



**MIDLANDS STATE UNIVERSITY**  
**FACULTY OF LAW**

**HUMAN RIGHTS vs. CULTURE: THE PLIGHT OF YOUNG WOMEN**  
**CONCERNING SORORATE MARRIAGE IN ZIMBABWE**

BY LINDA R. MTOMBENI

R0824814H

SUPERVISOR: DR T. MUTANGI

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**MIDLANDS STATE UNIVERSITY**

**FACULTY OF LAW**

**APPROVAL FORM**

The undersigned certify that they have read and recommended to the Midlands State University for acceptance a research project entitled *Human Rights vs. Culture: The Plight of Young Women Concerning Sororate Marriage in Zimbabwe* submitted by Linda R. Mtombeni (R0824814H) in partial fulfilment of the requirement of the Bachelor of Laws Honours Degree (HLLB) at Midlands State University.

.....  
**SUPERVISOR**

...../...../.....  
**DATE**

.....  
**PROGRAM CO-ORDINATOR**

...../...../.....  
**DATE**

.....  
**EXTERNAL EXAMINER**

...../...../.....  
**DATE**

## DECLARATION

I, LINDA RUVARASHE MTOMBENI, do hereby declare that this dissertation is the result of my own investigation and research, except to the extent indicated in the acknowledgement, references and by comment included in the body of the report, and that it has not been submitted in part or full for any other degree at any other university.

.....  
**STUDENT SIGNATURE**

...../...../.....  
**DATE**

## **DEDICATION**

To my parents Niya and Vinolia Mtombeni, for your long-suffering love and patience, my brother Lynn T. Mtombeni, for your wise counsel, Laurah Mtombeni, my daughter Annabelle Ruramai and my partner Joyman Rgwaringesu, for the support and motivation you gave me to complete this august programme.

## **ACKNOWLEDGEMENT**

To JEHOVAH the Almighty, I give glory and praise to You my God for being with me throughout all the years this program spanned.

To my supervisor Dr T. Mutangi, I thank you for taking me under your wing and being a mentor, an advisor and a guide through the course of this study.

To the entire staff of the MSU Law Faculty, your patience and dedication to excellence afforded me a chance to prove that I can do it. THANK YOU.

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## Chapter One

### **Introduction.**

The position of the woman and the girl child has for a long time been uncertain in Zimbabwe. Zimbabwe has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) IN 1991<sup>1</sup> and the Convention on the rights of the Child (CRC) as well as the regional counterparts of these instruments. In 2013, the nation adopted a Constitution Amendment (No.20) Act 2013 (the Constitution), which makes specific mention of women's rights and children's rights<sup>2</sup>. Several pieces of legislation are also structured towards the realisation of women's and children's rights. As the target group the rights of young women fall within the ambit of these laws and statutes. However despite all this, the situation of young women and their rights has not improved much in the country. The reason is an entrenched patriarchal culture that has for so long perpetuated certain practises that disregard women as equals and promote male dominance.

There are a lot of harmful beliefs and behaviours which have anchored themselves deep in culture with a view to keep women in submission, catering to the pleasure and sometimes economic strategies of men and their communities. It is trite to mention the need for a change in cultural perspective so as to acknowledge, accommodate and enhance gender equality and ultimately young women's rights as human beings.

### **Background.**

Traditionally the woman in the Shona culture, which forms the largest portion of the Zimbabwean population<sup>3</sup>, was an important member of the society. Her roles as a mother, grandmother, aunt, daughter, sister were duly recognised as she performed indispensable duties that kept the society running. Through all this, the woman however remained the property of a male member of either her family or of the family she got married into. The woman and the girl child were always subject to the dictates of a male member, regardless of status, wealth or age. Females had a few rights if any and these were seldom the sort that could be enforced, for instance at the headman's kraal or before a chief in a tribal court. Any offences committed against the person of a woman were conveyed to her male guardian, who then could bring the charge against the offender and claim compensation. Such was tradition in cases of rape and assault. Thus this apparently shows that where such guardian

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<sup>1</sup> S Chirawu, *Challenging the Status Quo: Gender, HIV/AIDS and the Law in Zimbabwe*. Sable Press Harare (2007)

<sup>2</sup> Section 80 and 81 of the Constitution of Zimbabwe Amendment (No.20) Act 2013

<sup>3</sup> <https://www.geni.com/projects/Zimbabwe-Tribes-and-People/23140> (accessed 02 May 2016)



was the perpetrator of such abuses, the woman had no recourse and suffered silently.

Apart from these instances where there was an obvious and glaring discount of women's rights, the traditional Shona culture has some not so obvious traditions that totally undermined the integrity and dignity of the woman as a human being. Seemingly trivial but deeply entrenched traditions such as sororate marriages (custom or law decreeing that a widower should, or in rare cases must, marry his deceased wife's sister)<sup>4</sup>, is one of the traditions which were widely accepted but harmful to women. It is important to note that there are schools of thought which state that pre-colonial society was not abusive of women's rights<sup>5</sup>. However even such scholars do admit that the concept of equality between men and women did not exist and that it was still a patriarchal society<sup>6</sup>.

During the colonial period, some hope for the realisation of women as human presented its self through the introduction of Christianity. The colonisers along with the converts frowned upon some of the more glaring abuses against women. Again with the advent of a European style legal system some abused women could make police reports which could lead to the arrest of offenders, although such women often faced reproach and were ostracised for their actions by their families. However the above mentioned tradition found its way into the system gaining support from particularly men who argued that it served a purpose in society and that it was more helpful than harmful. Thus this tradition of sororate marriages was held on to during this period.

In the post-colonial period, the movement for women's rights has gained significant steps as the country made moves to consider the plight of young women. The Legal Age of Majority Act<sup>7</sup> saw the removal of women from the 'perpetual minority' status to being able reach majority status and own property of their own. The ratification of the CEDAW was a landmark decision and 2013 Constitution now has a specific constitutional clause enshrining women's rights. Yet for all these seemingly significant steps towards the realisation of women's rights, the practice of sororate marriage has managed to go unchecked and unchallenged although it perpetuates discrimination and violation of women's rights. Some major harmful cultural practises such as appeasement and child marriages are being strongly lobbied against where they have not been totally done away with and declared criminal. Yet the afore mentioned practice has snuck in to this era, being practised on young women either secretly or openly in some circles of society to date. The practice of sororate marriages receives widespread support from people from all walks of life and yet it

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<sup>4</sup> <http://global.britannica.com/topic/sororate> (accessed 24 March 2016)

<sup>5</sup> Gudhlanga, E 2013, 'SHUTTING THEM OUT: OPPORTUNITIES AND CHALLENGES OF WOMEN'S PARTICIPATION IN ZIMBABWEAN POLITICS - A HISTORICAL PERSPECTIVE', *Journal Of Third World Studies*, 30, 1, pp. 151-170, Academic Search Premier, EBSCOhost, viewed 18 March 2016.

<sup>6</sup> Gudhlanga, E 2013 n 5

<sup>7</sup> now included in the General Law Amendment Act [Chapter 8:07]

mostly is diminishing and degrading to the young women forced into them. In some cases it leads to major health concerns for the young women involved<sup>8</sup>.

### **Problem Statement.**

The rights of young women are blatantly eroded by the practice of sororate marriage. Culture condones this but it goes against the Supreme law of the land, the Constitution. This study seeks to find out why the harmful cultural practice continues despite direct prohibition by statutory law and recommends how to stop the practice.

### **Research Questions.**

- 1) What is sororate marriage? Does it exist in other cultures? Why does it exist in our culture?
- 2) Who is a young woman? Which fundamental rights of young women are infringed upon by the practice of sororate and what are the effects of such infringement?
- 3) How does the current statutory law help combat sororate marriage? Why is this statutory law failing to eliminate the practice?
- 4) What recommendations, for cultural and legal reform can be given to effectively eradicate sororate marriage of young women?

### **Literature Review.**

Harmful cultural traditions and practises can be define as any and all behaviour, attitudes and or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education, and physical integrity<sup>9</sup>.

Sororate is a custom or law decreeing that a widower should, or in rare cases must, marry his deceased wife's sister. This harmful traditional practice is as widespread as early marriages/forced marriages, and has serious consequences touching on partners' procreation, since the cause of death is not taken into account. Infectious and transmittable diseases such as HIV/AIDS are thus propagated in the concerned families with disastrous consequences<sup>10</sup>.

Malawi Human Rights Commission Report of 2008 as further noted by UNICEF (2001), defines replacement of a deceased wife (chimutsa mapfihwa, chimeta masisi or chidzutsa nyumba), as a cultural practice in which the bereaved husband marries the young sister or cousin of the deceased. This involves emotional and physical duress on the part of the girl child who is obliged to protect the legacy of the family left upon by the dead sister through inheriting children and the husband to continue

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<sup>8</sup>[http://www.stopvaw.org/defining\\_other\\_forms\\_of\\_forced\\_marriage\\_wife\\_inheritance\\_levirate\\_and\\_sororate\\_marriages](http://www.stopvaw.org/defining_other_forms_of_forced_marriage_wife_inheritance_levirate_and_sororate_marriages) (accessed 24 March 2016)

<sup>9</sup><http://www.achpr.org/instruments/women-protocol/> (accessed 12 September 2015)

<sup>10</sup> (2009) M. Kouyaté: Harmful Traditional Practises Against Woman and Legislation Ethiopia

carrying for the family<sup>11</sup>. This indicates that the problem of sororate marriage of young women is apparent albeit elusive.

Article 2 of CEDAW mandates member states to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women<sup>12</sup>.

The Constitution of Zimbabwe contains the Bill of rights which details the inherent guarantees every individual is entitled to<sup>13</sup>. Among these are rights guaranteed to women and children which the harmful practice of sororate undermines or ignores.

The Domestic Violence Act [Chapter 5:16] and the Criminal Code (Codification and Reform) Act [Chapter 9:23] are pieces of legislation in Zimbabwe that directly address the problem of sororate marriage and other harmful practices. However these statutes have not been able to eliminate harmful cultural practices against young women as evidenced by recent reports<sup>14</sup>.

There is very little research why the aptly drafted statutory law backed by the Constitution, has failed to effectively stem harmful cultural practices in Zimbabwe. It is therefore the aim of this study to identify the barriers existing in the society which impede the operation of statutory law, making customary law and tradition paramount. This study will also attempt to give recommendations on how to bridge the gap between culture and its practices and human rights to ensure that rather than clash, the two coexist side by side.

### **Research Methodology.**

In this study, the research method employed is qualitative research primarily library and desk research. The main sources consulted are text books, articles and journals. Also referred to, are various pieces of legislation addressing the rights of women and children and the Zimbabwean Constitution.

Of paramount importance are the internet sources which provide current information and developments which aim at eradicating elusive harmful cultural practices in this and other jurisdictions. It is the author's aim to make recommendations based on this information on how to end the violation of young women's rights through continued support of these callous practices.

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<sup>11</sup> Unpublished: T.T Chidakwa, Chigadza mapfihwa and kuroodzera: Exposing children to intergenerational atrocities? presented at the Child Sensitive Social Conference, Harare Zimbabwe 2014

<sup>12</sup> Article 2 (f) of the Convention on the Elimination of All Forms of Discrimination Against Women 1979

<sup>13</sup> Section 49, 51, 52, 54, 56, 76, 78, 80 and 81 of the Constitution

<sup>14</sup> *Women & Development: The face of child marriages in Zim (Part 3)* The Standard February 28, 2016 <http://www.thestandard.co.zw/2016/02/28/the-face-of-child-marriages-in-zim-part-3/> (accessed on 2 May 2016)

## Chapter Synopsis.

- Chapter One is an introduction to the problem of some cultural tradition of sororate marriages in Zimbabwe which are maintained although they result in violation of young women's rights. This chapter also gives the construct and arrangement of the study.
- Chapter Two seeks to identify and explain the cultural practise under study and also explain how it impacts on young women and the possible consequences in their lives
- Chapter Three looks at the specific rights which clash with this cultural practice and the extent to which practise of this tradition infringes on the affected group's enjoyment of their rights
- Chapter Four seeks to examine current laws and statutes and to try and interpret them in a manner that would provide interim or permanent relief to any young woman currently caught up in this practice against her will.
- Chapter Five will focus on recommendations towards formulating a long term solution against this practice, enabling young women to know their rights and eliminating the fear to use the law for their protection.

## Chapter 2

### 2.1. Introduction.

Sororate marriage has existed in the history of mankind for a long time. It exists in most cases backed by culture and religion. Sororate marriage is the sociological custom of a man marrying or engaging in sexual activity with his wife's sister, usually after the wife is dead or has proven infertile<sup>15</sup>. The history of this practise will be studied through looking at different jurisdictions, taking into account their cultures and religions.

### 2.2. Sororate marriage in other jurisdictions.

The most known and perhaps oldest instances of mentioned sororate marriage are Hebraic being found in the Jewish Torah which is the Old Testament in the bible. Jacob exercised what is known as sororal polygyny when he married the sisters Leah and Rachel<sup>16</sup> although this was later expressly prohibited in the Torah<sup>17</sup>. It appears that among modern day Jews, sororate marriage remains legal provided the wife of the man has deceased first.

Islam condones the practice of sororate marriage and its counterpart, levirate marriage for the purported support and continuity of the family. Islam however only allows sororate marriage after the initial wife has died and the sister is replacement<sup>18</sup>. It does not allow for sororate polygyny.

Sororate is also practised in the United Kingdom (UK) and was formally legalised through *The Deceased Wife's Sister's Marriage Act 1907*<sup>19</sup>. This piece of legislation take defines sororate out of the parameters of incest and it was later amended to legalise levirate marriage also, in 1921. It is however very important to note that sororate marriage in the UK was solely based on choice of the parties involved and was neither necessitated by culture nor religion.

Closer to our jurisdiction, in Malawi ***mbirigha*** or ***nthena is*** the local *Chewa* word for sororate. Here it is actually done as a reward to a good son in-law or when he expresses interest in his sister in law. He is given a “bonus wife” which is usually the younger sister or niece of his wife<sup>20</sup>. This practise is driven by poverty as it reduces the number of mouths to feed. More so if the son in-law is wealthy and has been

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<sup>15</sup> <https://www.studypool.com/discuss/1043194/sororate-marriage-and-a-levirate-marriage> (accessed 30 March 2016)

<sup>16</sup> <http://molly.kalafut.org/marriage/marriage-types.html> (accessed 30 March 2016)

<sup>17</sup> Leviticus 18 vs18 “Do not take your wife’s sister as a rival wife and have sexual relations with her while your wife is living.” New International version

<sup>18</sup> Suran An-Nisa [4:23] Qur’an Saheeh International translation (accessed 2 April 2016)

<sup>19</sup> <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095705475> (accessed 30 March 2016)

<sup>20</sup> <http://www.scienceofrelationships.com/home/2014/11/10/will-you-be-my-bonus-wife-the-practice-of-marrying-sisters-i.html> (accessed 8 April 2016)

generous to the wife's family, they may practise sororate with the view that their daughters will be comfortable.

From the above discussion, it is evident that sororate marriage is a practice that has not only been around for a long time but one which is also as widespread as it is ancient. It is also apparent, observing the way sororate is done around the world that branding the practise entirely as a harmful practice would be remiss since there is evidence showing that in some jurisdictions, it is actually an exercise of one's right to marry whomsoever they will. However it is the aim of this study to bring to light the glaring circumstances where the practise of sororate undoubtedly amounts to harmful practice. This is especially true in Islam based and culturally inclined jurisdictions where the rights of young women, whether as children, women or even human beings are seldom put into consideration. The strong patriarchal bias is a common feature in the jurisdictions which harmfully apply the custom of sororate marriage. This shows that there is direct co-relation between harmful customs and practises against young women and overbearing male dominance regardless of the legal system which may prevail in the jurisdiction.

### **2.3. Justifications for sororate marriage in our jurisdiction.**

Although the Shona make up the largest percentage of the Zimbabwean population, all other ethnic groups found in the country are patriarchal. Be it the Ndebele, Kalanga or vaVhenda they all have patriarchy as a common feature. Therefore as the study progresses, a definite tie between patriarchy and harmful cultural practises especially sororate will be clearly established.

One cannot discuss the cultural fabric of Zimbabwean society without mentioning Hunhu/Ubuntu. This has been described as the African concept of humanism, a metaphor personifying the importance of human solidarity and negating inequality or isolated individualism<sup>21</sup>. Ubuntu/ Hunhu has been widely commended and applauded for the way it caters for children in such a manner that even orphans were cared for<sup>22</sup>. As one scholar said, a person with hunhu / ubuntu is one who upholds the African cultural standards, expectations, values and norms and keeps the African identity<sup>23</sup>. It is therefore perplexing how this humanism allows for otherwise paedophilic behaviour like child sororate.

In the Shona culture the practise of sororate is known as *chigadza mapfihwa*, where the younger sister joins the union while the older sister is still alive. Where it is done

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<sup>21</sup> M. Mawere, T.Mubaya African Philosophy and Thought Systems: A Search for a Culture and Philosophy of Belonging, Langaa Research & Publishing CIG, Bemenda, 2016

<sup>22</sup> Hunhu/Ubuntu as the cornerstone of African education: The Patriot, 24 October 2013  
<http://www.thepatriot.co.zw/> (accessed 9 April 2016)

<sup>23</sup> P. Sibanda The Dimensions of 'Hunhu/Ubuntu'(Humanism in the African Sense): The Zimbabwean Conception *IOSR Journal of Engineering Vol. 04, Issue 01* (January. 2014),

because the wife of the man is deceased, it is called *chimutsa mapfihwa* signifying that she comes to “resuscitate the fire” in the home<sup>24</sup>. The Ndebele call the custom *ukungena* and the Kalanga call it *nkadzana*<sup>25</sup>. The concept of marriage in most Zimbabwean ethnic groups was different from the man-and-wife setup that was introduced during the colonial period. The marriage was viewed as a social contract binding not only the individuals involved but also their families. Thus when a man who has paid bride price loses his wife to death, the family of the wife has to provide him with another to uphold their end of the bargain. This is how sororate marriage was justified in the Zimbabwean societies. The bond of marriage went beyond even death, such that death did not signify the end of the marriage. Sororate and levirate were a form of continuation of that marriage bond despite the death of one of the spouses<sup>26</sup>.

Furthermore, allowing a man to marry the younger sister of his wife was thought to curb extra-marital affairs as he would have enough intimacy at home. This was the major validation for the sororal polygyny. In most instances neither the concerns of the wife nor of her sister were considered as the man could carry out his intent to marry the sister regardless of his wife’s views and the man’s father in law could force the sister to marry the man. Thus it may be noted that the dynamics behind the practice of sororate are largely patriarchal and the people who bear the brunt of the effects of this practise are the young women forced to marry their sister’s husbands in the name of culture.

#### **2.4. Effects of sororate marriage on young women.**

Asked when a child matured into an adult, not all people gave the legally correct answer of 18 years. Some emphasised that a child was mature upon the emergence of physical attributes such as breasts, hips and other body curves. This perhaps brings to light some of the fundamental misconceptions that fuel harmful cultural practices like sororate marriage. In essence, the harmful practice of sororate on young women is child marriage. When the young woman reaches puberty, she is given to her sister’s husband even though she is not yet an adult and she is not even consulted as to whether she wants the union or not. This ordeal in most cases has a very negative impact on the young woman’s life.

Firstly around the time she reaches puberty and is given in marriage, the young woman is usually doing her secondary school. This means the girl will stop going to school and her chances of getting a job and being financially independent are dashed. Secondly, because of her immaturity the young woman lacks the skill and

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<sup>24</sup> Unpublished: T.T Chidakwa n16

<sup>25</sup> E. Makado, J. Zivanai, R. Makado An Assessment of the Bakalanga Cultural Sexual Practices in Relation to HIV/AIDS Spread and Prevention: A Case of Matabeleland South Zimbabwe. IJHSS, Vol2, Issue 9, 2014.

<sup>26</sup> M. Kambarami Femininity, Sexuality and Culture: Patriarchy and Female Subordination in Zimbabwe. ARSRC 2006

patience needed to handle a pregnancy. In most cases early pregnancy in young women can result in complications like high blood pressure, anaemia and premature birth of the baby.

In addition to that, the young woman cannot negotiate for birth control or for safe sex because the man is the one always in control of the woman's sexuality<sup>27</sup>. Thus even when it is clear that bearing more children will negatively impact her health, or that the man is being unfaithful, the young woman can do nothing to safeguard her health. This means that even where her sister died as a result of HIV/AIDS infection, the young woman cannot protect herself and is awaited by the same fate.

More so, the emotional and mental turmoil the young woman goes through has to be factored in. The husband may truly love her but feelings of betrayal may be harboured by the sister who may take it out on the young woman in the absence of the husband. Society may also brand her as a man snatcher despite the fact that the arrangement was not of her own making. Thus from this point it can also be noted that not only is sororate marriage child marriage but it is also arranged marriage. The young women's rights violated in the practise of such marriages are staggering and will be discussed in detail in the next chapter

## **2.5. Conclusion.**

From the above discussion, it is evident that the practice of sororate marriage dates back to the ancient days. It is practised in different ways in different cultures and societies around the world. It is also important to note that not all forms of sororate marriage are harmful. However in most cases the practice is done on unwilling young women, who have neither say nor recourse as they cannot defy culture. It is this form of sororate which should be eliminated as it violates numerous human rights guaranteed to these young women.

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<sup>27</sup> Research and Advocacy Unit Let Them Grow First: Early Marriage In Goromonzi, Zimbabwe 2014



## **Chapter 3**

### **3.1. Introduction.**

This chapter will take an explicit look at the rights of young women as children, as women and as human beings entitled to these inherent guarantees. The chapter will also discuss how the cultural practice of sororate marriage, as practised in the Zimbabwean cultures, infringe on young women's rights. The study will focus on the Bill of Rights in the 2013 Constitution of Zimbabwe in tandem with all the regional and international human rights instruments which Zimbabwe has ratified. This study will also attempt to explain how harmful cultural practices can continue to exist in a jurisdiction which has all-encompassing inalienable rights for its people.

### **3.2. Definition of young women.**

'Young women' as used in this study refers to girls in that transitional stage of development between childhood and adulthood. Also referred to as 'adolescence', it is marked by physical growth and reproductive maturation. The traditional view of the child to adult transition is flawed as it ignores the lack of mental and emotional maturity in young women. Thus a young woman given in marriage does not possess the mental and emotional maturity to handle the responsibilities of married life. Legally in Zimbabwe, the demarcation between a child and an adult is 18 years. Any one below the age of 18 is regarded as a child. It is because of this disparity that the term 'young woman' is used to describe the affected population. Even the Children's Act [Chapter 5:06] makes use of the term 'young persons' to refer to these females who albeit being children, they are culturally regarded as adults. Legally they are children but in the eyes of those who perpetrate these human rights violations against them they are women.

### **3.3. Human Rights affected by sororate marriage of young women**

#### **3.3.1 Right to Human Dignity.**

Dignity is the inherent value and worth of an individual as a human being<sup>28</sup>. Everyone is born with it as it is a transcendent worth and value that comes from God<sup>29</sup>. According to the Human Dignity Trust<sup>30</sup>, not only is human dignity a right in itself but it is also the basis of all other human rights. It is at the core of human identity which is why without it none of the other rights hold any meaning.

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<sup>28</sup> <https://www.psychologytoday.com/blog/dignity/201304/what-is-the-real-meaning-dignity-0> (accessed 4 May 2016)

<sup>29</sup> <https://educationforjustice.org/free-files/HumanDignity09>. (accessed 4 May 2016)

<sup>30</sup> <http://www.humandignitytrust.org/pages/OUR%20WORK/Why%20Human%20Dignity> (accessed 4 May 2016)

The right to dignity is found in section 51 of the Constitution of Zimbabwe. It is also enshrined in the preamble to, and Article 1 of the Universal Declaration of Human Rights (UDHR), the preamble to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the preamble to the Convention on the Rights of the Child (CRC). On the regional scene, the right to dignity is again found in the preamble to, and Article 5 of the African Charter on Human and Peoples' Rights (ACHPR) and Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol). Article 21 of the African Charter on the Rights and Welfare of the Child ACRWC urges party States to do what they can to stop harmful social and cultural practices, such as child marriage, that affect the welfare and dignity of children. This indeed marks dignity as the bedrock of the international human rights instruments.

The practice of sororate on young women aggressively ignores and erodes the dignity of young women. They are given in marriage to a partner who they have not chosen and without their consent. The marriage is usually a transaction between the young woman's family which gains economically and the husband who is content with a young wife that is impressionable and easy to manipulate. The only person who does not benefit at all in this transaction is the young woman, whose self-worth has been reduced to a commercial commodity, battered and traded by the males in her society. Culture forbids her to air her views against men and elders. Thus with her dignity violated and stripped, it is no surprise that the following rights of the young woman are also violated by the practice of sororate marriage.

### **3.3.2. The right to Personal Security.**

The Constitution of Zimbabwe in section 52 describes this as the right to bodily integrity, which includes freedom from all forms of violence from private and public sources. Article 3 of the UDHR, Article 6 of the ACHPR and Article 4 of the Women's Protocol also guarantee the right to security of person.

Sororate marriage of young women however leads to physical violation of their security of person. The young women have no autonomy over their bodies and are viewed as property of their male guardians and later, their husbands. Apart from the visible physical effects, the ravages of sororate marriage have psychological effects on the young women. They are forced to go through life with trauma from early sex, early child bearing and the burdens and responsibilities of married life.

### **3.3.3. The Right to Education.**

The Constitution of Zimbabwe now has education as a specific right. Enshrined in section 75, the clause grants every citizen state-funded basic education and avails further education which the state, through reasonable measures must make available and accessible. This clause read together with section 81 (1) (f) of the same Constitution grants young women below the age of 18 years a ramified right to

education. In international human rights instruments, Article 11 of the ACRWC and Article 28 of the CRC are particularly express on the right of children to education.

However, when a young woman is forced into sororate marriage, this oft times signals the end of her education<sup>31</sup>. Expectations on her shift from going to school to household chores, field work and child bearing and rearing for her husband. Denied basic education, these young women are often illiterate, unempowered and dependent on their spouses. This leaves them very vulnerable to all forms of abuse as they have nowhere else to go. Appealing to their families often does not help as they are told to go back to the abusive husband and not to be a disgrace to the family. These young women are resigned to a life of poverty and abuse. Since they are uneducated, they do not even know where to reach for help. Thus this harmful practice of sororate marriage is a serious infringement on the right to education.

#### **3.3.4. Health and Reproductive rights.**

Health care is a right afforded the Zimbabwean citizen in section 78 of the Constitution. The section specifically includes reproductive health care services. These services are essential to mothers in both pre and post-natal periods. Because of the biological ability of women to give birth, such services are much more crucial to them. This is why this right is also contained in Article 12 of CEDAW. In a show of true African uniqueness the Women's Protocol further goes on to point out the source of the problem in Article 14. The rights contained in this Article are the very targets of early/forced marriages. The victims of these harmful practices find themselves unable to choose their own spouse, and are deprived of the right to exercise any control over sexual and reproductive life. Thus young women end up unable to access health care facilities because their husbands or the elders forbid it. Sometimes it is because of religion and other times it is simply because the husband knows that the state of the young woman's health will raise questions.

When read together with section 78 of the Constitution<sup>32</sup>, Article 12 of CEDAW shows that there is real need to afford this right to African women in particular. Apart from Section 78(3), forced sororate marriage of young women violates all the other terms in the clause. It is neither consensual nor is it done on women above 18 years.

#### **3.4 The Cultural Relativism Dilemma.**

By virtue of their definition, human rights ought to be universal. They are to apply to all human beings. This has been the contention of the Universalist school of thought. The Relativist school of thought however argues that moral structures develop in the context of local cultures and that universal applicability is impractical<sup>33</sup>. The merits of

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<sup>31</sup> <http://www.zhrc.org.zw/index.php/2014-07-02-07-41-38/zhrc-in-the-news/64-early-child-marriages-girls-should-be-given-opportunities> (accessed 5 May 2016)

<sup>32</sup> Section 78 Marriage Rights.

<sup>33</sup> Good, Colleen (2010) "Human Rights and Relativism," *Macalester Journal of Philosophy*: Vol. 19: Iss. 1, Article 4.

cultural relativism appeal especially to the power structures predating the human rights movement and even colonialism. In Zimbabwe, this power is patriarchy.

During the colonial era the Nationalist movements relied on the universality of human rights, claiming self-determination, universal suffrage and all other rights in the UDHR. However upon attaining independence, furthering the application of human rights to encompass women and children would essentially remove the supremacy of patriarchy and take away the authority men had over women and children. Therefore cultural relativism is a useful tool used to negate the application of human rights in those areas of influence that traditionalists enjoy certain privileges. It is used to conserve customs and cultures which satisfy the whims of patriarchs, even though they are clearly abusive to women and children<sup>34</sup>. At the same time, preservation of one's culture is preservation of one's identity. Culture is what makes a person or people unique from others and thus identifiable. Total erosion of one's culture is akin to non-existence and is unacceptable. This is how the dilemma between universalism of human rights and their relative applicability due to diverse cultures arises.

The debate on human rights universalism and cultural relativism aggravates the already extremely complex issues arising out of abusive indigenous customs.<sup>35</sup> An approach based on either one of these conflicting ideologies will not yield any satisfactory position between safeguarding culture and implementing human rights. Instead steps should be taken to reconcile culture with the need to protect the rights of young women rather than emphasise the conflict between the culture of forced sororate and human rights. To action on this stance, a brand of relativism termed 'weak relativism' states that although moral and ethical standards are relative to each culture, there are certain cultural standards that transcend all cultural barriers and are found throughout the world. These have evolved to become the international human rights and should thus be universally applicable. This line of thought is reasonable when for example one considers the right to life. There is no culture where one can take a life and so, as long as young women are human beings, honour killings are violation of the right to life even when sanctioned by culture<sup>36</sup>.

### 3.5. Conclusion.

Therefore it is clear that the very union of forced sororate between a man and a young woman violates human rights guaranteed to her by the Constitution as well as international human rights instruments. Cultural relativism may contend that there is no violation, as different cultures may not recognise the practice as abusive.

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<sup>34</sup> C. Nagengast Women, Individual Rights and Cultural Relativity: Power and Difference in Human Rights Debates *University of New Mexico Working Paper* 266, 1998

<sup>35</sup> <http://www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-1/Charters.pdf> (accessed 6 May 2016)

<sup>36</sup> <http://edition.cnn.com/2016/05/05/asia/pakistan-teen-girl-killed/index.html?sr=fbCNN050616pakistan-teen-girl-killed0236AMVODtopLink&linkId=24202680> (accessed 6 May 2016)

However it evident that culture needs to be dynamic and evolve to the extent where it is not in direct conflict with the State's human rights obligations to its citizens. This is why, in fulfilment of its human rights obligations, Zimbabwe has established an elaborate network of statutory laws criminalising all forms of child marriage, sororate included.

## Chapter 4

### **4.1 Introduction .**

As mentioned above, Zimbabwe has a number of statutes which come together to form comprehensive protection for young women who are faced with the prospect or are currently victims of the harmful practice of sororate marriage. There however appears to be a point where these laws seemingly cease to apply and custom and tradition take over. This is because, from the moment a human being is capable of comprehending instruction, the first legal regime they experience are the rules of the family. Thus the customs of the family and the community within which the child grows have the biggest impact on a child. Statutory law is later introduced to a person often at a later stage when they start to attend school. It becomes a secondary legal regime often abstract and removed from day to day life. This is why customary law has wide spread acceptance and more influence on individuals<sup>37</sup>.

Despite this acceptance, customs which are contrary or prohibited by legislation will be overridden by the legislation since it is backed by superior sanction than customary law. The hybrid legal system in Zimbabwe recognises customary law as law but maintains legislation as the primary source of law. Hence as the primary law, it is appropriate that its position regarding sororate marriage of young women be established and analysed.

### **4.2. Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Criminal Code).**

This is the chief statute that prescribes what constitutes a crime to the state and between individuals in Zimbabwe. It is the primary legislation that has direct bearing on the harmful practice of young women being given in sororate marriage. Section 94 (1)(b) and (c) of the Criminal Code asserts that, if a lawful custodian or relative of a female person makes arrangements or promises to give her in marriage or forces her to do so before she turns 18 years or against her will be guilty of pledging a female person. It also further goes on to declare that any party to the said arrangement or marriage may be charged as an accomplice to the said crime. This clearly establishes that sororate marriage of young women is a criminal offence regardless of all the cultural approval it may have. It must be noted that this piece of legislation alone has the power to effectively stamp out sororate and all other forms of child marriages if it could be effectively brought to operate at community level. It is unambiguous and direct in stating its intent and the penalty the offence carries.

From the Criminal Code, one can also cite section 68 as read with section 65 which says that it shall not be a defence to a charge of rape that one was wife to the accused at the time of the actions forming the charge. This section can be interpreted as creating a way out for those young women who have already fallen

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<sup>37</sup> <http://jim.com/custom.htm> (accessed 13 April 2016)

victim to the practice of sororate marriage against their will. The lack of consent for the marriage is adequate to reasonably conclude that all sexual activity that occurred was rape. Although the Attorney General has to authorise the prosecution first<sup>38</sup>, it is a way out for young women who find themselves trapped in sororate marriage.

### **4.3. Domestic Violence Act [Chapter 5:16].**

This Act is of paramount importance as it governs the way family relates. It addresses the harm caused by patriarchal customs at family level. In the author's view, it is the first and biggest stride taken, to seriously challenge harmful cultural practices in the country. The fact that the Act governs the domestic arena makes it an open channel for victims to seek recourse. In section 3<sup>39</sup>, the Act makes specific mention of forced and child marriages as harmful practices and as constituting domestic violence. It further goes on to give a detailed outline of the steps which the victim should take until they find temporary relief before the offender is tried and permanent relief if the offender is convicted.

This Act however faces an exigent task as it seeks to make right wrongs that predate it and that are accepted. In a tangible example of cultural relativism, abuse of young women that derives from cultural rites and practices is viewed as normal and is sometimes encouraged by the older man and women<sup>40</sup>. Young women are often reprimanded by their families if they file a case with the authorities<sup>41</sup> and there is often stigmatization of the abused when the rest of the community feels that she was not abused. There is also a lot of mistrust of the police due to the fact that some police officers believe that domestic violence is a private matter and therefore laugh at the victims, further abuse them, accuse them of being insolent wives and decline to attend to complainants or carry out investigations<sup>42</sup>. The officers may come from communities which accept such customs and may even have child brides themselves ergo their sympathies will lie with the accused and not with the victims<sup>43</sup>. Thus regardless of the excellently drafted law combating domestic violence in all its forms, it appears that once again the statute is curtailed in its purpose by lack of implementation by law enforcement agents, subsequent lack of trust in the justice system by the victims and ultimately by customary beliefs.

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<sup>38</sup> Section 68(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

<sup>39</sup> section 3 (1) (l) (iv) and(v) of the Domestic Violence Act [Chapter 5:16]

<sup>40</sup> E. Makado, J. Zivanai, R. Makado An Assessment of the Bakalanga Cultural Sexual Practices in Relation to HIV/AIDS Spread and Prevention: A Case of Matabeleland South Zimbabwe. IJHSS, Vol2, Issue 9, 2014.

<sup>41</sup> Canada: Immigration and Refugee Board of Canada, Zimbabwe: Domestic violence, including legislation; state protection and support services available to victims (June 2012- May 2015), 3 June 2015, ZWE105170.E, available at: <http://www.refworld.org/docid/5587b7144.html> (accessed 14 April 2016)

<sup>42</sup> Ibid

<sup>43</sup> Innocenti Digest Domestic Violence Against Women and Girls No.6 - June 2000

#### 4.4. Legal Aid Act [Chapter 7:16].

It birthed the Legal Aid Directorate (LAD), which is mandated to help indigent persons with legal services. In light of the on-going discussion, it is evident that the young women subjected to sororate remain in this difficult situation because of the total economic dependence they have on the husband<sup>44</sup>. Thus where one seeks to escape from their situation, it is a relief to have professional legal assistance. The initiative shows that people are aware that financial/economic abuse is used so often to silence the victim. This means that the services of legal counsel are out of reach for most of these young women. The Legal directorate thus offers much need assistance to such indigents. However some have bemoaned the low morale services at LAD<sup>45</sup> and some have lamented the shortage of LAD staff. The fact that handling an indigent's case depends on availability of funds also reveals the present problem of government's lack of funds and could seriously impede the justice. LAD has however been decentralised which makes its services more accessible<sup>46</sup>. The biggest setback is that it appears that most people are not even aware that there is an institution that offers free legal aid in the country. Thus, for most young women who find themselves in situations of domestic violence, especially those involving harmful cultural practices, chances are they have never even heard of the Legal Aid Directorate.

It is however disconcerting that despite having such good legislation on one hand, there still remains some statutes which are seriously lacking when it comes to eliminating harmful cultural practices especially the ones like sororate marriage, which affect young women primarily. The fact that the Children's Act<sup>47</sup> which is the Act dealing with children and young persons does not even mention harmful cultural practises like child and forced marriage is disappointing. It mentions protection of children and young people in other areas like neglect but does not make direct reference to this problem seriously damaging young women's lives daily. This makes one question the sincerity of the government in domesticating international treaties<sup>48</sup> and upholding the rights of children.

Furthermore the Customary Marriages Act [Chapter 5:07] was recently challenged by two young women in the Constitutional Court of Zimbabwe<sup>49</sup> much to the satisfaction of child and women's rights advocates. They contended that the Act recognizing 16 years as the legal age of consent violates Section 78 of the new supreme law of the nation, which stipulates that anyone who has reached the age of

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<sup>44</sup> n4 above

<sup>45</sup> Pre-trial Detention in Zimbabwe: Analysis of the Criminal Justice system and conditions of pre-trial detention, ZLHR, Law Society of Zimbabwe (2013)

<sup>46</sup> <http://www.herald.co.zw/legal-aid-for-the-poor-gets-boost/> from October 3, 2015 (accessed 15 April 2016)

<sup>47</sup> Children's Act [Chapter 5:06].

<sup>48</sup> Section 34 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013

<sup>49</sup> Mudzuru & Anor v The Minister of Justice, Legal & Parliamentary Affairs N.O & Ors CCZ 12/2015



18 has a right to have a family<sup>50</sup>. It is sad to note that the Minister actually tried to defend the application but the court eventually ruled in the applicants' favour. Most impressive is the fact that the two applicants were themselves victims of early marriages ergo, giving hope to those still in that situation that the justice system can help them reclaim their rights.

#### **4.5. Conclusion.**

It is noteworthy that the legislation of the country provides for a stalwart system to combat and eliminate practices like child sororate marriages. The problem is a general distrust of some of the law enforcers and the contradictory nature of some pieces of legislation. To compound to that, there is a general lack of knowledge of where to get assistance should a young woman find herself in situations of domestic violence. Most importantly a way should be found to entirely prevent harmful cultural practices like sororate marriage of young women and not merely to remedy the situation. Remedy is not bad, but by then, the psychological and physical harm would already have been done and the state would have failed to fulfil its human rights obligations to citizens.

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<sup>50</sup> <http://www.voazimbabwe.com/a/zimbabwe-teengers-challenge-marriages-laws/2598175.html> (accessed 15 April 2016)

## **Chapter 5**

### **5.1. Introduction.**

In the wake of this study and having canvassed the problems of harmful cultural practices and their intricate ties with customary law, it is clear changes have to be made in Zimbabwe in order for the country to meet its human rights goals domestically and internationally. It has been averred that culture is dynamic, not static<sup>51</sup>. A static culture does not allow for development and positive change. For any development to be achieved the country has to harness all its potential and strive as one towards this object. The female population has a role to play and any hindrance like harmful cultural practices which diminishes female potential has to be eliminated. Reforms and modifications to any lagging laws have to be introduced to effectively fight harmful cultural practices. This chapter will detail the findings of this study, the conclusions and the reformatory measures that can be put in place to eradicate harmful cultural practices.

### **5.2. Findings.**

In essence the harmful practices that this study focused on, that of sororate marriage practised on young women, is a form of early or forced child marriage. The peculiarity is that the man to be wed is the sister's husband. This is the crutch upon which perpetrators lean when they argue for this practice as a custom to be preserved. As shown in this study, the results are physiological and psychological trauma on the young woman involved, and it cripples national development in the long-run. Thus retrogressive patriarchal tendencies and cultural perspectives have to be reformed.

### **5.3. Recommendations.**

The recommendations listed do not militate against the entire traditional culture in Zimbabwe. Not all cultural practices in Zimbabwe are bad or in violation of human rights. The reforms seek to address sororate, child marriages and forced early marriages and to diffuse those elements that make the practices thrive.

#### **5.3.1. Involvement of men in the fight to stop forced sororate marriage.**

Firstly, because patriarchy has been proved to be the catalyst for these harmful cultural practices, the logical step would be to address the men who ultimately drive the perpetuation of harmful cultural practices towards young women. Fathers and male relatives play a significant role in perpetuating child marriage for a variety of reasons, most of which stem from inequitable gender norms, such as an emphasis on family honour as it relates to the control of girls' sexuality, and economic issues of

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<sup>51</sup> <http://2012books.lardbucket.org/books/cultural-intelligence-for-leaders/s04-05-culture-is-dynamic.html>  
(accessed 15 April 2016)

property<sup>52</sup>. It is therefore important to engage men and have them conscientise other men of the ills of child marriages. This is because, although some men encourage this practice in its various forms, some men do not. They thus have the ability to meet their counterparts on an equal footing as men and point out the ills of such practices. Already initiatives like the UN Women's HeForShe organisation<sup>53</sup> have already commenced which reach out to men and boys as future fathers and husbands to effect the change and protect their mothers, wives, sisters and future wives

### **5.3.2. Dissemination of information at community level.**

Campaigns, workshops and outreaches are also important in that they educate the general populace including young women of their rights. Young women thus get knowledge that enables them to protect themselves from harmful practices. It will also encourage them to seek help from school teachers, social workers and even the police if they find themselves about to be forced into sororate or any other forms of child marriage. The dissemination of knowledge is very important because if the young women do not know their rights and where to get help when these rights are violated, then the harmful practices will go on. Therefore a joint movement involving men in general, traditional leaders and the community at large is the most efficient way to battle against harmful cultural practices. Apart for getting men to stop men who support and participate in sororate marriages with young women, there is also great need to tear down this practice at a community level. Cultural norms are deeply entrenched and only careful and dedicated endeavours will convince our culture to expunge harmful practices. They will be more successful if they are instigated from within our culture. That is why there is need to also involve our chiefs and our traditional leaders, who are the custodians of our culture, in the effort to eradicate sororate marriage of young women.

### **5.3.3. Involvement of Chiefs and respected Traditional Leaders.**

Personal meetings with chiefs and headmen on a nationwide scale will yield much, as they can be personally edified about the detriment of harmful cultural practices. Campaigns, workshops and other public outreach efforts will not be as effective if the society's leaders personally shun them and just pay lip service with no real commitment. This is why the practices continue despite them being outlawed. Since most of these cultural leaders will pay more attention to men, this reform ties in with the first one. Men advocating for the end of practices like child marriage will be seriously taken by traditional leaders who are used to taking council from men. The power wielded by chiefs and traditional leaders to end harmful practices was witnessed in Malawi where a chief, albeit a female one, annulled all child marriages

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<sup>52</sup> M. E. Greene, S. Perlson, A. Taylor, G. Lauro Engaging Men and Boys to End the Practice of Child Marriage. GreeneWorks and Promundo 2015.

<sup>53</sup> Formed on 20 September 2014 [www.heforshe.org](http://www.heforshe.org) (accessed 15 April 2016)

in her area<sup>54</sup>. Thus it is evident that this is a step Zimbabwe needs to take if it will break the elusive harmful practices still being observed in the country.

#### **5.4. Legal Reforms.**

Legislation such as our Constitution, the Criminal Code and the Domestic Violence Act are commendable in the way they fight and prevent harmful cultural practices. However there are gaps in our legislation which have for a long time been exploited by culture and patriarchy to perpetuate practices like sororate child marriage.

##### **5.4.1. The Children's Act [Chapter 5:06].**

Since this is the primary statute governing the welfare of children and young persons, it is imperative that it specifically prohibits all forms of child marriages. This Act should stipulate stiff penalties for this harmful practice against children and young persons since protection of minors is its charge. Applying this reform would also be a step towards aligning the statute with the 2013 Constitution. This will cement the law abolishing child marriages from the primary Act in tandem with the supreme law of the land.

##### **5.4.2. The Customary Marriages Act [Chapter 5:07].**

As seen above, significant steps have already been taken to reform this Act since the case of *Mudzuru & Anor v The Minister of Justice, Legal & Parliamentary Affairs N.O & Ors*<sup>55</sup>. The case provides crucial jurisprudence as it will aid the courts to make decisions prohibiting harmful cultural practices and upholding human rights in future. The ruling in the case declared that the Customary Marriages Act was unconstitutional for its failure to recognise that young women under the age of 18 are children and should not marry even with the consent of a parent or guardian. What remains now is to repeal the section allowing marriages of young persons so that the Act will not contradict the Constitution.

##### **5.4.3. Lobbying and Advocating.**

The precedent set by the Mudzuru case is vital in the sense that it paves the way for similar child rights abuses to be exposed in the courts. The commendable job by the rights lobbying group Real Open Opportunities for Transformation Support (ROOTS) is a shining example of how human rights activists and lobbying groups can push for change against harmful cultural practices. The applicants' legal council also showed diligence and commitment, proving how the legal profession is dedicated to forwarding the human rights cause. Therefore lobbying and advocating are powerful tools which result in real change when applied with commitment and for a just cause.

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<sup>54</sup> [http://www.huffingtonpost.com/entry/woman-chief-breaks-up-850-child-marriages-in-malawi\\_us\\_56fd51c2e4b0a06d580510da](http://www.huffingtonpost.com/entry/woman-chief-breaks-up-850-child-marriages-in-malawi_us_56fd51c2e4b0a06d580510da) (accessed 22 April 2016)

<sup>55</sup> CCZ 12/2015

### **5.5. Conclusion.**

This study managed to show that despite the measures taken by Zimbabwe as a country, against harmful cultural practices and the practice of sororate marriage of young women, the practices still persist. It has also shown that this practice is difficult to stop because it is practised under customary tradition and at community level and is thus very elusive. Sororate marriage of young women is just another form of child or forced marriage and is therefore illegal. Despite legislation prohibiting such practices they still thrive in the county. With a cultural perspective turn-around and legal reforms, harmful cultural practices such as sororate marriage of young women can be eliminated. Zimbabwe can develop a culture that observes human rights and at the same time maintains its uniqueness and identity.

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2. African Charter on Human and Peoples' Rights on the Rights of Women in Africa
3. African Charter on the Rights and Welfare of the Child
4. Convention on the Elimination of All Forms of Discrimination against Women
5. Convention on the Rights of the Child
6. Universal Declaration of Human Rights



## **Cases**

*Mudzuru & Anor v The Minister of Justice, Legal & Parliamentary Affairs N.O & Ors*  
CCZ 12/2015