



Ending child marriages – new laws bring progress but hurdles remain

Reform of family law is considered among the most difficult to achieve since it contests ‘the notion of women and children as property’.¹ There is a continuum ranging from criminalization to non-criminalization in the legal approach to child marriage in Africa. A new Marriage Act in Malawi has been hailed for raising the legally prescribed age of marriage to 18. Unfortunately, legal inconsistencies threaten the enforcement of the law. This Insight explores legal efforts to end child marriages with a special focus on Malawi, arguing that legal reform is important but not enough.

¹ Tripp et al. (2009: 113-119)

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A bird's eye view

Child marriage is commonly defined as a formal marriage or informal union before age 18. The practice is condemned by a number of international and regional treaties, conventions, resolutions and platforms. The UN Convention on the Rights of the Child (CRC) and The Convention on the Elimination on All Forms of Discrimination against Women (CEDAW) are among the most important

instruments. Both the CRC and CEDAW recommend legislating a minimum age of marriage at 18. State parties who do not have laws that meet the minimum age of marriage requirement, are regularly urged to do something about this (Silva-de-Alwis 2008).¹ The practice of child marriage entered the political agenda in many African countries after they committed to the Beijing Platform of Action

in 1995. The platform calls upon states to enforce laws securing a minimum age for (Beijing Platform for Action, Chapter IV, 274e).

International and regional human rights condemn child marriage as a human rights violation detrimental to girls and women's rights to health, education and to live free from violence.¹¹ There is a growing literature on the harmful consequences of child marriage (see e.g. Singh and Samara 1996; Raj et al. 2009; Parsons et al. 2015), but less knowledge about the process leading up to child marriage law reform (for notable exceptions see Scolaro et al. 2015; Prettitore 2015).

Over the years child marriage has gained increased prominence on the international agenda and has now reached an all-time high. In 2015, the United Nations Human Rights Council by consensus adopted the first-ever substantive resolution on child marriage. An explicit target under goal five in the new sustainable development agenda is to 'Eliminate all harmful practices, such as child, early and forced marriage.'² Against this international backdrop a number of African countries have developed national initiatives, strategies and plans on how to end child marriage. Ethiopia launched a national strategy and action plan to end child marriage in 2013. In 2015, alone, countries such as Burkina Faso, Ghana, Mozambique, Uganda and Zambia have developed comprehensive strategies against child marriage. Some countries, including Malawi, have also undertaken legal reform to help end the practice. Setting 18 or above as the legal age of marriage is a common step taken.

A legal continuum

Ethiopia is at one end of the continuum from criminalization to non-criminalization in the legal approach to child marriage in Africa. While 18 is set as the legal age of marriage in the revised family code of 2000, special provisions in the criminal code of 2005 (Article 649) criminalizes child marriage. The code explicitly states that marriage with someone below the age of eighteen (apart for the exceptions allowed according to the family code) is punishable with imprisonment ranging from a maximum of three years (marriage with minor below 18, or a maximum of seven years for marriage with minor below the age of thirteen).

Among the sizable 'middle group' of countries on the continuum are Tanzania and Zambia. These

countries have legislated a minimum age of marriage at 18 or above but have not criminalized child marriage. A number of these countries also provide exceptions to the law for instance upon parental consent or authorization by the court. Some make constitutional exceptions, typically for customary or religious law. The Zambian Marriage Act of 1964, for instance, sets the legal age of marriage at 21 years of age, but allows for marriage from the ages of 16-20 with parental consent (Article 17), and below the age of 16 with court approval. According to customary law, under which most marriages in Zambia take place, and to which the Marriage Act does not apply, a child can be married when he/she reaches maturity (which is not defined). In Tanzania, the Marriage Act (1971) allows girls at the age of 15-17 to marry with parental consent, while boys may marry at 18. Girls may even marry at 14 with court approval. Customary marriages are exempt from the law and this further opens up for child marriages below this age since girls typically are considered ready for marriage when they reach puberty.

At the other end of the continuum of legal approaches to child marriage is Sudan, where the 2005 Constitution requires all national legislation to have Sharia as its source. Child marriage reform has been controversial among the Sudanese religious and political elite. The National Child Act of 2010 defines childhood to end at the age of 18, but it has so far not been complemented by a reform of the 1991 Muslim family law. According to this law, the age of marriage is defined by maturity and is interpreted to start at 10 years of age. Marriage before maturity is also allowed upon consent by the girl's male guardian and with permission of a judge (Muriaas et al. 2015).

As will be detailed below, Malawi can be situated somewhere in the middle of this legal landscape.

The Marriage Act of 2015¹¹¹

On February 12, 2015 the Malawian Parliament passed the Marriage, Divorce and Family Relations Bill (Marriage Act). The act was signed into law in April by President Peter Mutharika. The passage of the Marriage Act is an important milestone in securing women and girls' rights in a country where patriarchal norms are deeply entrenched, poverty is widespread and women and girls generally score low on development indicators and lag behind in many areas of life. The new law consolidates multiple marriage regimes and addresses some of the discriminatory provisions in previous laws governing marriage and family relations.

² See Sustainable Development Goals. Available from <http://bit.ly/1EsFUDg> [Accessed 18 February 2016]

The provision that has received the most domestic and international attention sets the age of marriage at 18 and demands formal government registration of all marriages. Malawi has one of the highest rates of child marriage in the world with one of two girls marrying before the age of 18 (UNFPA 2012). Improving the legal marriage framework constitutes a critical measure to reduce child marriages. While the new law could play an important part to prevent child marriages, there is a risk that conflicting national and constitutional laws may undermine any potential efforts.

Twists and turns

The process leading up to the Malawian Marriage Act has been far from straightforward. The Malawi Law Commission produced a report on how to harmonize marriage laws already in 2006. Since then compromises have been made along the way. Age of marriage and polygamy proved to be among the most sensitive and difficult issues to deal with, and especially age of marriage has received a lot of media attention.

The issue of age of marriage was on the table in 2009 in relation to the so-called ‘Chidyamakanda bill’ (Enjoy the Children bill) which was an amendment to Clause 9 in the Constitution which would have raised the age of marriage from 15 to 16. While the bill was passed by Parliament, it was never approved to by the then President Bingu wa Mutharika.^{IV} Allegedly, some of the explanation was strong pressure from women and child rights’ activists who strongly opposed the amendment on the ground that the age of marriage should be in compliance with international human rights standards. Indeed, the cross-party women’s caucus in Parliament also voiced its concern. The caucus chair, Cecilia Chazama recalls that “I remember women MPs arguing that the age was a little bit on the lower side.”^V

The Marriage bill was discussed by the cabinet in 2010, but was referred back to the Law Commission, due to apprehension among parliamentarians (CHRR 2011). The bill was, despite pressure from advocates, not reintroduced until 2015. While the Law Commission recommended banning polygamy, this provision was removed prior to tabling the bill in Parliament. According to key informants, the provision was simply

too controversial and would have kept the bill from being enacted. In Malawi, there are regional differences in the prevalence of polygamy, with the highest number of such marriages found in the north and the lowest in the south (Reniers and Tfamily 2008). This may also explain why many parliamentarians shy away from taking a clear stance on the practice as they weigh this against popularity among constituents and future electability. As one development partner explains, “A member of parliament from the North would not want to vote for this bill knowing that his neck is on the line in the next elections. He might be in agreement with the age of marriage in the bill, but as long as the provision on polygamy is there, he is not going to say yes”.^{VI}

There was last minute uncertainty among key advocates as to whether the bill was actually going to be tabled and then passed. In the end, Parliament passed the marriage bill with a clear majority,

A puzzling achievement

The new Malawian Marriage Act has rightly been recognized by domestic and international actors as a major achievement with potential to be an important instrument in fighting child marriage. Legislating a minimum age of marriage is part of the broader area of family law reform and qualifies as a ‘doctrinal’ gender status issue, meaning that it affects all women regardless of their class, race, ethnicity, and religion and contradicts ‘the explicit doctrine, codified tradition, or sacred discourse of the dominant religious or cultural group’ (Htun and Weldon 2010: 210).

A combination of actors has played a role in the process leading up to the adoption of the new marriage law. Intriguingly, Malawi does not comply with many of the factors the scholarly literature identifies as conducive when adopting pro-women policies, such as a post-conflict history which creates space for new actors (Tripp et al. 2009; Tripp 2015), a strong and autonomous women’s movement (the most important factor in the literature) (Htun and Weldon 2012; Tripp et al. 2009), a critical mass of female legislators (Childs and Krook 2009), and a vital cross-party women’s caucus (Bauer 2012; Wang 2013). Malawi experienced a peaceful transition to multiparty politics

"I remember women MPs arguing that the age was a little bit on the lower side."

Cecilia Chazama

in 1993, the women's movement is independent but not particularly coordinated or strong (Tiessen 2008: 204), there are few women members of parliament (16.7 per cent), and the cross-party women's caucus in parliament has among other things suffered from internal disputes and lack of momentum (Chiweza et al. forthcoming). In this perspective, the enactment of the new law is somewhat of a puzzle.

When domestic and international agendas converge

The international legal framework has been used actively by domestic child rights and women's activists when advocating for raising the legal age of marriage. Civil society actors have attracted media attention and mobilized support for law reform, although initiatives appear to have been scattered and uncoordinated. Malawi's Stop Child Marriage campaign was launched in 2011. In 2013 an age of marriage law reform and enforcement campaign was kicked off targeting decisions-makers. Additionally, several child marriage symposiums involving a number of stakeholders took place. While activists hoped that Joyce Banda with her background from the women's movement would advance the issue upon becoming president, she left them disappointed. The bill was not tabled in parliament until 2015, when Peter Mutharika had assumed the presidency. Mutharika is being portrayed as somewhat of a women's rights champion in international and local media, and he is also committed to

the UN Women HeForShe campaign.^{vii} Commenting on the drawn out nature of the marriage bill process and the compromises made, the Minister of Gender, Children, Disability and Social Welfare Patricia Kaliati still emphasizes the significance of the bill, "it is very important. It took time for us and we lost a number of things, but it is never too late."^{viii}

International aid actors have played a critical role in the process leading up to enactment. UN Women in Malawi has for instance been active on the advocacy front and facilitated numerous dialogues and consultations with parliamentarians, civil society actors, and civil servants in the ministry of gender, including the minister of gender. It has also worked closely with the women's caucus in parliament to develop a clear agenda with a focus on pending bills, the marriage bill being

one of these. Speaking about the work the UN Women does in relation to the marriage bill, the UN Women Country Representative especially stresses coordination, 'On the marriage bill what we have really been focusing on is getting all the players together. Malawi is full of little projects that don't talk to each other. And this [the marriage bill] is an example'.^{ix}

In retrospect there seems to have been convergence between the interests of international actors, civil society actors and to some extent key actors within the government on the issue of the age of marriage. This has been conducive to achieving reform. In this case it can be argued that international aid to law reform may have substantive effects, and to some extent can bypass the importance of a strong women/child rights movement. A word of caution, however, seems to be in order as this situation is not sustainable over time.

Good news

Efforts to end child marriage started prior to the enactment of the law and are already paying off in Malawi. News stories about traditional leaders taking an active stance against the practice of child marriage are many.

Chiefs have passed bylaws in their areas prohibiting child marriage and implemented penalties.^x Indeed, a female senior chief in Dedza District recently was reported to annul 330 customary child marriages and encouraging child brides to return to school.^{xi} A Task Force on Ending Child Marriage has been established

and will report directly to the President. Establishing marriage courts and improve marriage registration are key to enforcing the new act. Local child rights and women's activists, together with international NGOs and UN agencies, have actively worked to raise awareness of child marriage. Engaging traditional leaders have been considered key at the community level. Churches have also actively helped in the effort. The minister of gender Patricia Kaliati in an interview to one of the leading newspapers in Malawi, conveys that the number of annulled child marriages in 2015 amount to at least 600 000.^{xii} This is indicative of a will by actors at multiple levels to use the new law to address child marriage in practice. Yet hard work remains, also in terms of law reform.

"Malawi is full of little projects
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example"

Alice Shackelford

Not-so-good news

On the downside, the new age of marriage set in the Marriage Act is not absolute since it is subject to the Constitution. Section 22 (6) of the Constitution allows for marriage between the ages of 15 to 18 with parental consent (or consent by guardian). Even marriage below the age of 15 is not explicitly prohibited, although such marriage should be “actively discouraged”. There are also inconsistencies in the law that further complicates matters. The age of a child is 16 according to the Constitution, and the Penal Code Amendment Act (2011) also sets the age of sexual consent at 16. This means that the spouse of a 15 year-old child (who obtained consent upon marrying) commits a crime if engaging in sexual intercourse with him/her. The above conflicts point to serious legislative problems and the need for constitutional amendments. Advocacy efforts to this end have already started. Plan Malawi in partnership with youth groups have presented a petition to the minister of justice and are also collecting signatures in support of a constitutional amendment.^{xiii} Civil society activists pointed to the problem of conflicting legislation on age of marriage also in the process leading up to the enactment of the Marriage Act, and the need for further law reform. For instance, several actors expressed concern as to how the new law would match the constitutional provision.

Conclusion

The new Marriage Act constitutes an important step towards preventing child marriage in Malawi. The initiatives already taken to address child marriage practices are promising and testify to how law reform can be a tool to effectuate change and help address a detrimental practice. Yet further legal change is clearly called for in order to rule out contradictions and discrepancies in the legal framework and ensure effective enforcement of the law. Establishing 18 as a definite minimum age of marriage in the Constitution should provide for a good start.

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Endnotes

- I For Malawi, see for instance the following reports: CRC 2009. 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention' Available from <http://bit.ly/24Dtuol> [Accessed 1 February 2016]; CEDAW 2006. 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Malawi' Available from: <http://bit.ly/21JJIdt> [Accessed 1 February 2016]; CEDAW 2008. 'Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. Malawi' Available from <http://bit.ly/1OToqkl> [Accessed 1 February 2016].
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Editor: Ingvild Hestad Graphic design: Kristen Børje Hus