 482. See further Skelton (n 32 above).

44 At the time of writing.

45 Extensive reliance on foreign law is evident in the recent *Makoni* decision (n 22 above).

4 Purposive reading of section 78(1)

In considering the purposive reading accorded section 78(1) by the Court, regard must be had to the defence adduced by the respondents in support of the interpretation of the constitutional validity of the provisions of the Marriage Act, and the Customary Marriages Act (insofar as the latter does not establish a minimum age for marriage).

One leg of the defence has already been referred to in section 2 of the article, namely, that the applicants lacked standing to bring an application for constitutional validity as they were parties to unregistered unions covered by neither the Marriage Act nor the Customary Marriages Act. Moreover, they were no longer children as constitutionally defined. The Court, however, found that they did have standing in the public interest.

A second objection argued by the respondents was alluded to in section 3.1, namely, that section 78(1) read literally only established the right to 'found a family' from the age of 18, and that this did not mean that persons below this age could not marry. The absurdity of this interpretation was correctly identified by the Court.⁴⁶

The third objection raised by the respondents was that a discriminatory age for marriage of girls and boys was justified on the ground that, physiologically and psychologically, a girl matures earlier than a boy. This averment, the Court held, was without scientific evidence to support it, and was countered by the international law position which is to the effect that the minimum age for marriage is set at 18 precisely because only persons above this age are considered psychologically and physiologically developed enough to be capable of giving free and full consent to marriage, and to bear children.⁴⁷ The Court's reasoning displayed commendable concern for gender equality, dispelling patriarchal views that 'females were destined solely for the home and the rearing of children of the family and that only males were destined for the market place and the world of ideas'.⁴⁸

A fourth strand of reasoning cited by the respondents was the fear that if the marriage laws allowing child marriage were struck down as unconstitutional, 'men would impregnate girls and not bear the responsibility of having to marry them'.⁴⁹ In its response, the Court reiterated the constitutional guarantee of equality of boys and girls without exception, and noted that the circumstance of a girl falling pregnant did not 'disentitle her from the enjoyment of all the rights of a child enshrined in section 81(1) of the Constitution'. Pregnancy did not make her an adult.⁵⁰ Whilst pregnant, she is also entitled to all

46 *Mudzuru* (n 1 above) 43. Also see *dicta* to this effect at 45 and 46.

47 *Mudzuru* 51.

48 *Mudzuru* 52.

49 *Mudzuru* 53.

50 As above.

other rights awarded children, such as the right to parental care, and the right to schooling.⁵¹ In the view of the Court, the parental obligation to care for and control the girl child does not cease because of her pregnancy. The Court conceded that early pregnancy was a social problem that stakeholders should co-operate to solve, but that compelling a pregnant girl to marry constitutes a form of abuse, and cannot justify child marriage.⁵²

The Court further held, after providing convincing and detailed evidence of the harmful consequences of child marriage for a child's education, economic opportunities in life, and sexual and reproductive health, that a law which purported to authorise child marriage as legitimate could not be said to be in the best interests of the child⁵³ and, hence, that the various aspects of the constitutional clause on children's rights supported a position which recognised the horrific consequences of early marriage for girl children, and justified striking down the Marriage Act as unconstitutional. The Court ultimately declared that section 78(1) of the Constitution set 18 as the minimum age for marriage in Zimbabwe and that, with effect from the date of judgment (20 January 2016), no person, male or female, may enter into any form of marriage⁵⁴ before attaining the age of 18 years.

In adopting a purposive interpretation of section 78(1), the Court was mindful of the social milieu in which such an endeavour had to occur, by stating:⁵⁵

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.

The stark reality is that Zimbabwe is regarded as a child marriage 'hotspot'. With a child population estimated at 47 per cent, 4 per cent of girls are married before the age of 15, and 31 per cent are married before the age of 18. Zimbabwe is ranked at 41 on the list of countries where children marry before the age of 18 years.⁵⁶ The rate of child marriage is higher in some areas than in others. An analysis of the 2012 National Housing and Population Census by the Zimbabwe Statistics Agency illustrates that the majority of child marriages occur in rural areas, in districts such as Chiredzi, Kariba Rural, Makonde,

51 Education Circular 35 of 2001 grants leave to girls who fall pregnant in primary and secondary schools and allows their re-enrolment after delivery.

52 *Mudzuru* (n 1 above) 54.

53 *Mudzuru* 51.

54 Unregistered customary law unions and unions arising out of religion or religious rites are expressly covered by the ruling.

55 *Mudzuru* (n 1 above) 53.

56 http://www.devinfo.info/mdg5b/profiles/files/profiles/4/Child_Marriage_Country_Profile_AFRZWE_Zimbabwe.pdf (accessed 5 January 2014).

Mbire, Muzarabani, Sanyati and Shamva, with a proportion of above 35 per cent.⁵⁷ On average, one out of three girls will be married before their eighteenth birthday.⁵⁸

Furthermore, there have been reports of acceptance of the phenomenon in influential circles. In June 2015, the Attorney-General of Zimbabwe was widely reported as saying that young girls who are not in school and who are doing nothing should be able to be married off by their parents.⁵⁹ Further, he is reported to have claimed that it was not practical to jail adults who have sex with 'consenting' 12 year-old girls because the girls would suffer more with no one to look after them while their abusers are being incarcerated.⁶⁰ These comments were very widely reported and attracted a barrage of criticism, as Zimbabweans took to various forms of social media to protest and to call for his resignation from office. The Constitutional Court could not have been unaware of this, given the extensive media coverage that it attracted, and given the fact that the *Mudzuru* matter had already been argued before it in December of the preceding year. It is thus possible that the Constitutional Court was aware of the need to send out a strong message against child marriage to counter these conservative and, it should be stated, rather irresponsible remarks from a public leader.

The transformative nature of the Constitution in altering the social reality appears to have been fully appreciated by the Court. The Court highlights that once it becomes known that child marriage in Zimbabwe is abolished, 'the imperative character of the law shall be felt in the hearts and minds of men and women so strongly that transformative obedience to it shall become a matter of habit'.⁶¹

5 Regional impact

Subsequent to this ruling, a legal challenge to the Tanzania Law of Marriage Act was brought, which allowed girls to marry at the age of 15 with parental permission, and at the age of 14 with the permission of a court.⁶² The High Court ruled this provision unconstitutional on

57 http://www.zimstat.co.zw/sites/default/files/img/National_Report.pdf (accessed 5 October 2016).

58 Zimbabwe National Statistics Agency (ZIMSTAT) Multiple Indicator Cluster Survey 2014, Key Findings. Harare, Zimbabwe. This survey is cited in the *Mudzuru* judgment. See further Plan International *In-depth review of legal and regulatory frameworks on child marriages in Zimbabwe* (2016). See further <http://www.girlsnotbrides.com> (accessed 5 October 2016).

59 <http://www.chronicle.co.zw/let-them-have-sex-marry-tomana-says-12-year-olds-can-consent/> (accessed 10 October 2016).

60 As above.

61 *Mudzuru* (n 1 above) 54.

62 *Rebeca Gyumi v Attorney-General* Misc Civil Cause 5 2016 (copy on file with authors).

the basis that it contravened the equality clause⁶³ of the Constitution of Tanzania, 1977 (as amended). Apart from the difference in the minimum age for marriage of girls and boys, a further ground for alleging discrimination was that the Act provided differently for girls who had parents or guardians in a position to furnish consent, and those who did not (in this instance parental consent could be waived).

However, the government of Tanzania (in the words of the High Court) 'strongly resisted' the claim of unconstitutionality' in that Court. The basis for the respondent's opposition was the sentiments of the people in divergent communities based on custom, tradition and religious belief in relation to marriage. Arguing that the 1971 Marriage Act of Tanzania was a compromise to accommodate this diversity, it was further suggested that the provision requiring the intervention by a court for the marriage of a person below the age of majority provided a safety valve.⁶⁴ Noting that the law itself seemed to have reservations about the capacity of girls aged 15 years and over to make an informed decision to marry (by also requiring parental consent), and significantly swayed by the in-depth arguments in *Madzuru* about the negative consequences of child marriage for girls, the Court agreed with the petitioner that the Marriage Act of Tanzania was unconstitutional. As was the case with the *Madzuru* judgment, significant weight is accorded the provisions of the African Children's Charter, notably article 21, and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)⁶⁵ (which also establishes the minimum age for marriage at 18).⁶⁵

The government of Tanzania, however, has now noted an appeal against the judgment,⁶⁶ which is clearly indicative of ongoing strong resistance to the proposition that the marriage of children under 18 should as a matter of principle be outlawed.

At the time of writing, the conclusion of the Tanzanian appeal was still being awaited. However, it is hoped that the Appeal Court will follow the lead of the Zimbabwean Constitutional Court by rejecting arguments defending child marriage on the basis of custom, culture and belief,⁶⁷ in clear contravention of regional human rights commitments.

63 Since male persons were entitled to marry only from the age of 18 years.

64 *Gyumi* (n 62 above) 10. It was also argued that boys could approach a court for leave to marry if they were below 18 but above 14 years of age.

65 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005) (African Women's Protocol), ratified by Zimbabwe in 2008.

66 *Legalbrief* 10 August 2016 (accessed 10 August 2016).

67 Mutangi refers to the fact that Pentecostal churches in Zimbabwe support the practice of child marriage on religious grounds; T Mutangi 'Religion, law and human rights in Zimbabwe' (2008) 8 *African Human Rights Law Journal* 526.

6 Conclusion

It has been argued that the *Madzuru* judgment discussed here is significant for more reasons than may at first glance appear. By striking down the offending provisions of the Marriage Act, and including customary marriages and unregistered unions within the reach of the pronouncement on constitutional invalidity, a strong signal is sent out that new marriage laws have to be devised. The international human rights community has for some time been urging Zimbabwe to undertake this.⁶⁸ The Constitutional Court has taken a bold step by addressing the seeming reluctance of the government to develop and enact such revised laws. Recent research which analysed the correlation between marriage laws that consistently set the age for marriage for girls at 18 years or older, and the prevalence of child marriage and teenage childbearing in 12 sub-Saharan African countries, revealed that the prevalence of child marriage was 40 per cent lower in countries with consistent laws against child marriage in comparison with countries without consistent laws against this practice, and that the prevalence of teenage childbearing was 25 per cent lower in countries with laws setting a consistent minimum age for marriage compared to countries without such laws.⁶⁹ These results support the hypothesis that laws containing a consistent minimum age for marriage protect against the exploitation of girls, and provide concrete evidence in support of the unequivocal stance taken by the Constitutional Court of Zimbabwe.

Further, the Court's willingness to engage with widely-held social perceptions regarding girls' sexual maturity and the appropriate protection of pregnant girls is important in the context of apparent support at high level for legal provisions enabling child marriage.

However, an equally important aspect of the decision lies in the generous approach to *locus standi* adopted by the Court, which signals that in future the Constitution can become a valuable tool in the hands of civil society seeking to enforce human rights. Furthermore, the Court's reliance on international treaty law to underpin the interpretation of the Constitution and its recourse to foreign judgments in support of its reasoning are welcomed, as it lends stature and weight to the Court's reasoning and avoids the insularity that characterises some jurisdictions.

68 See, eg, the Concluding Observations of the Committee on the Rights of the Child to Zimbabwe in 2016 (CRC/C/ZWE/CO2 para 46(a)). As early as 1998, in its Concluding Comments addressed to Zimbabwe, the Human Rights Committee recommended that the government of Zimbabwe adopt measures to prevent and eliminate prevailing social and cultural attitudes supporting early and child marriage, and to address law reform in this regard (CCPR/C/79/Add.89).

69 B Maswikwa et al 'Minimum marriage age laws and the prevalence of child marriage and adolescent birth: Evidence from sub-Saharan Africa' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 58.