SOUTH AFRICA

THE IMPLICATIONS OF VARYING STATUTORY MINIMUM AGE THRESHOLDS FOR CHILD CONSENT IN RESPECT OF MINORS GRANTED MAJORITY STATUS THROUGH CIVIL MARRIAGE IN SOUTH AFRICA

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Résumé

L'Afrique du Sud est une jeune démocratie constitutionnelle à cheval sur les caractéristiques d'un pays en développement et d'un pays développé.

Ses principales lois nationales protégeant les enfants, à savoir la Constitution suprême (1996) et la loi générale sur l'enfance (2005) fondée sur ses dispositions, sont internationalement reconnues pour leur caractère progressiste. Elle a ratifié, sans aucune réserve, les principaux instruments internationaux et régionaux relatifs aux droits de l'Homme qui protègent les enfants. Toutes ces lois définissent un enfant comme une personne âgée de moins de 18 ans. En Afrique du Sud, le terme 'mineur' désigne généralement les personnes de cette tranche d'âge, et le terme 'majeur' désigne les personnes adultes âgées de 18 ans et plus.

De nombreuses lois de droit privé et de droit public ont été modifiées afin de renforcer les efforts en vue de la réalisation des droits de l'enfant et, dans la plupart des cas, elles l'ont fait en abaissant l'âge de consentement pour permettre aux mineurs, en grande partie à partir de 12 ans (avec quelques variations et exceptions), de s'engager dans certaines activités. Presque toutes les activités des personnes de moins de 12 ans, même si elles sont consenties, sont interdites et illégales puisque la maturité et la capacité mentale suffisantes pour comprendre sont presque toujours requises. Cependant, avant même l'introduction des principales lois et instruments, la loi principale (par défaut) sur le mariage (1961) permettait aux mineurs de contracter un mariage précoce dès l'âge de la puberté (12 ans pour les filles et 14 ans pour les garçons). Ces âges minimums de mariage proviennent de la common law romano-néerlandaise introduite au cours d'une période de colonialisme ayant commencé dans les années 1650. Ces dispositions mettent l'accent sur l'aspect biologique de la puberté, sans se soucier du fait qu'elle est aussi un processus émotionnel (mental). Lorsqu'ils contractent un mariage précoce, les enfants mineurs acquièrent une majorité anticipée avant l'âge de 18 ans.

Le présent article examine une selection de lois contenant des dispositions relatives à la variation de l'âge du consentement de l'enfant afin de mettre en évidence leur impact sur ces enfants et leur conflit avec d'autres lois. La détermination de l'âge requis pour prendre certaines décisions n'est pas simple, mais très complexe en droit sud-africain. Par conséquent, la possibilité que des recours constitutionnels soient introduits par des enfants mariés, leurs parents ou d'autres parties intéressées ne doit pas être exclue. Cet article conclut que le mariage des enfants n'est pas en phase avec la nature progressiste des principales lois et instruments et qu'il n'est pas non plus en phase avec les réalités locales parce qu'il n'est pas pratiqué couramment. Le statu quo ne peut être justifié comme étant protecteur des enfants ou dans leur intérêt supérieur. Il est proposé que l'âge minimum du mariage dans la Loi sur le mariage soit uniformément, et sans exception, porté à 18 ans, conformément à la définition de la majorité dans la Loi sur les enfants. Cela permettra également de réformer la common law conformément aux impératifs actuels des transformations constitutionnelles, de l'africanisation et de la décolonisation. Si les mariages de droit coutumier et les mariages qui n'ont pas encore été officiellement reconnus devaient être inclus

dans le cadre d'une telle réforme, cela garantirait la disparition du mariage légal des enfants en Afrique du Sud.

1. INTRODUCTION

South Africa is a young constitutional democracy and developing country. Its main national laws protecting children, namely, the supreme Constitution 1996[1] and the comprehensive Children's Act 2005[2] based on its provisions, are internationally acclaimed for their progressive nature. South Africa is also a state party to the main international and regional human rights instruments protecting women and children, namely, the UN Women's Convention, the CEDAW 1979;[3] the UN Children's Convention, the CRC 1989;[4] and the African Children's Charter, the ACRWC 1990.[5] It has ratified these instruments without any reservations and therefore has a legal obligation to apply their provisions to its national laws. However, although there is a commitment in the Constitution[6] to do so, the rights contained in its Bill of Rights may also be subject to limitation.[7]

All the above main laws and instruments define a child as a person under the age of 18. In South Africa the term 'minor' is used generally to refer to persons in this age range and the term 'major' (adult) is used to refer to persons aged 18 and older. Although minors have limited legal capacity to act independently without the assistance of an adult (major), there are several legal 'concessions', like emancipation,[8] which allow minority to be suspended, rather than terminated, for certain purposes. However, there are also two ways of becoming a major.

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1 Constitution of the Republic of South Africa 1996 (the Constitution).

2 The Children's Act No. 38 of 2005 (Children's Act). The Children's Act (as amended by the Children's Amendment Act No. 41 of 2007) came into full force on 1 April 2010.

3 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 and entered into force on 3 September 1981. South Africa ratified the CEDAW on 15 December 1995 without any reservations.

4 The Convention on the Rights of the Child (CRC) was adopted in 1989 and entered into force on 2 September 1990. South Africa ratified the CRC on 16 June 1995 without any reservations.

5 The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted in 1990 and entered into force on 29 November 1999. South Africa signed the ACRWC on 10 October 1997 and ratified it on 7 January 2000 without any reservations.

6 The interpretation clause (s. 39(1) b)) of the Constitution provides: 'When interpreting the Bill of Rights, a court, tribunal or forum – (b) must consider international law.'

7 See the limitation of rights clause (s. 36) of the Constitution.

8 T. BOEZAART, *Child Law in South Africa* (2nd ed., Juta, Cape Town, 2017) at p. 26 defines emancipations as '... the express or tacit consent by a parent or guardian given to a minor to independently participate in commercial dealings ...'. See further J. HEATON, *The South African Law of Persons* (4th ed., LexisNexis, Durban, 2012), pp. 112–116.

While the usual way is for a person to acquire such status on their 18th birthday, a second (unusual) way is for a minor to attain majority prematurely, by way of exception, through concluding a valid civil or customary marriage before the age of 18.[9] This exception can therefore be construed as encouraging child marriage.

With a focus on the default civil marriage regulated by the Marriage Act 1961,[10] this chapter will argue that the exception of marital majority results in some conflict in South African law about the decisions children are able to make and at what age they can do so. This chapter will investigate what attaining majority through early marriage implies, and whether being treated as a (marital) major is the same as being treated as having attained the age of 18. It will examine the definition of majority in the main laws and instruments; how local courts have interpreted notions of majority; and the drafting of general legislation aimed at the protection and promotion of children's rights to determine whether it is related to majority or age. Since many such pieces of legislation merely indicate that persons must reach a certain age and do not refer to majority, this chapter investigates the possible ways in which the two can be reconciled. This chapter will highlight that, ultimately, minor children merely acquire the *status* of majority through early civil marriage and not the full *capacity* to act, which is for the most part still determined by the legal age of majority. Their marriage therefore becomes a juristic act with varying consequences, and certain rights and protections are not available to them because they have not reached the required age of majority. Variations with regard to consenting age thresholds give rise to disharmony and conflict between these laws. This status quo may be confusing not only for marital majors but also various stakeholders, including parents.

While South African law may regulate it, the harmful practice of early child marriage also has its basis in the historical common law[11] which was brought to South Africa during a period of colonialism. Although support for the current status quo can still be found in the conflicting positions (for and against child marriage) contained in the above human rights instruments, their ratification forms the basis of some of the most fundamental human rights contained in the progressive Constitution and the Children's Act. In comparison to the conservative understanding and interpretation of the law which prevailed prior

9 Hereafter 'marital majority' for the sake of convenience. See BOEZAART, above n. 8, at p. 18 and HEATON, above n. 8, at p. 113. This is a common law rule.

10 The Marriage Act No. 25 of 1961 (Marriage Act).

11 J.A. ROBINSON ET AL., *Introduction to South African Family Law* (5th ed., Printing Things, Potchefstroom, 2012) at p. 11 defines the common law as '... the body of law that is not found in legislation and ... is derived chiefly from Roman-Dutch law'. Roman-Dutch law is an uncodified legal system based on Roman law as it was applied in The Netherlands in the 17th and 18th centuries.

to democracy, the current position, in the existing culture of human rights in South African law, favours the autonomy of all children to make decisions for themselves over the 'parental responsibilities and rights' of their parents or guardians. This chapter therefore makes a cogent case for the increased protection of children through the legislative prohibition of child marriages since they can never be found to be in a child's best interests (a principle supported by all the above main laws and instruments), especially since South Africa does not have any serious problem of early marriages. The Marriage Act 1961 was introduced during a period in which Apartheid (institutionalised racial segregation and discrimination) was formally operational. An examination of the Act's provisions highlights both internal inconsistencies and minimum marriageable ages that discriminate between minors on the basis of both age and sex. After nearly 25 years of freedom from Apartheid, its provisions are out of sync with the current aspirations of children. It is therefore contended that the minimum marriageable ages, which are based on the common law, be increased to protect children's interests. Doing so will allow for a separation of, and logical sequence between, laws meant for children and those meant for adults.

There are several private law and public law statutes which also pertain to the protection of minor children but which, because they take into consideration their evolving capacities in the age range from seven to under 18, contain many variances with regard to consenting age thresholds. When children enter into early marriage, they encounter such variances in the interim (grey) period between minority and de facto adulthood. It will be illustrated, by integrating examples throughout the chapter, that these variations have the potential to cause confusion for married children, their parents and the various stakeholders dealing with them. Given their accelerated status of majority, a valid question as to whether or not marital majors can rely on the protective provisions of the main laws meant for de facto minors, has also been raised as follows:

> [It may be] ... a question for debate whether a child under 18 who acquires majority status through marriage, remains a 'child' for the purposes of the Bill of Rights and the Children's Act or whether such a child loses the protection of section 28 [pertaining to children] in the Bill of Rights or the provisions set out in the Children's Act.[12]

This is exacerbated by the fact that there is neither a clear legal definition of a minor nor a statutory minimum marriageable age for minors to enter into civil and customary marriages. An undue reliance is therefore placed on the common law to provide guidance in both these areas. However, the Constitution[13]

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12 See P. MAHERY and P. PROUDLOCK, *Legal guide to age thresholds for children and young people* (5th ed., Children's Institute, University of Cape Town, Cape Town, 2011) at p. 6.

13 The interpretation clause of the Constitution (s. 39(2)) states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and the objects of the Bill of Rights.'

encourages us to strive for the achievement of an effective and meaningful development of the common law. All law faculties in South Africa are expected to comply with the current higher education call that requires an alignment of the main undergraduate law curriculum with the imperatives of transformative constitutionalism, decolonisation and Africanisation. This chapter contends that one of the ways to effectively achieve this is to stop treating the different branches of law as independent legal silos and to integrate the way they are, for example, understood and taught in law schools across South Africa. An awareness of their basic constitutional rights and protections must also be imparted to all, especially pubescent, school-going learners. Until this is done, various stakeholders dealing with children, as well as the children themselves, will never be sure whether and when they are acting within the ambit of the law, and research pertaining to children in these areas will remain basic (one-sided) and lacklustre rather than creative (multi-faceted) and developmental.

2. MEANINGS AND DEFINITIONS USED IN RELATION TO CHILDREN

2.1. DEFINITIONS OF 'CHILD', 'MINOR' AND 'MAJOR' IN THE CONTEXT OF EARLY MARRIAGE IN TERMS OF NATIONAL, REGIONAL AND INTERNATIONAL LAW

Although the main laws and instruments share a common definition of a child, the term 'child'[14] itself does not appear to have any established meaning in South African law. There is also no statutory definition of a 'minor'. Hence, an undue reliance is placed on the common law for guidance. The common law term 'minor'[15] is generally used in South Africa to refer to persons younger than 18 and 'major' is used to refer to persons aged 18 and older. Although the term 'minor' therefore also includes children younger than seven, for the purposes of this chapter, it is used specifically to refer to children between seven and 18.[16]

Although the terms 'adult' and 'major' and 'child' and 'minor' are often used interchangeably in legal publications,[17] this terminology becomes unduly complicated when children legally acquire the status of marital majority while still remaining de facto minors in terms of age.

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14 See L. SCHÄFER, *Child Law in South Africa: Domestic and International Perspectives* (LexisNexis, Durban, 2011) at p. 13.

15 Ibid, at pp. 11–12.

16 See T. BOEZAART, Law of Persons (6th ed., Juta, Cape Town, 2016), at p. 50 and BOEZAART, above n. 8, at p. 20. See also text to n. 33.

17 See T. BOEZAART (DAVEL) 'Some comments on the interpretation and application of section 17 of the Children's Act 38 of 2005' (2008) *De Jure* 248.

The Constitution[18] and the Children's Act[19] clearly define children, regardless of sex, as persons below the age of 18. The Children's Act also separately provides, in Section 17,[20] that 18 is the uniform age of majority (adulthood) for both sexes. Minority therefore terminates when a child reaches the age of majority at 18.

While both the CRC,[21] and its more recent African counterpart, the ACRWC,[22] share the above definition of a child, it appears that the South African approach that a minor child attains majority upon reaching the age of 18 is more in line with the ACRWC than the CRC provision. The CRC collapses its definition of a child and its reference to majority in one provision without clearly distinguishing between the two. On the other hand, the ACRWC draws a clear distinction between its definition of a child and age 18 as the minimum age of marriage although it contains no reference to the term 'majority'. The Children's Act clearly separates its definitions of a child and majority in two separate provisions and in so doing aligns South African private law with the definition of a child in the Constitution. However, the Constitution itself does not contain a separate definition of majority nor any specific reference to the term 'majority'. Section 17 in the Children's Act is therefore not as comprehensive as the CRC provision but it is nonetheless clear.

The CRC provision (Article 1), because it is much broader, appears to allow legal discrimination between male and female children on the basis of religion and culture. Since there is no uniform norm that can stereotypically, let alone universally, be applied to children from different walks of life, Article 1 of the CRC clearly leaves it to states parties to regulate the relevant age and takes cognisance of the fact that the definition of a child may differ from state party to state party. Article 1 of the CRC therefore clearly offers more flexibility than Article 21 (Protection against Harmful Social and Cultural Practices) of the ACRWC and section 12(1) of the Children's Act (Protection against harmful social, cultural and religious practices).[23] Unlike the possibility in favour of child

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18 s. 28(3) of the Constitution: 'In this section [Chapter 2, Bill of Rights pertaining to children] "child" means a person under the age of 18 years.'

19 In terms of the definitional [interpretation] s. [1] of the Children's Act '"child" means a person under the age of 18 years'.

20 s. 17 of the Children's Act (titled Age of majority) defines a major as follows: 'A child, whether male or female, becomes a major upon reaching the age of 18 years.' Before 2007, the age of majority was 21. s. 17, through repealing the Age of Majority Act, Act No. 57 of 1972, has thereby reduced the legal age of majority in South Africa from 21 to 18 since 1 July 2007 when this section came into effect. See Children's Act 2005, Sch. 4.

21 Art. 1 of the CRC: 'For the purposes of the present Convention, a child means every human being below the age of 18 years *unless under the law applicable to the child, majority is attained earlier*' (emphasis added).

22 Art. 2 of the ACRWC: 'For the purposes of this Charter, a child means every human being below the age of 18 years.'

23 In fact, s. 12(2) of the Children's Act explicitly deals with child marriage and contemplates that marriage below the age of majority may be allowed by law.

marriage created by Article 1 of the CRC, the ACRWC[24] and the CEDAW[25] clearly do not condone it. Similarly, section 17 of the Children's Act does not contain the built-in flexibility of the CRC and gives no indication that there is an exception (marital majority) in terms of which majority may be attained earlier. Section 17 of the Children's Act clearly does not alert stakeholders that there is an exception to the general law that majority is attained at the age of 18 because it deals with the age of majority and not the status of majority. Pleading ignorance of the law may therefore not be a defence when stakeholders suffer loss as a result of dealing with a marital major.

While the provisions of the ACRWC and the CEDAW proscribing child marriages are to be welcomed, child marriages remain a reality in the region. Acknowledging that child marriages are often founded upon culture and religion, the ACWRC[26] also appears to discourage child marriage on this basis. The best interests of the child should be the determining factor in decisions relating to children as is well established in South African private law. The rule has been entrenched in the Constitution[27] and the Children's Act[28] because it also forms a key or guiding principle of the CRC[29] and the ACWRC[30] which deal with the 'primacy' of the best interests of the child. The CEDAW[31] also supports the best interests of the child principle and, as will be highlighted in section 3.1, even the Marriage Act 1961 takes the 'interests' of children into consideration in determining whether or not to recognise a child marriage.

The lack of a clear distinction between the definition of a child and the age of majority in the CRC not only opens the door to the condonation of child

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24 Art. 21(2) of the ACRWC: 'Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.'

25 Art. 16(2) of the CEDAW: '[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.'

26 Art. 1(3) of the ACWRC, which deals with the obligation of states parties, expressly provides: '*Any custom, tradition, cultural or religious practice* that is *inconsistent* with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be *discouraged*' (emphasis added).

27 s. 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.

28 s. 9 of the Children's Act provides that '[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied'.

29 Art. 3(1) of the CRC provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

30 Art. 4(1) of the ACRWC provides: 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'

31 Arts. 16(1)(d) and (f) of the CEDAW.

marriages but may also justify its current legalisation in South Africa in terms of two of the three forms of recognised marriages, namely, civil and customary marriages. However, a reverse argument is also true. Because the ACRWC categorically prohibits child marriage in conformity with the provisions of the CEDAW, it should be abolished in South Africa. Further support for the abolition of child marriage locally may be found in the fact that South Africa straddles both first and third world realities. While the ACRWC may ban it, child marriage remains rife in Africa generally, South African statistics highlight that it is not commonly practised despite being legalised. South Africa may therefore be duty bound to safeguard all the children that make up this rainbow nation from early marriage because the abuse, neglect and exploitation usually associated with such a harmful practice may deprive them of a normal childhood and adolescence.

2.2. 'FULL' CAPACITY TO ACT IS DETERMINED BY THE LEGAL *AGE* OF MAJORITY NOT THE LEGAL *STATUS* OF (MARITAL) MAJORITY

This section will demonstrate that in South Africa 'age' is still deemed to be '... the single most important factor that affects any person[s'] status and capacity'.[32] According to Heaton, a leading South African scholar on family law, '[a] person who enters into a valid civil or customary marriage before turning 18 thereby *becomes a major for all purposes*'.[33] In contrast, ordinarily minors, once they reach the legal (physical) age of majority (18), also concomitantly acquire the mental capabilities associated with full capacity to act. This much can be gleaned from the explanation provided by Boezaart (formerly Davel), a leading South African scholar on children's law, as follows:

> The law grants full capacity to act only to those who are in possession of both intellectual ability and the ability to judge. In this respect a distinction is made between three age groups: the *infans* ... (a minor under the age of seven years), the minor (from seven to under the age of 18 years) and the major (18 years of age and older) ... *Whether or not a minor possesses the necessary judgment to manage his or her own affairs is a question of fact.* It would, however, be impractical and lead to a great deal of legal uncertainty if each individual's ability to judge had to be assessed separately every time. For this reason, *the law prescribes a general age limit for the attainment of full capacity to act.* According to s17 of the Children's Act ... every person reaches the *age of majority* at *the age of 18*.[34]

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32 SCHÄFER, above no. 14, at p. 11.

33 (Emphasis added); HEATON, above n. 8, at p. 113.

34 See BOEZAART, above n. 16, at p. 50. Emphasis added. See also BOEZAART (DAVEL), above n. 17, at 248.

Support for this position is also found in case law. In the early case of *Meyer v. The Master,*[35] Van den Heever J. indicated that the term 'major' was used interchangeably to either refer to a person's specific age or to his or her being afforded full legal capacity. In this case, the learned judge held that the term 'major' was conventionally used to refer to a person's *age rather than his or her legal status.*[36] More recently, in the case *of Malcolm v. Premier*[37] the Court, after finding support for its view in both the old (common law) authorities and Van den Heever J.'s interpretation in the *Meyer* case, held that the term 'minor' typically also referred to a particular age.

The position outlined by Boezaart in the quotation above, precisely because of the implicit 'impracticality' of having to ascertain full capacity to act on a case-by-case basis, may ultimately mean that marital majority as such has more theoretical than practical value. This could ultimately mean that a constitutional challenge relying on discrimination purely on the basis of marital (majority) status may have little chance of success.

Boezaart's explanation above would justify why it would only be upon reaching the age of majority (18 years) that a marital major, as an adult citizen, would, for example, qualify to vote[38] in national elections, because only then can it be assumed that he or she will possess the necessary discernment to make a meaningful mark on a ballot paper. However, it does not explain what happens in cases where legislation has categorically taken into consideration the marital status of minors, and dispensing with considerations of age. A clear example of this is found in the Marriage Act 1961, which provides that a minor who has obtained majority through a valid civil marriage retains the status of majority even if the marriage is terminated through death or divorce before he or she reaches the age of 18.[39] The Marriage Act makes it clear that upon remarriage, widows and divorcees under the age of 18 do not require any consent additional to their own. Given that a marital major may acquire the status of husband or wife, father or mother (parent), widower or widow, or divorcee, normally attributed to adults, before turning 18, what happens to the concomitant rights and responsibilities associated with these statuses?

The fact that minority status does not revive if the marriage terminates through death or divorce before the age of 18 may give rise to its own set of

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35 1935 SWA 3, at p. 5. See also n. 111 for reference to facts of the case.

36 Ibid, at p. 5.

37 *Malcolm v. Premier*, Western Cape (207/2013) [2014] ZASCA 9.

38 s. 1 (definition of voter) of Electoral Act 73 of 1998 stipulates 18 as the legal age when a person can be eligible to vote in an election. See also s. 19(3) of the Constitution (1996).

39 s. 24(2) of the Marriage Act provides as follows: 'For the purposes of subsection (1) a minor does not include a person who is under the age of eighteen years and previously contracted a valid marriage which has been dissolved by death or divorce.' See also HEATON, above n. 8, at p. 113.

challenges. For example, the Marriage Act only governs the solemnisation and registration of civil marriages. Its scope does not extend to the dissolution of such marriages which is governed by a separate Act,[40] nor does it deal with the matrimonial property regimes and the financial consequences of such marriages which are also governed by a separate Act, namely, the Matrimonial Property Act 1984.[41]

Minor children usually only acquire full legal capacity to contract and litigate in their own name upon turning 18. However, when they enter into an early civil marriage, the Matrimonial Property Act 1984 provides that the default proprietary consequence of such a marriage is automatically a marriage in community of property. As is the case with all couples getting married in community of property, their capacity to perform certain juristic acts also becomes limited. In the case of such an early civil marriage, the Department of Home Affairs[42] only requires that marriage be registered but does not require the existence of a marriage contract to be recorded. Furthermore, the Matrimonial Property Act 1984 governs the distribution of assets where the minor's civil marriage is annulled due to the absence of consent and provides that the court may order any division of matrimonial property that it deems just.[43] However, if the marriage is not subsequently set aside because of the absence of consent, the financial consequences of the marriage will be the same as if the minor had been a major when entering into the marriage.[44] While a person has to be 16 years and older to acquire the capacity, with the assistance of his or her parents or guardian, to execute a will,[45] a civil marriage creates a right of intestate succession[46] between spouses. If the deceased is survived by a spouse or spouses, as well as descendant/s, each spouse will inherit a certain specific amount or a child's share. In our example such a spouse could technically still be a child (below the age of 18), and this may complicate such calculations.

Further statutory provisions which expressly treat a marital major as an adult include the ability to apply for a passport[47] and a change of forename and surname[48] without parental consent.

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40 Divorce Act No. 70 of 1979.

41 Matrimonial Property Act No. 88 of 1984.

42 The Department of Home Affairs is the governmental department responsible for the recording of legal marriages and is headed by the Minister of Home Affairs.

43 The Matrimonial Property Act, s. 24(1).

44 The Matrimonial Property Act, s. 24(2).

45 s. 4 of the Wills Act 7 of 1953.

46 In terms of Intestate Succession Act 81 of 1987.

47 s. 1 of the South African Passports and Travel Documents Act No. 4 of 1994 excludes from its definition of a minor, '... a person who has been declared a major ... or who has contracted a legal marriage ...'.

48 According to s. 24(1) (alteration of forename) read with the definition of 'major' or 'person of age' in ss. 1 and 26(2) (assumption of another surname) of the amended version of the Births and Deaths Registration Act 51 of 1992 that applies as from 1 March 2014, that is, the date of commencement of the Births and Deaths Registration Amendment Act 18 of 2010.

These inconsistencies in legislation with respect to ages of consent may not make sense to the marital major or to other interested parties dealing with him or her. How are marital majors, during the 'grey' period between the acquiring of the status of marital majority and reaching the de facto age of majority (adulthood), expected to deal with laws which do not allow them, because of their age, to fulfil the roles usually associated with marriage? Must they apply for exemption on a case-by-case basis and/or prove that they have the full capacity to act as envisaged in the explanation given by Boezaart above?

3. INCONSISTENCIES WITHIN LEGISLATION AND THE WELFARE OF MARRIED CHILDREN

3.1. THE IMPLICATIONS FOR A 'MINIMUM' MARRIAGEABLE AGE OF THE VARYING AGES OF CONSENT IN THE MARRIAGE ACT 1961, THE CHILDREN'S ACT 2005 AND OTHER STATUTES

There are currently three types of marriage that are legally recognised: since 1961, heterosexual, monogamous civil marriages; since 1998,[49] heterosexual, monogamous or polygamous African customary marriages; and since 2006,[50] monogamous same-sex or opposite-sex civil unions. Since 18 is the legal age of majority for both sexes, it is therefore also the legal age to enter into all three types of marriage without any consent additional to that of the prospective spouses. However, a child marriage between two children below the age of 18, or between such a child and an adult person, is legal only in respect of civil and customary marriages; civil unions, by clearly specifying 18[51] as the minimum age for marriage, do not permit it. It can therefore be argued that, by not allowing child marriage in one of the three types of marriages, South Africa does not fall afoul of its compliance with, or commitment to, human rights. As is borne out by current data, civil marriage is the main or 'default' marriage which remains the preferred choice of South Africans. Furthermore, since there is no uniform minimum marriageable age for both sexes for all three types of marriage, it can be argued that this is discriminatory and open to constitutional challenge. The equality clause of the Constitution not only guarantees everyone

49 The Recognition of Customary Marriages Act No. 120 of 1998 ('Recognition of Customary Marriages Act').

50 The Civil Union Act No. 17 of 2006 ('Civil Union Act').

51 In terms of s.1 of the Civil Union Act, a 'civil union' is defined as 'the voluntary union of two persons who are both 18 years of age or older'. The legal consequences of a civil union are the same as those of civil marriage governed by the Marriage Act 1961.

the equal protection and benefit of the law[52] but also provides for protection against unfair discrimination on grounds of, amongst others, sex, gender, age and marital status.[53]

This section highlights both internal inconsistencies within the Marriage Act 1961 itself and further conflicts with its consent provisions which may subject it to potential constitutional challenge on the basis of both sex and age. Brief reference will also be made to both customary marriages and civil unions where relevant, to highlight comparisons. Religious marriages are not afforded equal recognition with the above three types of marriage although the Constitution[54] makes special allowance for such formal, legal recognition. Given that there is currently a call for the recognition of one such type of marriage, namely, the Muslim marriage, which has progressed to a draft Muslim Marriages Bill (MMB)[55] being approved, brief reference will also be made to Muslim marriages in a local context, especially since the MMB, although it condones child marriage, proposes that 18 years be the age of consent. Cognisant of the fact that in cases where child marriages may be arranged, and consent may be given under social pressure, the MMB also emphasises actual consent and the 'interests' of minor children.[56]

Although the Marriage Act[57] makes use of the term 'minor', it does not define it. As indicated in section 2.1, the term 'minor' is understood to be a common law concept without a concrete definition. The legal age of puberty in South African law is based on the common law and is set at 12 years for girls and 14 years for boys.[58] On the basis of these common law ages of puberty, civil and customary marriages are legally permitted for girls from the (minimum) age of 12 and boys from the (minimum) age of 14. It is generally presumed that children below these ages may never enter into a civil marriage.[59] The Children's

52 s. 9(1) of the Constitution (equality clause) provides as follows: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.'

53 s. 9(3) of the Constitution provides as follows: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

54 s. 15(3)(a), s. 15(3)(a)(i) and s. 15(3)(a)(ii).

55 A draft Muslim Marriages Bill (MMB) was approved by the Cabinet in 2010 but has yet to be enacted into legislation. A published version is available at <www.gov.za/sites/www.gov.za/files/33946_gen37.pdf> (last accessed 25 March 2018).

56 See cl. 5 of the MMB which deals with the requirements for the validity of Muslim marriages.

57 e.g., in terms of s. 24(1): 'No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.'

58 See A. BARRATT, 'Minority: How Age Affects Status and Capacity', in A. BARRATT ET AL., *Law of Persons and the Family* (2nd ed., Pearson, Cape Town, 2017) at p. 66.

59 HEATON, above n. 8, at p. 104.

Act 2005[60] merely reiterates the common law position when it states that a child 'below the minimum age set by law for a valid marriage may not be given out in marriage or engagement'.

According to Heaton, the reason why the legal age of puberty for girls is lower than that for boys is based purely on the biological fact that girls reach sexual maturity earlier than boys, and would for this reason pass constitutional muster if challenged on the basis of unfair sex discrimination in terms of section 9(3) of the Constitution.[61] However, I contend that the differentiation between the sexes with regard to puberty may yet be discriminatory and therefore unconstitutional. While the physical (biological) aspect of puberty is a legal marker recognised almost everywhere in the world, puberty is also an emotional or mental process; and the latter appears to be ignored in the Marriage Act but not in the Children's Act. In terms of the Children's Act 2005, once a minor, male or female, reaches the age of 12,[62] he or she may consent to his or her own medical treatment and surgery without the assistance of a parent or guardian. In terms of the Children's Act, this right to consent does not only depend on age but is also subject to a test of 'sufficient maturity' and 'mental capacity to understand'[63] the consequences and implications of the medical treatment. In comparison to this position, the Marriage Act's reliance on the physical aspect of puberty, with little regard to its mental component, may be problematic because it implies that the traditional rationale on which it may be based (that one of the main purposes of marriage is procreation and that sex is only permitted inside of marriage) may currently be outdated in South Africa. The legalisation in 2015 of consensual sex from the age of 12 for both sexes[64] and the legalisation of same-sex marriages (where procreation is not a consideration) bear this out. While an alignment between early marriage with consent and consensual sex is therefore possible for girls from the age of 12, boys who may enjoy sexual intercourse outside of marriage from the age of 12 may only enter into marriage from the age of 14. The legalisation of consensual sex from the age of 12 could therefore be a justifiable argument used by a boy wishing to be granted permission to enter into marriage at the age of 12 without any fear of being found guilty of marital rape.

Since 2015 there no longer appears to be any real conflict between the provisions of the Sexual Offences Act 2015 and the Marriage Act 1961 in cases of marriage between minors aged 12 to 17 or between such minors and adults. However, given the possibility that the Marriage Act 1961 may not entirely rule

60 s. 12(2)(a).

61 J. Heaton, *South African Family Law* (4th ed., LexisNexis, Durban, 2015) at p. 18.

62 s. 129(2)(a).

63 s. 129(2)(b).

64 The Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 5 of 2015 decriminalises consensual sex of children between the ages of 12 and 17.

out ministerial validation of a marriage of a minor before the age of 12, the implication for sex in this context amounting to both the offences of rape and marital rape,[65] cannot be entirely ruled out. Although such a minor spouse may have consented to sex within the safety net of marriage, given that such spouse is deemed incapable of consenting to sex in the first place, it would also amount to 'non-consensual' sex.

All children below 18, regardless of their sex, must have the written consent of both legal guardians (usually parents)[66] to the marriage. In addition to such consent, a male under the age of 18 and a female under the age of 15 will also need the consent of the Minister of Home Affairs.[67] While a minimum marriageable age of 12 for girls and 14 for boys may be biologically justified on the basis of the common law ages of puberty, there is no real justification for why only girls aged 15 to 17, and not boys aged 14 to 17, are exempted from such ministerial consent. This makes it easier for abuse to occur in the case of girls. It is therefore not surprising that this distinction is in the process of being done away with so that any minor (girl or boy) below the age of 15 will require ministerial consent before entering into a civil marriage.[68]

A further conflict is evidenced by the fact that the Marriage Act 1961[69] requires that the two (male and/or female) witnesses that must be present at the wedding ceremony to sign the marriage register, must be 16 years of age or older and must be able to produce a South African Identity Document.[70] While such minors can therefore witness the civil marriage of both minors and majors, these requirements imply that marital majors below the age of 16, who only qualify for an Identity Document at the age of 16, cannot act as witnesses.

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65 Marital rape is recognised as a crime in South Africa since 1993. Given its criminalisation, it has been incorporated into the offence of rape which at present is governed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007.

66 See ss. 24(1) and (2) of the Marriage Act.

67 s. 26(1) of the Marriage Act provides: 'No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him, *which he may grant in any particular case in which he considers such marriage desirable ...*' (emphasis added).

68 HEATON, above n. 61, at pp. 17–18. Although both types of marriage permit child marriage, the minimum marriageable ages for boys and girls in respect of customary marriages differ from those for civil marriages, with customary marriages providing added protection for older girls while the position of boys in customary and civil marriages appears to be the same. Hence, girls aged 12 to 17 years may marry if the girl, her parents and the Minister of Home Affairs or an officer in the public service authorised by the Minister consent to it. Boys aged 14–17 may conclude a customary marriage provided the boy, his parents and the Minister of Home Affairs or an officer in the public service authorised by the Minister consent to the marriage. See s. 3(1)(a)(i) read with s. 3(4)(a) of the Recognition of Customary Marriages Act 1998.

69 s. 29A(1).

70 s. 15(1) of the Identification Act 68 of 1997 prescribes 16 as the age at which a person can apply for an identity document.

As also highlighted by several leading scholars,[71] discrepancies in consenting ages in the Marriage Act may amount to discrimination on the basis of both age and sex and be open to constitutional challenge. Hence, given the fact that the equality clause of the Constitution (section 9) also prohibits discrimination based on sex, age and marital status, among others, it is not surprising that some of the above provisions in the Marriage Act are currently under formal review.[72]

While the dual parental and ministerial[73] permission required may be perceived to be a form of additional protection against forced or arranged early marriages, if minors fail to obtain the required consent from their parents (legal guardians) they have access to a range of legal officials which makes it relatively easy for them to seek and obtain such consent, without having to supply any real cogent reason, including a religious or cultural rationale, therefor.[74] However, as will be detailed in section 3.2 below, when they are permitted to enter into an early marriage, whether with or without parental consent, and subsequently encounter practical problems, it may still be expected that parents and the state will come to their rescue.

If a minor manages to get married without consent while under the age of 18, his or her parents can seek to have the marriage dissolved. It appears that in terms of section 24A(1)[75] of the Marriage Act dealing with the '[c]onsequences and dissolution of marriage for want of consent of parents or guardian', that should a minor conclude a marriage but fail to obtain the necessary consent of

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71 See HEATON, above n. 61, at 18 and A. BARRATT, 'Minority: How Age Affects Status and Capacity', in BARRATT ET AL., above n. 58, at p. 86.

72 For a detailed discussion of proposed repeals and amendments to the Marriage Act 1961 that may be relevant to this chapter, see the SOUTH AFRICAN LAW REFORM COMMISSION, Discussion Paper 133, Project 25 (Statutory Law Revision in respect of legislation administered by the Department of Home Affairs), 31 May 2015, pp. 11–21. Available at <http://www.justice.gov.za/salrc/dpapers/dp133.pdf> (last accessed 25 March 2018).

73 See BARRATT ET AL., above n. 58, pp. 40–82 at p. 66.

74 See J. HEATON and H. KRUGER, *South African Family Law* (4th ed., LexisNexis, South Africa, 2015) at pp. 16–19 and A. BARRATT, 'Minority: How Age Affects Status and Capacity', in BARRATT ET al, above n. 58, at p. 67. See also s. 9 (equality clause) of the Constitution which prohibits discrimination on the grounds of both culture and religion and the Marriage Act, s. 24 read with Children's Act 2005, s. 18(3)(e)(i).

75 s. 24A (1): 'Notwithstanding anything to the contrary contained in any law or the common law a marriage between persons of whom one or both are minors *shall not be void* merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for the entering into of a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made (a) by a parent or guardian of the minor *before he attains majority* and within six weeks of the date on which the parent or guardian becomes aware of the existence of the marriage; or (b) by the minor *before he attains majority* or within three months thereafter. (2) A court shall not grant an application in terms of subsection (1) unless it is satisfied that the dissolution of the marriage is in the interest of the minor or minors' (emphasis added).

the presiding officer of a Children's Court, the marriage is merely voidable rather than void, as would be the case if the Minister's consent in terms of section 26(2) was not obtained. In cases where minors fail to obtain the necessary ministerial consent, the legal position appears to be clear, but not all too logical for the following reasons: it could either result in a void marriage (which means marital majority will not be attained) unless the Minister subsequently declares it valid. If the minor did not receive the necessary parental (or other required) consent, section 26 of the Marriage Act[76], which deals with the 'Prohibition of marriage of persons under certain age', makes provision for the Minister to give retrospective consent to a minor's civil marriage if the marriage is in the best interests of the couple and all other essential requirements (such as age, gender and existing marital status) were also complied with. Furthermore, section 24A(1) of the Marriage Act, by specifically using the phrase 'before he attains majority' implies that, even though a married minor acquires the status of marital majority, that it is ultimately the age of majority (not marital majority) that is relevant.

It is generally accepted by many academics that girls and boys below 12 and 14, as the respective legal ages of puberty, may not enter into a valid civil marriage.[77] However, given that, as Heaton[78] has highlighted, section 26 of the Marriage Act itself creates uncertainty over the question whether the Minister of Home Affairs may condone a marriage below the age of puberty, such a possibility cannot be completely ruled out.

While the number of early marriage is low, the number of early pregnancies among school-going learners is high.[79] Many become pregnant before their

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76 Marriage Act, ss. 26(1), (2) and (3) provide as follows: '(1) No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted. (2) If any person referred to in sub-section (1) who was not capable of contracting a valid marriage without the written permission of the Minister or any officer in the public service authorized thereto by him, in terms of this Act or a prior law, contracted a marriage without such permission and the Minister or such officer, as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he may, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes *be a valid marriage*. (3) If the Minister or any officer in the public service authorized thereto by him so directs *it shall be deemed that he granted written permission to such marriage prior to the solemnization thereof*' (emphasis added).

77 See BARRATT, above n. 74, at p. 66 and HEATON and KRUGER, above n. 74, at p. 17 and text to fn. 42; HEATON, above n. 8, at p. 104.

78 See HEATON and KRUGER, above n. 74, at p. 17.

79 Although free abortion services are available to both married or unmarried girls of any age and free access to contraception is available from the age of 12, teenage pregnancy

bodies may be ready for it. Although there is a report recommending that it be increased to 12 years,[80] the minimum age for the criminal capacity of children is currently 10 years.[81] Children under 10 may not be arrested or prosecuted. At the age of 10 a child is deemed to have the mental ability to distinguish between right and wrong and can be expected to understand or appreciate the consequences of his or her acts. Yet, a minor girl in South Africa can legally consent to the termination of a pregnancy at any age, and without the consent of her parents or guardians, without necessarily falling afoul of the law.[82]

Since the Constitution (1996) also prohibits discrimination based on pregnancy and religion,[83] pregnant learners are allowed to attend school in post-Apartheid South Africa.[84] Whether for cultural reasons of proving fertility or to gain access to state grants, neither of which may be true, it appears that it is not uncommon in some communities in South Africa for teenagers or young women to have children early without entering into marriage or to do so prior to marriage. On the other hand, parents in Muslim religious communities, for example, instead of promoting a permissive attitude towards adolescent sexual activity that might not be morally acceptable, will consider the early marriage of their minor children preferable to an early marriage as a result of pregnancy because it may be permitted in terms of Islamic law.[85] However, Muslim school-going girls at both public and private schools[86] do fall pregnant

among learners remains a great challenge for South African schools as the following figures highlight. 'In 2013, just over 99,000 learners attending schools fell pregnant' according to statistics released in the General Household Survey (GHS) 2013 Report: Focus on Schooling, Department of Basic Education, 2014 on p. 39 available at <https://www.education.gov.za/Portals/0/Documents/Reports/GHS%202013.pdf?ver=2015-07-20-112444-467> (last accessed 3 July 2018).

80 For detail, see M.I. SCHOEMAN, 'Determining the Age of the Criminal Capacity: Acting in the best interest of children in conflict with the law' available at <http://www.scielo.org.za/pdf/sacq/n57/05.pdf> (last accessed 25 March 2018).

81 The Child Justice Act No. 75 of 2008, s. 7.

82 See s. 129(1) of the Children's Act 2005 read with s. 5(2) of the Choice on Termination of Pregnancy Act No. 92 of 1996.

83 The Constitution (1996) guarantees a right to basic education (s. 29) and prohibits discrimination on the grounds of pregnancy and religion (s. 9(3)).

84 The South African Schools Act No. 84 of 1996 contains directives and policies to prevent unfair discrimination and exclusion based on pregnancy.

85 See N. MOOSA, 'Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS' (2009) 12(3) *Potchefstroom Electronic Law Journal (PER/PELJ)* 65–95, at 81.

86 Commenting on a pregnancy in a public high school in the Western Cape, authors N. DAVIDS and Y. WAGHID noted that '[w]hile the school generally accepted the return of teenage mothers, the principal, in this instance refused the admission of the girl because she had been married by religious rites. A married woman, he maintained, should not be at school, as she no longer had anything in common with her peers'. See N. DAVIDS and Y. WAGHID, 'Teenage pregnancy and the South African Schools Act: is religion a justifiable reason for exclusion?' (2013) 58 *Journal of Education* 135–151 at 141. Furthermore, according to Davids

outside of marriage. To avoid facing social, cultural and religious stigmatisation and ostracisation by family and friends, some parents who may be opposed to an abortion for religious reasons may especially want their daughters to enter into both early religious and civil marriages. Muslim religious marriages are as yet not formally recognised and civil marriages offer better protection. In many such cases where religion may be a primary consideration and marriage to the father of the child does follow, girls either do not, or are not encouraged to, return to school. Many such learners, whether or not marriage follows, do not return to school for practical reasons after giving birth. As will be seen, a heavy reliance is often placed on parents to assist young mothers with childcare, and on state grants for financial assistance.

Although sex with children younger than 12, presumed to be incapable of consenting thereto, amounts to the offence of rape, the Minister may, if deemed to be in the best interests of a girl, be obliged or even compelled to authorise an early marriage before the age of 12. Minor girls and boys wishing to enter into existing civil and customary marriages before the respective minimum marriageable ages of 12 and 14 for a cogent reason (like an early pregnancy before the marriage rather than as a result of the marriage) may therefore yet have a valid case especially since pregnancy, like abortion, is a reproductive right. Two South African girls aged nine and ten are reported to have given birth in 1966 and 2009, respectively.[87] Although these are exceptional cases, they highlight that, unless we legislate that civil marriages can only be entered into by adults, there may be cases in the future where a civil marriage between the ages of 9 and 12 for a pregnant girl cannot be ruled out (in spite of its ridiculousness) because it may be a preferred option over an abortion, for religious reasons.

3.2. WHOSE RESPONSIBILITY IS IT TO SUPPORT MARITAL MAJORS: THEIR SPOUSES', PARENTS' OR THE STATE'S?

Although, as detailed in section 2.2, some statutes clearly take the exception of marital majority into account, most statutes do not do so. The change in majority status is merely theoretical in nature because child spouses are, for all practical purposes, simply treated as de facto minors in the 'grey' period

and Waghid (ibid, at 142) '... within the Western Cape, it is also not uncommon for Muslim-based [independent] schools to expel pregnant girls, as well as the boys, if they are the fathers, on the grounds that they have contravened the Shari'ah (Islamic law), which prohibits sexual intercourse outside of marriage'. Such expulsion at both types of school amounts to religious discrimination and would therefore be open to constitutional challenge on the basis of both moral and religious grounds.

87 For a newspaper report on the nine-year old, see <http://news.google.com/newspapers?id=BBdEAAAAIBAJ&sjid=zrAMAAAAIBAJ&dq=african%20girl%209%20gives%20birth%20to%20a%20baby&pg=886%2C5197943> (last accessed 25 March 2018).

between minority and de facto majority (adulthood). When this happens, and the married couple are both minors in age, they may find themselves faced with a financial conundrum. Given that the actualisation of the rights associated with their status of majority is hampered, how are they going to support themselves? Are parents, who may already be faced with straitened circumstances or old age and who may not have approved of their marriage, expected to be burdened with increased responsibilities for marital majors?

Although the Constitution[88] does not contain any explicit reference to the rights of parents or the protection of parental rights, it clearly burdens parents with the financial well-being of their children. The general rule is that parental responsibilities and rights automatically terminate when children reach the age of 18.[89] However, because minor children may have entered into an early marriage with their parents' blessings, parental responsibilities for such minors may not necessarily terminate earlier. Parents who are financially able to do so may be duty bound to maintain their children who are in need of such support regardless of their majority status. Divergent academic views have been expressed in this regard.

On the one hand, a view has been expressed that parental responsibilities and rights both terminate on '... the attainment of majority and the marriage of a minor'.[90] On the other hand, another view is that

> [i]f [such a] child enters into a marriage ... the duty of support rests on the child's spouse ... first ... [and] if the child's spouse ... is unable to support the child, the child may still claim maintenance from his or her parents, grandparents or siblings.[91]

This begs the question: what happens in the case where both spouses are minors and one or both sets of parents were not in favour of the marriage? If both spouses are de facto minors, the likelihood of one being able to maintain the other is slim unless the parents who condoned the marriage step in to assist. The law elsewhere makes it difficult for minors to seek employment especially when they ought to still be in compulsory attendance at school.

Although learners ordinarily attend school until grade 12 when they usually turn 18, schooling in South Africa is compulsory for children of both sexes until they reach the age of 15,[92] and as such provides a necessary foundation for

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88 See, e.g., the provision pertaining to a child's right to 'family care or parental care' in s. 28(1)(b) of the Constitution.

89 HEATON and KRUGER, above n. 74, at pp. 349 and 351.

90 ROBINSON ET AL., above n. 11, at p. 72: note 139.

91 HEATON and KRUGER, above n. 74, at p. 351.

92 In terms of the South African Schools Act No. 84 of 1996 attendance at school is compulsory for all children between the ages of seven (grade 1) and 15 (grade 9) (ch 2, 3(1)).

economic independence. Although the results of a recent survey[93] highlight that child labour figures, although on the decline, still remain high in South Africa, children of both sexes are not expected to take on 'major' responsibilities, like being gainfully employed, until the age of 16,[94] at which age they can also open and operate a bank account.[95] They are nonetheless treated like adults when expected to pay taxes[96] on income derived from gifts or an inheritance received from persons other than their parents.

In support of its commitment to its constitutional socio-economic obligations,[97] South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)[98] in 2015. However, poverty is one of the remnants of an Apartheid history and accordingly there is a large reliance by the poor and needy on a variety of state social grants. At the end of 2016, over 17 million South Africans (of a then estimated population of 56 million[99]) accessed a variety of social grants. In the case of one such grant, the child support grant (CSG), there are currently some 12 million child beneficiaries.[100] Children younger than 15 constituted roughly 17 million (30 per cent of the population).[101] The state, in its calculation of the percentage of children in the

93 See Statistical release PO212 Survey of Activities of Young People, 2015, 16 March 2017 published by Statistics South Africa, Pretoria, pp. 36–40 available at <http://www.statssa.gov.za/publications/P0212/P02122015.pdf> (last accessed 25 March 2018).

94 It is a criminal offence to require or permit a child under 15 to work. In terms of s. 28(1)(f) of the Constitution children under 18 may 'not be required or permitted to perform work or provide services that- (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development'. See further ss. 43-48 of the Basic Conditions of Employment Act No. 75 of 1997, as amended by the Basic Conditions of Employment Amendment Act No. 20 of 2013.

95 From the age of 16, a minor may, with the assistance of his or her parents or guardian, open a bank account. See s. 88 of the Mutual Banks Act 124 of 1993 and s. 87 of the Banks Act 94 of 1990.

96 If minor children possess sufficient taxable income, they become liable to pay income tax and must be registered as tax payers by their parents who are also expected to submit returns on their behalf until they reach the age of majority. See C. Rossouw, 'Personal Investing: Your minor children and the taxman' (6 November 2015) available at <https://www.allangray.co.za/latest-insights/personal-investing/your-minor-children-and-the-taxman/> (last accessed 25 March 2018).

97 ss. 24 to 29 of the Bill of Rights in the Constitution recognise various socio-economic rights of South African citizens.

98 The ICESCR was ratified in January 2015 and entered into force in South Africa in April 2015.

99 The population was estimated to be 55.9 million by end June 2016. See 2016 mid-year estimates available at <http://www.statssa.gov.za/?p=8176> (last accessed 25 March 2018).

100 These grant figures were obtained from the (not very user friendly) official website of the South African Social Security Agency (SASSA) available at <http://www.sassa.gov.za/index.php/social-grants> (last accessed 25 March 2018). For further details, see G. Kelly, 'Everything you need to know about social grants: For people who receive a grant or need to receive one' (7 April 2017) available at <http://www.groundup.org.za/article/everything-you-need-know-about-social-grants_820/> (last accessed 25 March 2018).

101 Statistical release P0302 Mid-year population estimates 2017 available at <http://www.statssa.gov.za/publications/P0302/P03022017.pdf> (last accessed 25 March 2018) at p. 1.

national population census, appears to have counted children from the age of 15 as adults; hence, this is not an accurate figure of the total number of children. If, for example, children above 15 but below 18 (who are legally still minor children) are included, the number of children would be closer to 18 million (32 per cent of the population). According to the recently published highlights of a Statistics South Africa Survey[102] detailing the activities of children, in 2015 there were an estimated 11.2 million children between the ages of 7 and 17 in South Africa, with equal distribution between the sexes. Seen in the context of the above population statistics, the proportion of children dependent on the CSG is already alarmingly high. It is contended that the situation would be exacerbated if marital majors were to be included as eligible dependents (of the CSG) because of their age. The fact that it would not be economically viable for the state to so include them should therefore be viewed as a further reason why child marriages should not be allowed or encouraged in South Africa. This is further explained and motivated as follows.

In the South African context, state grants are only available to the aged (over 60 years), people with a disability that may prevent them from working, and minor children who are too young to work. A good case, based on possible discrimination due to marital status and age, can therefore be made for marital majors, which would enable them to seek state support through their parents or on their own accord and to access parental funds that would otherwise be denied to them. It can be argued that, as would be the case with de facto minors, needful marital majors, because they are still minors in age and therefore may not legally be allowed to work, have little choice but to rely on their poor parents to support them (through a social support grant) and if they themselves have minor children, these parents (grandparents) will similarly have to take care of these grandchildren. Alternatively, it can be argued that such marital majors (as would also be the case with de facto minors) may seek such state aid in their own name for their minor children. However, as detailed below, marital majors may not be able to do so because the eligibility requirements, and the amounts allocated, for the grants vary.

Poor caregivers, mainly women, usually receive CSGs on behalf of children in their care. A CSG is therefore allocated to a biological parent (which includes a minor child who is a parent) or primary caregiver (e.g. grandparent)[103] of a child (who must be under the age of 18) on the basis of meeting specific

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102 These figures were extracted from pp. 5–6 of the 'Statistical release PO212, Survey of Activities of Young People, 2015' published by Statistics South Africa, Pretoria on 16 March 2017 available at <http://www.statssa.gov.za/publications/P0212/P02122015.pdf> (last accessed 25 March 2018).

103 e.g., the parents of unmarried mothers are able to care for their grandchildren through a CSG.

requirements in terms of an economic 'means test', and will depend on whether or not the person is married.[104] An amount of 380 ZAR (roughly €26) per month per child is currently available although this is set to increase marginally in 2018. These grants are not meant to be accessed by caregivers to support themselves. This may leave marital majors faced with another conundrum because of their age.

It appears that not only can a marital major not access a grant in his/her own name to support him/herself, but that the age at which a marital major (as is the case with any child) can act as a caregiver and access a CSG in his/her own name for his/her own child or younger sibling is 16 years or older.[105] Similarly, the age at which a marital major (as is the case with any de facto major) can act as a foster parent and access a foster child grant (FCG) in his/her own name for siblings or other children in his/her care is 18 years. In comparison to the CSG, foster parents do not have to pass any means test in order to qualify for a FCG. Moreover, the value of the FCG is currently more than double the amount (920 ZAR (roughly €63 per month) per child under the age of 18, which makes it a very lucrative prospect and incentive. For example, if a family takes in a few children, they are able to support their whole household.

While the CSG may assist either the biological parents of minors (who themselves may still be minors) or their parents (grandparents) burdened with such primary care-giving responsibility, this begs the question whether minors who obtain majority through marriage may be unduly prejudiced by virtue of being married? For example, the (economic) means test threshold for married and unmarried persons in the case of the CSG is based on income earned and is much higher (almost double) for married persons than for unmarried persons. Furthermore, how are such married 'major' persons able to continue with schooling if they are expected to find work in order to earn an income which will satisfy these threshold requirements, given the various anomalies in legislation which may legally prevent them from seeking employment before a certain age?

It is also possible for families to be headed by children over the age of 16 in child-headed households.[106] In the case of a CSG, a primary caregiver can apply for grants for both non-biological and legally adopted children. However, although a girl of 16 may be the primary caregiver of a household, according

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104 In order to qualify for the CSG a person must meet the following requirements of the means test which is set at a monthly income of R3,800 (roughly €260) per month for single caregivers and, if married, the spouses' combined income must not be more than R7,600 (roughly €520) per month. See KELLY, above n. 100.

105 The Social Assistance Act 13 of 2004 defines a 'primary caregiver' as a person of 16 years or older.

106 The Children's Act 2005, s. 137(1)(c) provides that a household may be recognised as a 'child-headed household' if: '[a] child over the age of 16 years has assumed the role of care-giver in respect of the children in the household'.

to the Children's Act girls below the age of 18 cannot place a child for adoption without a guardian's consent[107] nor are children themselves eligible to adopt a child (and be adoptive parents) until they are 18 years or older.[108] Yet, as detailed below, a girl of any age has the reproductive right to an abortion. This begs the question whether these provisions of the Children's Act can be challenged by marital majors who may want to give up a child for adoption because they may not be in a financial position to support the child, or who may want to adopt a child because they are unable to conceive one naturally but who may be denied the ability to do so due to a lack of income or insufficient funds to support such a child,[109] because of their age?

It is therefore contended that as long as child marriage is permitted in South Africa, a cogent argument may yet be made for the state to extend the CSG to marital majors acting in their own name in order to support both themselves and their minor children. However, given that statistics published in 2017[110] highlight that poverty remained highest amongst children aged 0 to 17, South Africa may hardly be in an economic position to do so. Hence, this adds to the reasons why child marriage may no longer be a viable option for South Africa.

4. FURTHER REASONS WHY EARLY MARRIAGE (AND MARITAL MAJORITY) SHOULD BE GIVEN THE DEATH KNELL IN SOUTH AFRICA

As explained in section 3.1, given that it may be relatively easy for minors to acquire the additional consent to enter into early marriage, the possibility of such marriages being entered into purely for convenience to facilitate economic opportunity or as forced or arranged child marriages should not be ruled out as the following cases highlight.

In the early (1935) case of *Meyer v. The Master*,[111] a father encouraged, and consented to, his son's early civil marriage at the age of 16, to a woman nearly twice his age, so that he could attain marital majority and thereby circumvent the problem of varying ages of consent in the law. According to the facts of case, the applicant, a minor, had inherited a sum of money from his mother but, given that he was just over 14 years old at the time, would only be able to

107 The Children's Act 2005, s. 233(1)(a).

108 The Children's Act 2005, s. 231(2)(c).

109 The Children's Act 2005, s. 231(2)(b).

110 See 'Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015', Report No. 03-10-06, p1–138, published by Statistics South Africa (2017) available at <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (last accessed 25 March 2018) at p. 59.

111 *Meyer v. The Master* 1935 SWA 3. See also n. 35.

access the money when he reached 21 (which at that time was the formal age for attaining majority) in terms of the provisions of his mother's will. In an attempt to circumvent this time gap and access his money, his father assisted his entering into what appeared to be a sham marriage. The marriage was terminated after about two years, when the minor would have then been 18 (which is the current age of majority). The Court dismissed his application that claimed the money should be made available to him on the grounds of his early marriage. The Court found that despite his early marriage, he was not a major and that he therefore had to wait until he reached the age of majority in order to access his inheritance.[112]

This case highlights a typical example of one parent (father), motivated by economic gain, both contradicting the wishes of the other parent (mother) and not acting in the best interests of the minor child. It also highlights that ultimately it is the age of majority and not the status of majority that ought to matter.

In a more recent case, *Jezile v. S and Others* (2015),[113] the grandmother and uncle of a 14-year-old girl gave permission to a man of 35 (thus more than twice her age) to enter into an early customary law marriage with her against her wishes. This resulted in the girl's schooling being terminated given that it would interfere with the expectation that she be a dutiful wife. Fortunately for the girl, the neighbours intervened and the husband was arrested and sentenced to 25 years imprisonment for the crimes of human trafficking, rape and assault. While this case had a relatively good outcome, and the publicity given to it[114] may have created awareness, such cases often go unnoticed and unreported.

Spouses in South Africa are generally marrying when older. According to information collated from a report[115] recently (2017) released by Statistics South Africa, a total of 138,627 civil marriages; 3,467 customary marriages; and 1,185 civil unions were recorded in 2015 in the South African national marriage registration systems maintained by the Department of Home Affairs. As for the number of marriages entered into by minors: for civil marriages, six bridegrooms and 77 brides were below the age of 18; for customary marriages, five bridegrooms and 120 brides were younger than 18. Thus, only 11 minor grooms and 197 minor brides entered into civil or customary

112 Ibid, at 11.

113 *Jezile v. S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

114 See L. Feni, 'Teen's forced marriage hell', *Daily Dispatch*, 6 June 2017, available at <http://www.dispatchlive.co.za/news/2017/06/06/teens-forced-marriage-hell/> (last accessed 25 March 2018).

115 See Stats SA (Statistics South Africa), STATISTICAL RELEASE P0307 Marriages and divorces 2015, released on 5 July 2017 available at <http://www.statssa.gov.za/publications/P0307/P03072015.pdf> (last accessed 25 March 2018) at pp. 3–6.

marriages. Nonetheless, accounting for at most 208 marriages out of a total combined figure of 142,094 civil and customary marriages, highlights that very few minors actually entered into marriage in 2015, and indicates that the minors managed to overcome the legal obstacles pertaining to consent.

Although the global trend is for people in developed countries to enter into marriage at a later stage and for people in developing countries to do so earlier,[116] in South Africa, which has elements of both a developed and developing country because of its unique colonial and political history, statistics highlight that the local trend is more in line with that expected of a developed country. Despite the high number of early pregnancies referred to earlier in section 3.1, the low number of child marriages highlights that an early marriage, or any marriage at all for that matter, will not necessarily follow because of a pregnancy. The above figures, and the different types of available marriages that are still being entered into, also highlight that the institution of marriage is still very much alive in South Africa. The following statistics identify that those entering into marriage are also doing so later in life. In 2015, the median (rather than the mean or average)[117] age for bridegrooms of (first time) civil marriages was 34 years and 30 years for brides. For all customary marriages it was 34 years for grooms and 28 years for brides. Grooms in both types of marriage were generally older than the brides. For all civil unions, the median age for spouse-1 was 36 years and 34 years for spouse-2.[118] These figures therefore show that it is not the norm in South Africa for either minors or adults to enter into marriage at an early age.

Recent (2016) UNICEF data pertaining to child marriage rates highlight that a child bride problem is not really prevalent in a developing country such as South Africa since only 1 per cent of girls are married before or by the age of 15 and 6 per cent before or by the age of 18.[119]

Nonetheless, what is a cause for concern is that while the latest civil marriage statistics highlight low numbers of child marriages, these numbers highlight that more girl-children enter into child marriages than boys.

The 2016 General Household Survey released in 2017 also indicates that early marriage is one of the reasons more adversely impacting the educational opportunities of girl-children than those of boys. The following figures and

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116 See e.g., A. Mayyasi, 'The age when people get married around the world' (2016) available at <http://www.businessinsider.com/the-age-when-people-get-married-around-the-world-2016-7> and United Nations Children's Fund, 'Ending Child Marriage: Progress and prospects' (UNICEF, New York, 2014) (both last accessed 25 March 2018).

117 e.g. the median age in the case of civil marriage grooms would mean that in terms of the 2015 figures, half of the grooms were younger than 34 and half were older, and that for brides the midpoint was 30 years.

118 See Stats SA, above n. 115.

119 See 'Child marriage around the world: SOUTH AFRICA' available at <http://www.girlsnotbrides.org/child-marriage/south-africa/> (last accessed 25 March 2018).

reasons were cited by male and females aged 7 to 18 for not attending an educational institution:

> Although 9,9% of individuals left their studies as a result of family commitments (i.e. getting married, minding children and pregnancy), it is noticeable that females were much more likely to offer these as reasons than males (18,5% compared to 1,3%).[120]

It is contended that early marriage, if allowed to continue, will not only deny children their constitutional right to human dignity (Constitution, section 10) but will also deprive them of the right to freedom and security of the person (Constitution, section 12) guaranteed to everyone. While it may be true that the problem of child marriage is not unique to developing countries like South Africa since it continues to rear its head even in developed countries like, for example, the USA,[121] all of the above reasons provide more than enough additional justification that the time may have arrived for such marriages to be both discouraged and banned.

As explained below, while South Africans are warned of the health and other risks connected with smoking tobacco and the use of alcohol, there is little discouragement of, and scant information regarding the precautionary measures to be taken in respect of, early marriage and its potentially more harmful effect on the right of girls to normal physical development and to complete their initial education. The prospects of such girls pursuing further education and careers, and thereby gaining financial stability, are therefore very slim.

The Tobacco Products Control Act 1993,[122] the Liquor Act 2003[123] and the National Gambling Act 2004[124] prohibit the selling of tobacco and alcohol to anyone under the age of 18 and their participation in gambling. A new proposed Liquor Amendment Draft Bill which aims to increase the age from 18 to 21 has been in place since 2016.[125] However, under-age smoking, drinking[126] and

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120 See Statistical Release P0318 General Household Survey 2016, Pretoria, South Africa published by Statistics South Africa (Stats SA) and released on 31 May 2017, available at <https://www.statssa.gov.za/publications/P0318/P03182015.pdf> (last accessed 25 March 2018) at p. 13.

121 M. Jeltsen 'Grown Men Are Exploiting Loopholes in State Laws to Marry Children' (2017) available at <http://www.huffingtonpost.co.za/entry/child-marriage-state-laws_us_59a5e70ee4b00795c2a27e19> (last accessed 25 March 2018).

122 Act No. 83 of 1993, s. 4(1).

123 Act No. 59 of 2003.

124 Act No. 7 of 2004.

125 According to details available at <https://pmg.org.za/call-for-comment/475/> (last accessed 25 March 2018) a call for comments on the Liquor Amendment Draft Bill, 2016 opened 3 October 2016 and closed on 15 December 2016. However, no further information on the progress of the Bill has been made available as yet.

126 K. Padayachee, 'Screen teens for underage drinking, says experts', *IOL News*, 15 June 2016, available at <https://www.iol.co.za/news/crime-courts/screen-teens-for-underage-drinking-says-experts-2035270> (last accessed 25 March 2018).

gambling[127] are still rife in South Africa. The status quo therefore highlights that sometimes banning minors from doing certain things may not have the desired effect, whereas legalising it within controlled parameters and subject to clear guidelines may yet be a solution. This much is clear from, for example, the current Dutch experience and success with the legalisation of the drug cannabis, as opposed to the current position in South Africa where its general use still remains illegal.[128] However, it is contended that one cannot legalise early marriage in South Africa because the harmful effects of child marriage by far outweigh its benefits. Girls aged 12 may not lack the physical capacity for sex but their bodies may not be ready for early pregnancies and childbirth, and they also lack sufficient mental maturity to deal with the implications and responsibilities that go with marriage and parenting. The fact that early marriage is therefore not in the best interests or to the advantage of any minor, warrants both it and the legal exception of marital majority be abolished. As detailed in section 5 this would therefore also merit a proposed uniform increase in the minimum marriageable age to 18 years for both sexes, which for practical reasons would more realistically ensure alignment with the definition of a child and the age of majority, although 21 years would have been preferred as more ideal.

Crime is a serious problem in South Africa.[129] Yet, in an effort to defend oneself, a person must be 21 years old[130] in order to apply for a firearm (gun) licence in South Africa. Some of the stringent requirements that an applicant must meet in order for the application to be successful include being

> (c) ... a fit and proper person to possess a fire arm ... (d) ... of stable mental condition and is not inclined to violence; (e) ... not dependent on any substance which has an intoxicating or narcotic effect.[131]

On the other hand, a minor is given a marriage 'licence' (certificate) with little other than consenting requirements having to be met. However, once the certificate has been obtained, the minor becomes a marital major but is not

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127 See, e.g., the study commissioned by the National Gambling Board titled: 'The Social Impact of Gambling in South Africa: Qualitative perspective' (2013) at pp. 27–29 available at <http://www.ngb.org.za/SiteResources/documents/Social%20impact%20of%20gambling%20qualitative%20perspective%202013.pdf> (last accessed 25 March 2018).

128 Although the use of cannabis is currently still illegal in South Africa, a judicial challenge seeking to legalise it on constitutional grounds is currently underway in the High Court. For detail, see D. Jake, 'Is Weed Legal in South Africa?', *BTL South African Cannabis News & Culture*, 26 May 2017, available at <https://btl.co.za/is-weed-legal-in-south-africa/> (last accessed 25 March 2018).

129 For a simplified version of South African crime statistics relating to murders, assaults, sexual offences and other crimes, see those supplied by Crime Stats SA available at <https://www.crimestatssa.com/national.php> (last accessed 25 March 2018).

130 See the Firearms Control Act No. 60 of 2000 (as amended), s. 9(2)(a).

131 Ibid, ss. 9(2)(c)-(e).

deemed fit to possess a weapon to protect his or her family in a crime-ridden South Africa until he or she reaches the age of 21! Nor, for that matter, is a marital major able to protect his or her country because the minimum age for recruitment into the South African National Defence Force is 18 years.[132]

It is therefore proposed in section 5 that a solution that may be more in alignment with the best interests of minors would be for the state to adopt a more specific approach against child marriage in legislation. Nothing precludes communities in the rainbow nation, whose private lives may also be governed by religious and/or cultural constructs and rules which favour a more flexible approach in support of child marriage, to resort to these rules.

5. CONCLUSION

Although data highlights that South Africa does not have a serious child marriage problem, South African law nonetheless permits it. Minor children are therefore able to enter into a civil marriage with differing proprietary contractual consequences, assume the responsibilities of heading a household, and be lawful guardians of their biological children – all before they reach the age of 18. This has given rise to terms, such as, 'child-bride', 'child-parent' (child with responsibility for his or her own child), 'child-caregiver', and 'child-headed household', becoming commonplace. One therefore has to question just how enlightened such a legal framework really is.

Furthermore, although marital majors may be treated like adults in selected situations, this does not imply majority 'for all purposes' nor 'full capacity to act' because, as this chapter has highlighted, the termination of minority through marriage does not result in the attainment of de facto majority (adulthood) but merely of the status of majority. The reports submitted by government highlighting steps taken to ensure compliance with UN (CRC) and regional (ACRWC)[133] instruments as far as its obligations to children may be concerned

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132 See the Defence Act No. 42 of 2002, s. 52(1).

133 See, e.g., Department of Women, Children and People with Disabilities, 'South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child' (Reporting period January 2000–April 2013) available at <https://www.unicef.org/southafrica/SAF_resources_africanunionreport9.pdf> (last accessed 25 March 2018). This is the Government of South Africa's combined First, Second, Third and Fourth Reports under the ACRWC presented to the African Committee of Experts on the Rights and Welfare of the Child. See also 'South Africa's second Country Report to the African Committee of experts on the Rights and Welfare of the Child on the African Charter on the Rights and Welfare of the Child' (Reporting period May 2013–May 2016) available at <http://www.gov.za/sites/www.gov.za/files/SA%20%27Second%20Country%20Report%20to%20the%20African%20Committee%20on%20the%20ACRWC%20%20%2019%20DEC%202016.pdf> (last accessed 25 March 2018).

often do not reflect an entirely honest or accurate picture as becomes clear from the alternate[134] reports also submitted. However, conflicting provisions on child marriage in these instruments may make it easier for government to do so with little fear of censure.

In an effort to answer the question raised in section 1, this chapter has highlighted, and illustrated with various statutory examples, that when minors enter into early marriage they are faced with the conundrum of being minors in age but majors in status. As such, it is uncertain whether they are entitled to the same protection and benefit of the main laws and instruments as all other minors or majors. Technically, it can be argued that if they are treated as children in statutes because of their age, there should be no reason why they should be precluded from its protective ambit. If, however, they are treated as majors, as they in fact are in some statutes, then there may be good reason to exclude them therefrom. Article 41 of the CRC, for example, may be construed to support the view that if marital majors are still treated as minors because of their age then they should be protected as minors:

> Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.

It is contended that, while it may also be construed as a short-term step in the right direction, it will be of little use to merely amend the (civil) Marriage Act, to either increase or decrease the common law minimum marriageable age if it is to remain below 18 years for both girls and boys in order to bring them into alignment with each other: doing so would not address the problem of child marriage in South Africa in the long term. The practice of child marriage is itself discriminatory and its disadvantages currently far outweigh its advantages for South African children. For these reasons, it is predicted that the Marriage Act will not be able to evade, or withstand, constitutional challenges when they ultimately arise – which they will. It is contended that the solution to this conundrum would be for South Africa to be proactive and to replace the common law minimum marriageable ages (based on puberty) in the Marriage Act 1961 with a uniform minimum marriageable age of 18 years for both sexes *without exception*. At the same time child marriage and the exception of marital majority, that may encourage it, will also be formally abolished. Its

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134 See, e.g., 'SOUTH AFRICAN ALTERNATE REPORT COALITION, Alternate Report to the UN Committee on the Rights of the Child in response to South Africa's Combined 2nd, 3rd and 4th Periodic Country Report on the UN Convention on the Rights of the Child October 2015' available at <http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/INT_CRC_NGO_ZAF_22650_E.pdf> (last accessed 25 March 2018).

death knell will afford minors a greater opportunity to grow towards their full potential until they reach the age of 18. By doing so South Africa will align itself with the closer to home ACRWC position rather than that of the more outdated CRC.

Further support for such an approach may be found in the fact that the varying ages of consent in some statutes may discriminate between minor children on the basis of sex for reasons that have little to do with their evolving capacities, and may for this reason have to be amended to avoid facing any constitutional challenge. However, all these statutes remain within the age parameters of the definition of a child and are meant for the protection of children. However, if a uniform minimum marriageable age of 18 were to be introduced for all types of marriage currently recognised, as well as for those in the pipeline awaiting recognition, then, since these marriages will only be able to be entered into by de facto majors (adults), it ought to automatically resolve the confusion with varying ages of consent in most statutes – because it simply would not exist. To effect these changes will not be a mammoth task nor will it be insurmountable to achieve.

Why age 18, and what do we do in the meantime while child marriages still subsist? Although a decade has passed since 2007 when the legal age of majority was reduced from 21 to 18, it remains a traditional practice for many South African parents to formally celebrate and bless the coming of age of their children when they reach the age of 21 (not 18). On that occasion parents present children with a key which symbolises both the unlocking of the door to their future and independence and an acknowledgement by the parents of the relinquishing of their responsibilities. It is contended that while 21 may be more ideal as a minimum age for marriage, it may be less practical when it comes to alignment with the current definition of a child in the main laws and human rights instruments. Hence, it is recommended that the minimum age for marriage be uniformly increased to 18. If this is done, then children will be afforded both better legal protection and an opportunity to enjoy the rest of their youth and adolescence before having to venture into marriage and assume the adult responsibilities that come with such a major step. In so doing, parents (and the state) will also be less burdened with additional responsibilities for these married children of theirs.

However, although such law reform is encouraged, by itself it is not enough. Attitudes, values and beliefs must also change. The first democratic President of South Africa, Nelson Mandela, was a champion of children's rights. A quotation attributed to him correctly asserts that 'there can be no keener revelation of a society's soul than the way it treats its children'.[135] This chapter has shown that

[135] 8 May 1995.

allowing minor children to enter into early marriage is both bad in law and certainly not in their best interests. Instead of waiting until they leave school or reach the age of majority, all pubescent school-going learners should be given copies of abridged or slim-line versions of the Constitution,[136] taught their rights, and instilled with the confidence and ability to effortlessly navigate its pages. Section 3.1 highlighted that high rates of teenage pregnancy indicate that women have children early but not necessarily that early marriage will follow. After a series of court cases, involving schools and expelled or excluded pregnant learners, necessitated a review by the Department of Education of its 'pregnancy policy', and its subsequent revocation, a new draft policy, which sets out how schools should support pregnant pupils and protect them against discrimination, was recently published by the Department of Education for public comment (by 10 March 2018).[137] School-going learners are also taught about sex and the prevention of teenage pregnancy in compulsory Life Skills programmes[138] for the duration of their schooling (until grade 12). It is contended that these programmes should be extended to include topics about early marriage and its implications. South Africans commemorate, and have public holidays in honour of, the youth. Yet, marriage certificates are issued to children without any requirement that they undergo marriage preparation, counselling or enrichment courses. Acquiring all the above skills will afford children an informed opportunity to meaningfully participate in the annual Nelson Mandela Children's Parliament.[139] One of the issues that should be placed on the agenda is child marriage and ways to safeguard children from its harmful effects on their lives. It should remain a standing item on such agendas until the

136 There are two abridged versions that could prove useful. One was produced by the Constitutional Court in an attempt to make the content of the Constitution more accessible to the general public. It is available at <https://www.concourt.org.za/images/phocadownload/the_text/Slimline-Constitution-Web-Version.pdf> (last accessed 3 July 2018). The other version entitled 'The Basic Provisions of the Constitution of the Republic of South Africa, 1996, Made Easy for Learners' was developed specifically with children in mind. It is available at <http://www.justice.gov.za/legislation/constitution/FoundingProvisions_Constitution.pdf> (last accessed 25 March 2018).

137 For information pertaining to, and a copy of, the Department of Basic Education's draft 'National Policy on the Prevention and Management of Learner Pregnancy in Schools', see Government Notice No. 128, p. 15 and pp. 17–36 in Government Gazette No. 41456 published on 23 February 2018 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180223policypreventionmanagementoflearnerpregnancy.pdf> (last accessed 25 March 2018).

138 For more information about the Life Skills programmes, see the document 'Measures for the Prevention and Management of Learner Pregnancy' (2007) developed by the Department of Education available at <http://www.naptosa.org.za/index.php/doc-manager/40-professional/46-general/105-sgb-dbe-pregnancy-2007/file> (last accessed 25 March 2018).

139 The Children's Parliament was inaugurated in 2011 and has since been held annually to celebrate Mandela's values and commitment to South African children by giving them a platform to discuss issues that affect them.

common law minimum marriageable ages are brought into alignment with the new constitutional order in South Africa. Rather than just complete their basic education, both boys and girls must be encouraged to complete school until grade 12 when they usually turn 18, and, until then, to leave marriage to de facto adults. All children, although not a homogenous group in our plural society, remain members of a vulnerable group and their protection is important as they represent the future of society.