

Adolescent Consent to Marriage and Sexual Activity, and Access to Sexual Reproductive Health Services in Light of the Zimbabwe Marriages Bill

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Introduction

2019 marks the 30th anniversary of the adoption of the United Nations Convention on the Rights of the Child (UNCRC). A landmark Convention aimed at the protection of all children worldwide, States have come far in ensuring the wellbeing and fulfillment of more children's potential than ever before. With child mortality decreasing by 50% since 1990ⁱ, primary school enrolment increasing by almost 20% in sub-Saharan Africa in the last 25 years,ⁱⁱ and global youth literacy rising to over 90% this decade,ⁱⁱⁱ the world had plenty successes to celebrate on the anniversary of the Convention on 20 November 2019.

Although most people would agree that protecting children from violence and safeguarding their wellbeing are founding pillars of any society, the public is often much less comfortable viewing children and adolescents being able to consent to sexual activity and accessing sexual health services, whilst only being able to consent to marrying at a later age in their lives. Indeed, these rights are recognized by the United Nations Committee on the Rights of the Child (UNCRC): the minimum ages of consent to marriage, sex and sexual health services should “closely reflect recognition of the status of human beings under the ages of 18 as rights holders in accordance with their evolving capacity, age and maturity.”^{iv} These include rights in relation to sexual activity and the right to be informed about, and have access to, sexual and reproductive health services. ‘Evolving capacity’ in this regard refers to the growing ability of children to take responsibility for life decisions as they attain more skills, with the need for protection lessening as their capacities evolve.^v

At the time of writing, Zimbabwe is debating a new Marriages Bill, which will see civil and customary marriages harmonised into one Bill, instead of being treated separately. There are several important rights that are upheld in the Bill, but the most groundbreaking is protecting children from being forced into marriage before they are 18 years old. This aligns legislation to the Constitution, which prohibits child marriage – a marriage of anyone under 18 – at its adoption in 2013 and follows essential global standards.

As the Marriages Bill is debated, the age at which an adolescent should be able to consent to sexual activity, sexual and reproductive health services, and marriage, is being discussed widely. This debate is strongly influenced by societal, cultural and political factors.^{vi} This paper aims to differentiate between the three types of consent. It will show why children need to be protected from marrying before they are 18, whilst recognizing that adolescents engage in sexual activity and have rights that need to be protected in that regard. Acknowledging that adolescents may engage in sexual activity, it is important to ensure their realization of sexual and reproductive health. The protection of girls and boys from sexual violence needs to be carefully balanced against their right to human dignity, privacy and health services.

This paper will explain the three types of consent, summarize Zimbabwe's current legal framework, outline international standards, explore regional best practices on adolescents' age of consent to marriage, sexual activity and reproductive services, and analyze what this means for Zimbabwe.

Concepts

AGE OF CONSENT TO MARRY

The age at which someone is seen able to make a consensual decision to marry has been set at 18 years in many countries worldwide in the last two decades.^{vii} Entering a marriage before 18 years leads to a range of negative consequences, particularly for girls. These include a higher probability of early pregnancy and childbirth, which results in higher than average maternal morbidity and mortality, increased likelihood of experiencing intimate-partner violence, higher rates of depression and a lower chance of completing education and reaching economic empowerment.^{viii} In 2015, 25% of females below the age of 19 were married in Zimbabwe.^{ix}

Article 21(2) of the African Charter on the Rights and Welfare of the Child urges State Parties to take action including through legislation, to specify the minimum age of marriage to be 18 years. The Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women has explained that a child marriage, where one of the parties is under 18 years of age, is considered to be a form of forced marriage, because that party is not seen to be able to express full, free and informed consent.^x Outlawing marriage of children is also stipulated in the SADC Model Law.^{xi}

AGE OF CONSENT TO SEXUAL ACTIVITY

Globally, at least half of all adolescents are sexually active before turning 18.^{xii} In Zimbabwe, this is only slightly lower: nearly 40% of girls and 24% of boys are sexually active before they reach the age of 18.^{xiii} Most countries have legislated an age at which an adolescent is deemed to be able to express informed consent to engage in sexual activity. There is no uniformly applied or accepted age, with ages ranging from 11 (Nigeria), to 16 (UK), to 20 (South Korea). In Canada, it is 16, but the country has implemented two 'close in age' exception to age of consent to sex, to prevent consenting adolescent peers from gaining a criminal record. An adolescent between 12-13 years can consent to sexual activity with a person not more than two years older than them, and an adolescent between 14-15 years can consent to sexual activity with someone not more than 5 years older.^{xiv}

In Zimbabwe the age of consent is 16, although 13-15-year olds are in some cases deemed able to consent.^{xv} Even though children need to be protected from sexual abuse and exploitation, it needs to be acknowledged that adolescents start exploring their sexuality and engaging in consensual sexual activity with their peers before they turn 18. Raising the age of consent to sexual activity does not prevent adolescents from engaging in sexual activity. It only leads to adolescents being criminalized as sex offenders. Apart from these harsh consequences, it creates barriers in accessing sexual and reproductive health services. This can lead to higher levels of unsafe abortions, sexually transmitted diseases (STDs) and unwanted pregnancies. In addition, research shows that promoting sexual abstinence, as is often the case in jurisdictions with high ages

of consent to sexual activity, does not actually lead to a delayed sexual debut. It rather gives adolescents the option to make safe decisions about their health.^{xvii}

AGE OF CONSENT TO ACCESS SEXUAL AND REPRODUCTIVE HEALTH SERVICES

The age at which a person is considered mature enough to consent to receiving health services related to sex and reproduction without a guardian is in many States tied to the age of sexual consent. The higher the age of sexual consent, the more barriers exist in accessing sexual health services before that age. Having to obtain consent from a guardian or a parent to access services related to sexual health is a hurdle many adolescents will choose to avoid. Research shows that the better access adolescents have to sexual health services, the more likely they are to be empowered to express full, free and informed consent to sex. This increases overall health and wellbeing. In this regard, the Committee on the Rights of the Child has encouraged States to recognize a “presumption of capacity” for adolescents to access sexual and reproductive health services.^{xviii}

Legal Framework in Zimbabwe

AGE OF CONSENT TO MARRY

Section 78(1) of the Constitution of Zimbabwe provides that only persons who have attained the age of 18 have the right to found a family. This was tested and confirmed in a landmark Constitutional Court case decision in 2016 to also mean entering a marriage.^{xix} In the current Marriages Act of 1964 [Chapter 5:11], the age at which a girl is allowed to marry is 16 years, whereas it is 18 years for boys. In addition, the current Customary Marriages Act does not set the age of marriage for customary marriages. In the court case, the Court concluded that section 78 (1) of the Constitution sets 18 years as the minimum age of marriage and that any law, practice, or custom authorizing a person under 18 years to marry is invalid, with effect from 20 January 2016.^{xx} The Marriages Bill of 2019 will align and set the age of marriage at 18 years for all marriages and for both genders.

AGE OF CONSENT TO SEXUAL ACTIVITY

In Zimbabwe, sexual relations with a girl aged 12 years or below is rape as girls in this age bracket are not seen to have the capacity to consent to sexual relations.^{xxi} As for ages 13-15, it gets more complicated: as per the Criminal Law and Codification Act of 2004 [Chapter 9:23], sexual relations with a person of or above 13 but under 15 is presumed to be rape, unless there is evidence to show that the person was capable of consenting, and did do so.^{xxii} This assumption of lacking capacity to consent does not apply to those who are 15. It is then up to the courts to decide if there was consent. It can be assumed that the law is drafted in this way to cater for unregistered child marriages where the girl child is

under 16. Another potential result of the way this legislation is applied is that boys who are just one or two years older than their female partners gain a criminal record for engaging in consensual sexual activity if it goes to court, even though they are not yet adults.^{xxiii}

AGE OF CONSENT TO ACCESS SEXUAL AND REPRODUCTIVE HEALTH SERVICES

As for accessing sexual and reproductive health services, such as seeking contraception or termination of pregnancy, Zimbabwe does not have an expressed age at which a child may consent to medical procedures. The Public Health Act of 2018 [Chapter 15:17] defines a child as anyone under the age of 18 years, and states that “informed consent” can only be given by a person who has legal capacity to do so. The Act is silent on sexual and reproductive health services, which leaves the provision of such services to children unclear and up to the health care worker to interpret whether or not a child can receive such services without a guardian present. In such a legal environment, medical providers base decisions on personal opinions around the appropriate age, rather than following a stipulated framework.^{xxiv} There is need to amend the bill to ensure adolescents can access sexual health services universally.

Terminating an unwanted pregnancy is prohibited and can attract a prison sentence up to five years, as per the Termination of Pregnancy Act of 1977 [Chapter 15:10]. Exceptions are in cases of rape, incest, when the mother’s life is at risk, or when the child may be born with serious disabilities. In the latest concluding observations of the Committee on the Rights of the Child on Zimbabwe, the Committee expressed concern over the high rate of sexual violence experienced by adolescent girls and stated that the abortion law in Zimbabwe was restrictive and that the extensive procedures for authorizing an abortion resulted in “illegal and unsafe abortions”. The Committee urged the Government to “ensure children’s access to safe abortion and post-abortion care services in law and in practice”.

Regional (Sadc) and International Standards on Age of Consent to Sex and Accessing Sexual and Reproductive Health Services

EXAMPLES FROM THE REGION

According to Section 46 (1) (e) of the Zimbabwean Constitution, a court, tribunal, forum or body may consider relevant foreign law when interpreting the Declaration of Rights set out in Chapter 4. Therefore, it is useful to explore how other countries in the region have addressed the issue of age of consent to sexual activity and accessing sexual and reproductive health services, to assist in

the interpretation of the relevant rights under the Zimbabwean Constitution.

In 2015, South Africa introduced an amendment to the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007 (hereafter the Sexual Offences Act), that allows adolescents aged 12 to 15 to engage in consensual sex with peers of the same age, or between the age of 16 to 17 if there is no more than a 2-year age difference.^{xxvi} This followed a 2013 Constitutional Court decision known as the *Teddy Bear Clinic for Abused Children* case.^{xxvii} The South African Court had to decide whether criminalising consensual sexual acts between children aged 12 to 16 as per the Sexual Offences Act was constitutional. The Clinic contested the Sexual Offences Act that at the time allowed prosecution of adolescents engaging in consensual sex. The Clinic argued that the law had various harmful effects on adolescents, such as exposure to the criminal justice system, and a negative effect on their understanding of, and healthy attitudes towards, sexuality. The respondents argued that the relevant sections of the Sexual Offences Act were in place to protect the rights of children by “delaying the choice to engage in sexual activities” and empowering caregivers and institutions to emphasize the risks of early sexual activity.^{xxviii}

The court found that criminalising consensual sexual activity between adolescents increased the likelihood of them participating in unsafe sexual behavior. Caregivers and institutions were as a result disempowered in responding to adolescents because they could not promote behavior deemed illegal and they may have had a legal obligation to report.^{xxix} The sections of the Act were found to infringe on a range of children’s rights, such as human dignity, privacy, bodily and psychological dignity, and as such, were ruled unconstitutional.^{xxx}

South African courts have also judged adolescents’ right to access sexual health services as a potential violation of the best interest of the child and the South African children’s constitutional right to be free from maltreatment, neglect and abuse. In a case at the High Court Transvaal Division in 2004, a Christian legal group argued that pregnant girls under 18 were not able to “appreciate the need for and value of parental care” and should not be seen as able to consent to abortions. The Association argued that the abortion law in South Africa allowing abortions for adolescents was unconstitutional. The Court rejected the argument and stated that the best interest of the child was in fact catered for in the Act because the principle and the Act recognise “the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority”.^{xxxi}

Namibia, similar to South Africa, has implemented an age of consent to sexual activity and reproductive health services of 14 years. In addition, the country has adopted a ‘close in age’ exception in the Combating of Rape Act, preventing prosecution of adolescents having consensual sex if the younger person is under 14 years and the older person is not more than 3 years older.^{xxxii}

Earlier this year, the Kenyan Court of Appeal overturned a decision by the High Court that sentenced an adult man for having consensual sex with a girl approximately 17 years and 5 months old. The Appeal Judges criticized the

unrealistic nature of a law that presumes teenagers do not engage in sexual activity and asserted that although below the age of 18 years, young adults had "reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies".^{xxxiii} In the conclusion of their judgement, the Judges of the Court of Appeal called for a discussion on the age of consent, referring to the current law as a "tragedy" in need of "serious interrogation".^{xxxiv}

INTERNATIONAL STANDARDS

Criminalising consensual adolescent sexual behaviour and limiting adolescents' access to sexual and reproductive health services violates fundamental rights enshrined in international human rights law.^{xxxv} These include the right to the highest attainable standard of health, the right to access information, the right to survival and development, and the principle of the best interests of the child.^{xxxvi} This is especially important because the Constitution of Zimbabwe allows interpretation of the Declaration of Rights which takes "into account international law and all treaties and conventions to which Zimbabwe is a part- [and] may consider relevant foreign law"^{xxxvii}.

On consenting to sexual activity, the Committee on the Rights of the Child emphasizes that "State parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent".^{xxxviii} These ages should respect the evolving maturity of the child and every child's status as a rights holder.^{xxxix} The Committee underlines that States should not criminalize adolescents of similar ages for consensual and non-exploitative sexual activity. There needs to be a balance between evolving capacities and protection when States decide upon the minimum age for sexual consent.^{xl}

As for adolescents accessing sexual and reproductive health services, the Committee on the Rights of the Child in addition to encouraging states to recognize a "presumption of capacity" when seeking services, insists that "all policies and programmes effecting children's health should be grounded in [the] recognition of equal rights related to sexual and reproductive health", and that "children's right to health contains a set of freedoms and entitlements, including sexual and reproductive freedom to make responsible choices".^{xli} The Committee advocates for States allowing adolescents to access sexual and reproductive information, including on the prevention of HIV/AIDS, family planning and contraceptives, the dangers of early pregnancy and the prevention and treatment of sexually transmitted diseases.^{xlii} These positions reflect the commitment of the Committee to children's inherent right to control their health and body, which includes their sexual and reproductive autonomy.^{xliii}

Not only do these rights obligate the State to provide sexual and reproductive services to adolescents, but the Committee also urges States to provide appropriate information without consent from spouses or parents. In addition, States must legally protect administration of confidential advice that would allow adolescents to give informed consent and receive medical treatment without the consent of a guardian.^{xliv}

Conclusion: Aligning Different Ages of Consent – in the Best interests of the Child?

In the discussions around the new Zimbabwean Marriages Bill, there have been concerns raised around the age of consent to marriage and sexual consent not being aligned. Proposals have ranged from lowering the proposed age of consent to marriage in the bill to 16 years, to increasing the age of consent to sexual activity to 18 years.

These proposals have been guided by the notion that adolescents should not engage in sexual activity outside marriage. As highlighted above, a high age of sexual consent does not necessarily delay the age at which adolescents engage in sexual activity and is likely to increase health risks. Adolescents who illegally engage in sexual activity are not able to access information and health services related to sex, risk having unsafe abortions, carry unwanted pregnancies and are at risk of contracting STDs. For girls especially, these consequences can lead them to drop out of school, which renders them more vulnerable to further rights violations. Further, it can lead to two adolescents engaging in consensual sexual activity both being charged with rape or indecently assaulting each other, with the prospect of a long prison sentence.

Concerns have been voiced that a lower age of sexual consent to that of marriage encourages adolescents to engage in sexual activity outside of marriage. However, the implications of the two are very different. Child marriage impacts children, in particular girls, negatively in many ways. In line with the Zimbabwean Constitutional Court decision, children need to be protected from the harmful implications of child marriages. In contrast, sexual activity between adolescents is not as such harmful, as long as both adolescents give informed consent and have access to sexual and reproductive information and services. Adolescents that are afforded the information and knowledge necessary to protect themselves are more empowered to make full, free and informed decisions about when or when not to have sex when they are ready, and without suffering negative consequences for doing so.

The concept of the evolving capacities of adolescents reflects a balance between recognising children as active agents in their own lives, while also being entitled to protection in accordance with their relative immaturity and youth. There is no single age at which maturity or agency occurs. The capacity to take responsibility for decisions affecting one's life can happen at different ages for children and adolescents with diverse life experiences. It is vitally important to keep the age of marriage at 18 to protect children, and particularly girls, from higher chances of early pregnancy and its associated negative consequences, intimate-partner violence, depression, and poor educational and economic opportunities.

It is time to recognize that sexual activity is likely to occur before the age of 18 years, and that the prohibition of consensual sexual activity has not shown to be been effective. Instead, adolescents should be armed with information that

empowers them to protect themselves from unwanted pregnancies, STDs and sexual violence. This view is held in children's rights law, human rights law related to gender equality, as well as regional and international standards on age of consent to sex and reproductive health services.

Other Resources

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Endnotes

ⁱ UNICEF, Under-five mortality, <https://data.unicef.org/topic/child-survival/under-five-mortality/>, March 2018

ⁱⁱ World Bank EdStats, Children in the official primary school age range who are not enrolled in either primary or secondary schools, 1970-2015, retrieved from <https://ourworldindata.org/primary-and-secondary-education>

ⁱⁱⁱ UNESCO Institute for Statistics, Fact Sheet No. 45, FS/2017/LIT/45, Literacy Rates Continue to Rise from One Generation to the Next, September 2017, p.1

^{iv} Committee on the Rights of the Child. General Comment No. 4 (2003) on adolescent health and development in the context of the convention on the rights of the child. 2003, para 5 <https://www.refworld.org/docid/4538834f0.html>.

^v Lansdown, Gerison (2005). The Evolving Capacities of the Child, Innocenti Insights no. 11

^{vi} Many religions practiced in Zimbabwe believe that sexual activity should only occur within marriage, hence encouraging abstinence.

^{vii} In Zimbabwe, the age of marriage is set at 18 in the Constitution but is 16 in national legislation. Malawi, Mexico and Guatemala recently increased the age to 18. Wodon, Q., Tavares, P., Fiala, O., Le Nestour, A., and Wise, L. 2017. Ending Child Marriage: Legal Age for Marriage, Illegal Child Marriages, and the Need for Interventions. London and Washington, DC: Save the Children and The World Bank.

^{viii} Age of Marriage vs. Age of Sexual Consent, Girls Not Brides, January 2019, page 2

^{ix} UNICEF Zimbabwe, Extended Analysis of Multiple Indicator Cluster Survey (MICS) 2014: Child Protection, Child Marriage and Attitudes towards Violence, 2016

^x Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women (CEDAW) and No. 18 of the Committee on the Rights of the Child (CRC) on Harmful Practices (2014), para 19

^{xi} Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage, SADC Parliamentary Forum, art 16 and g17

^{xii} MacQuarrie K, Mallick L, and Allen C. Sexual and reproductive health in early and later adolescence: DHS data on youth age 10–19. DHS comparative reports No. 45. Rockville, MD: ICF, 2017

^{xiii} Zimstat, Zimbabwe Demographic Health Survey, 2015

^{xiv} Canadian Criminal Code, Section 150.1 (2)-(2.1)

^{xv} Zimbabwe Criminal Law (Codification and Reform) Act [Chapter 9:23], Act 23 of 2004, s 64 (2)

^{xvi} Santelli J, Kantor L, Grilo S, Speizer I, Lindberg L, Heitel J., Abstinence-only-until-marriage: an updated review of US policies and programs and their impact, *J Adolesc Health* 2017; 61: 273–80

^{xvii} United Nations Population Fund, *Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights*, 2017, p. 8

^{xviii} Committee on the Rights of the Child. General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence. 2016. Para 43. <https://www.refworld.org/docid/589dad3d4.html>.

^{xix} Constitutional Court of Zimbabwe, *Mudzuru and Tsopodzi v Minister of Justice, Legal and Parliamentary Affairs, Minister of Women's Affairs, Gender and Community Development and the Attorney General*, 12/2015

^{xx} *Ibid.*

^{xxi} Zimbabwe Criminal Law (Codification and Reform) Act [Chapter 9:23], Act 23 of 2004, s 70

^{xxii} *Ibid.*, s 64(2)

^{xxiii} Justice for Children Trust, *Age of Consent, Sexual Intercourse with Young Persons and Access to Sexual and Reproductive Health Care in Zimbabwe*, 2019, p. 18-19

^{xxiv} United Nations Population Fund, *Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights*, 2017 p. 10

^{xxv} CRC Concluding Observations Zimbabwe 2016 para.s 60 (c) 61 (c)

^{xxvi} Amendment of section 1 of the South African Sexual Offences Act 32 of 2007 sec. 2

^{xxvii} Constitutional Court of South Africa, *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013).

^{xxviii} *Ibid.*

^{xxix} *Ibid.*

^{xxx} *Ibid.*

^{xxxi} *Christian Lawyers Association v. National Minister of Health and other*, Case No: 7728/2000, 2004 (10) BCLR 1086 (T) (South Africa, High Court, Transvaal Provincial Division).

^{xxxii} Parliament of the Republic of Namibia, *Child Care and Protection Act* 3, (2015), *Namibian Combating of Rape Act* sec. 2(2)(d).

^{xxxiii} High Court of Kenya at Nairobi, *Eliud Waweru Wambui v Republic* (2019).

^{xxxiv} High Court of Kenya at Nairobi, Eliud Waweru Wambui v Republic (2019).

^{xxxv} Convention on the Rights of the Child art. 3, 6, 17, 24 (1), African Charter on the Rights and Welfare of the Child art 4(1). 14(1), International Covenant on Economic, Social, and Cultural Rights art 12(1.)

^{xxxvi} The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art 14 (1)

^{xxxvii} Constitution of Zimbabwe Amendment (No. 20) Act, 2013 [Zimbabwe], 22 May 2013, sec 46(1)(c) and sec 46(1)(e).

^{xxxviii} Committee on the Rights of the Child. General Comment No. 4 (2003) on adolescent health and development in the context of the convention on the rights of the child. 2003. Para. 5. <https://www.refworld.org/docid/4538834f0.html>.

^{xxxix} Ibid.

^{xl} Committee on the Rights of the Child. General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence. 2016. Para 40. <https://www.refworld.org/docid/589dad3d4.html>.

^{xli} Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), art. 10, art. 24.

^{xlii} Committee on the Rights of the Child. General comment No. 20 (2016) on the implementation of the rights of the child during adolescence. 2016. Para 59. <https://www.refworld.org/docid/589dad3d4.html>

^{xliii} Committee on the Rights of the Child. General Comment No. 4 (2003) on adolescent health and development in the context of the convention on the rights of the child. 2003. Para. 24. <https://www.refworld.org/docid/4538834f0.html>.

^{xliv} Ibid., Para 5, 24.

^{xlv} Ibid., Para. 24.