

ENDING CHILD MARRIAGE IN SOUTHERN AFRICA: GAPS AND OPPORTUNITIES IN THE LEGISLATIVE FRAMEWORKS

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ABOUT EQUALITY NOW

Since its founding in 1992, Equality Now has been using a unique combination of legal advocacy, regional partnership-building, and community mobilization to encourage governments to adopt, improve and enforce laws that protect and promote the human rights of women and girls around the world. With an international team, their campaigns are centered on four program areas: Achieve Legal Equality, End Sexual Violence, End Harmful Practices, and End Sexual Exploitation, with a cross-cutting focus on the unique needs of adolescent girls.

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BACKGROUND

International human rights instruments such as the Convention on the Rights of Children (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) all categorically state the minimum age of marriage as 18, without any exceptions. The African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), in their Joint General Comment on Ending Child Marriage, adopted in 2017, also unequivocally state the minimum age of marriage as 18 with no exceptions. The Southern African Development Community (SADC) [Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage](#) also echoes these human rights principles and recommends that Member States do not deviate from the minimum age of marriage, that is 18.

A child is defined as a person under the age of 18 by these international human rights instruments (CRC, ACRWC) as well as in domestic laws. Such a person in most jurisdictions is not capable of entering into a legally binding contract, neither are they allowed to vote. Despite this, several African countries allow a child to get married to an adult or to another child with all its attendant obligations.

“International human rights instruments... all categorically state the minimum age of marriage as 18, without any exceptions.”



The institution of marriage is regulated in one form or another in all Member States of SADC, often through Civil Codes, Marriage Laws, or Child Protection Laws. These laws are meant to protect the rights of children but as will be demonstrated below, some of them still fall short of a comprehensive protection of children, with girls often bearing the brunt of the negative consequences of child marriages.

The enactment of robust laws prohibiting child marriage has been proven to have a positive influence on the reduction of the incidence of child marriages and improving the general welfare of children. [Research](#)¹ shows that countries with laws that set the minimum age as 18 without exceptions (like parental consent to marry below the general minimum age of marriage) have relatively lower incidence² of child marriages and adolescent pregnancies. To further illustrate this, [research](#) done in Mali³ indicates that when the minimum age of marriage was lowered from 18 to 16, child marriages progressively increased. Clear, consistent laws, therefore, have the impact of not just acting as a deterrent, but also demonstrating to the community the need to allow children to grow and attain their full potential by positively influencing societal attitudes.

Child marriages are the result of many societal issues, including patriarchal norms, economic challenges, traditional beliefs, curtailed or limited access to education as well as in some instances, conflict or natural disaster-related disruptions.

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

2 UN Women '2011-2012 Progress of the World's Women: In Pursuit of Justice' (2011).

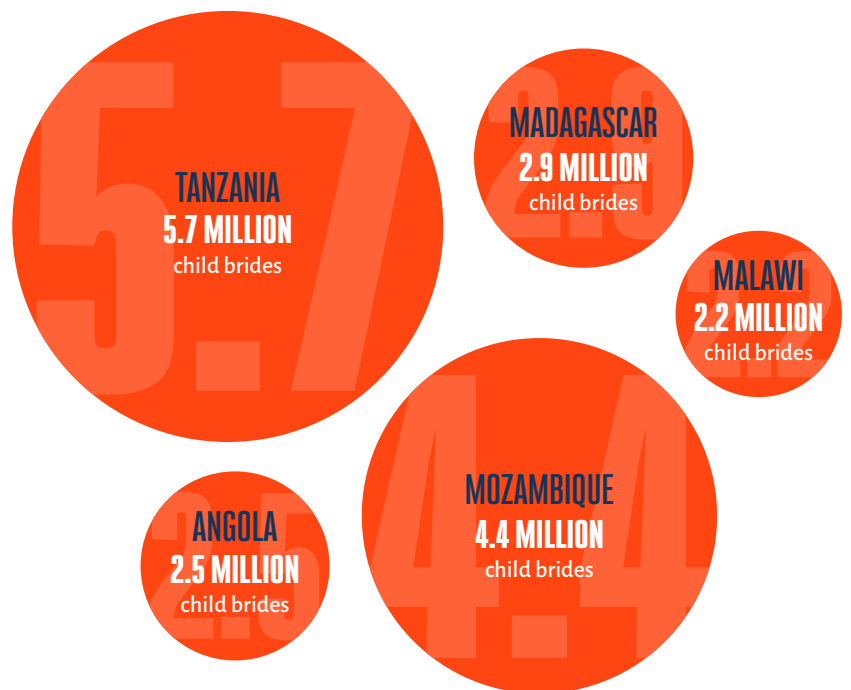
3 E Batyra and LM Pesando "Reverse Policies?" Reducing the legal minimum age of marriage increases child marriage among the poorest in Mali' (2022) University of Pennsylvania Population Centre Working Papers.

THE STATUS OF CHILD MARRIAGE IN EASTERN AND SOUTHERN AFRICA

Tanzania and Mozambique are estimated to have the largest number of child brides in the East and Southern African region, with **5.7 million** and **4.4 million**, respectively. In Mozambique, 53% of the women in the country have been married before they reached the age of 18. Other countries in the sub-region also have high incidences of child brides, for example, Madagascar (**2.9 million**), Angola (**2.5 million**), and Malawi (**2.2 million**).⁴ The types of unions vary from marriage among peers to marriage to adult partners.

Some of the unions are formal marriages, while others are informal cohabiting unions. For example, in [Angola](#), an estimated 83% of the children in child marriages are in informal unions while only 10% are formally married. However, this situation varies vastly by country. In [Lesotho](#), for example, nearly all (95%) of the married children are in formal marriages, while only 2% are in informal unions.

The [negative effects of a child entering marriage](#) are many and varied, ranging from disruption of their education, reduced economic activity, increased risk of early and frequent pregnancies that are detrimental to their health, and increased risk of gender-based violence, among others.⁵ These consequences are illustrated below.



- Children who are in child marriages are more likely to drop out of school as compared to their unmarried counterparts. In [Madagascar](#), 97% of teenage girls aged 15-17 who are married or in unions are not in school, as compared to 49% of girls who have never been married.
- Early pregnancies associated with child marriage significantly increase the risk of maternal mortality and morbidity. In [Namibia](#), 33% of women married before the age of 18 had children within a year of marriage, and 37% after the first year of marriage. This shows a stark difference with women who were married at or after the age of 18, where only 10% (compared to 33%) were pregnant within a year, and 11% (compared to 37%) were pregnant after a year of marriage. These statistics indicate that early pregnancies, many of which are unintended, are more likely to occur in the context of child marriage. Indeed, limited access to sexual and reproductive health information and services can lead to adolescent pregnancies, which in [some contexts](#) can trigger child marriages.⁶ For example, it was [documented](#) that during the COVID-19 pandemic, disruption in sexual and reproductive health services contributed to an increase in adolescent pregnancies and, in many settings, child marriages.⁷
- Lack of autonomy and freedom from violence compromises the quality of life of child brides. In [South Africa](#), only 13% of women married before the age of 18 had bank accounts, as compared to 50% of those who married at or after the age of 18, and 51% of women who have never been married. Similarly, 41% of women who married before the age of 18 had experienced intimate partner violence as compared to 21% of women who married at or after the age of 18.

⁴ UNICEF 'Child marriage in Eastern and Southern Africa: A statistical overview and reflections on ending the practice' (2022).

⁵ Plan International, 'Child Early and Forced Marriages and Unions' (2020) Policy Brief.

⁶ UNICEF 'Child marriage and teenage pregnancy: Key Issues in East Asia and the Pacific'

⁷ ReliefWeb 'Child marriages, pregnancies soar during pandemic' 12 October 2020 https://reliefweb.int/report/world/child-marriage-pregnancies-soar-during-pandemic?gclid=CjoKCQJw_r6hBhDdARIsAMiDhV8zogsdxpGUjsjYvYGSvV5dlnBwfl_Ad-jobQq3eIQoJTSP81glsAaAvPIEAw_wcB

CURRENT LAWS IN SADC

This policy brief presents the status of laws in the SADC region as they relate to three crucial thematic areas;

- 1) The minimum age of marriage and the extent of its uniform application between boys and girls;
- 2) The existence of exceptions as they relate to customary or religious or other laws;
- 3) Provisions for the waiving of the minimum age of marriage through parental or judicial consent.

Table 1 below provides an overview of the current laws in the sub-region relating to these issues.

Table 1 SADC Child Marriage laws on 3 selected themes

Countries	Existing Law	General minimum age of marriage	Are there exceptions for customary/religious laws?	Is parental/judicial consent for marriage below the general minimum age allowed?
Angola	Family Code 1988	18 (both boys and girls), with exceptions	No	Yes. Marriage can be allowed at 16 for boys and 15 for girls if deemed for the best interest of the child by their parent or guardian (art. 24)
Botswana	Marriage Act 2001	18 (both boys and girls) with exceptions, (s14 Marriage Act, s62(2)(a) Children's Act)	Yes. Marriage Act specifically excludes customary and religious marriages so the age of 18 doesn't apply	No. However, consent of parent and guardians required for under 21 (s15 Marriage Act)
Comoros	Family Code 2005 Penal Code (Crimes and Misdemeanours)	18 (both boys and girls) with exceptions	Yes, for customary marriages (only Muslim marriages are covered by the Family Code). However, the Penal Code prescribes penalties for those who consummate or attempt to consummate a marriage according to customary law with a child below the age of 13	Yes. Judge can permit marriage of children below 18 on serious and legitimate grounds. Judicial exceptions exist under the Family Code
Democratic Republic of the Congo	Family code 1987 (amended 2016) Child Protection Act 2009	18 (both boys and girls) with no exception (both Family Code and Child Protection Act) with penalties for the marriage officer, the parents who consented, the adult spouse, and those who witnessed it	No	No

Eswatini	Marriage Act 1964 Children's Protection and Welfare Act 2012 Marriage Bill 2022	18 for boys and 16 for girls (Marriage Act) * However, Children's Protection Act gives children under the age of 18 the right to refuse to be compelled into harmful practices; and penalises adults who orchestrate child marriages. <i>Prospective Marriage Bill seeks to increase to 18 for both boys and girls</i>	Yes, for marriages contracted in accordance with Swazi law and custom. Customary law accepts marriage from puberty	Yes, Minister of Justice can consent to marriage under the minimum age under the Marriage Act. Parental consent is also required for children below 21 to marry
Lesotho	Marriage Act 1974 Child Protection and Welfare Act 2011	18 for boys and 16 for girls, with exceptions (Marriage Act)	Yes. Under the Laws of Lerotholi (the customary laws codified in 1908), both boys and girls can get married as long as they reach puberty age	Yes. Consent by parents and Minister responsible for administration of the Marriage Act (if s/he considers the marriage 'desirable') may be obtained to marry below 18 for boys and 16 for girls. Parental consent is also needed for marriage of persons below 21
Madagascar	Law on Marriage and Matrimonial regimes 2007 Law on the fight against human trafficking	18 years (both boys and girls), with exceptions. Law on trafficking has penalties for forced marriage of a child	No	Yes. The court may consent to under 18 marriages at the request of a parent or guardian
Malawi	Marriage, Divorce and Family Relations Act 2015 Constitution of Malawi 1994 (with 2017 amendment)	18 (both boys and girls) with no exceptions	No	No
Mauritius	Civil Code of Mauritius Children's Act 2020 (came into force in January 2022)	18 (both boys and girls), with no exceptions	No	No. The Children's Act has repealed the possibilities of parent/guardian or judicial consent for children aged 16 to 18 which existed under the Civil Code
Mozambique	Family Law Act 2019 Prevention and Combating of Premature Unions Act 2019	18 (both boys and girls) with no exceptions	No	No
Namibia	Marriage Act 1961 Married Person Equality Act 1 of 1996 Child Care and Protection Act 2015	18 (both boys and girls) with exceptions (Marriage Act and CCPA)	No. The CCPA explicitly states that it applies to religious and customary marriages	Yes. Written consent of Minister of Home Affairs may allow boys and girls under 18 to marry, if parents' Consent is also given (CCPA). Parental consent required for marriage below 21.

Seychelles	Civil Code of Seychelles 2021	The Revised Civil Code removed the earlier exceptions which permitted marriage below 18. It now states an adult is a person over the age of 18 (s 17) with legal capacity (s 18) and later states that there is no marriage without consent (s 145). These sections read together may confirm the minimum age of marriage as 18 years ⁸ , however, the law could clearly state this.	No	No
South Africa	Marriage Act 1961 Children's Act 2005 Recognition of customary marriages Act 1998	For civil marriages: 18 for boys and 15 for girls, with exceptions (Marriage Act) For customary marriages: 18 for both, with exceptions (Recognition of Customary Marriages Act)	No*	Yes. Marriage with consent by parents and the Minister or judiciary allowed even below the minimum age (Marriage Act and Recognition of Customary Marriages Act)
Tanzania	Law of Marriage Act	18 for boys and 15 for girls with exceptions**	No, customary law and religious law has no effect on Law of Marriage Act	Yes. A Court may allow marriage from 14 years for either sex. Parental consent for girls under 18 required (withheld parental consent may be overturned by court)
Zambia	Marriage Act 1964 Children Code Act No. 12 of 2022 Education Act 2011	16 for both boys and girls, with exceptions (Marriage Act) Education Act prohibits "learners" from being married (defined as child under 16) Children's Code Act- prohibits marriage under 18 years for both boys and girls	Yes. There is no age limit for customary marriage. Constitution defers to customary law for personal law matters such as marriage.	Yes. A High Court Judge can give consent to marriage of children below 16 also. (Marriage Act). Additionally, parental consent required for children above 16 and under 21.
Zimbabwe	Marriages Act No.1 of 2022 Constitution of Zimbabwe 2013	18 (both boys and girls) with no exceptions	No.	No.

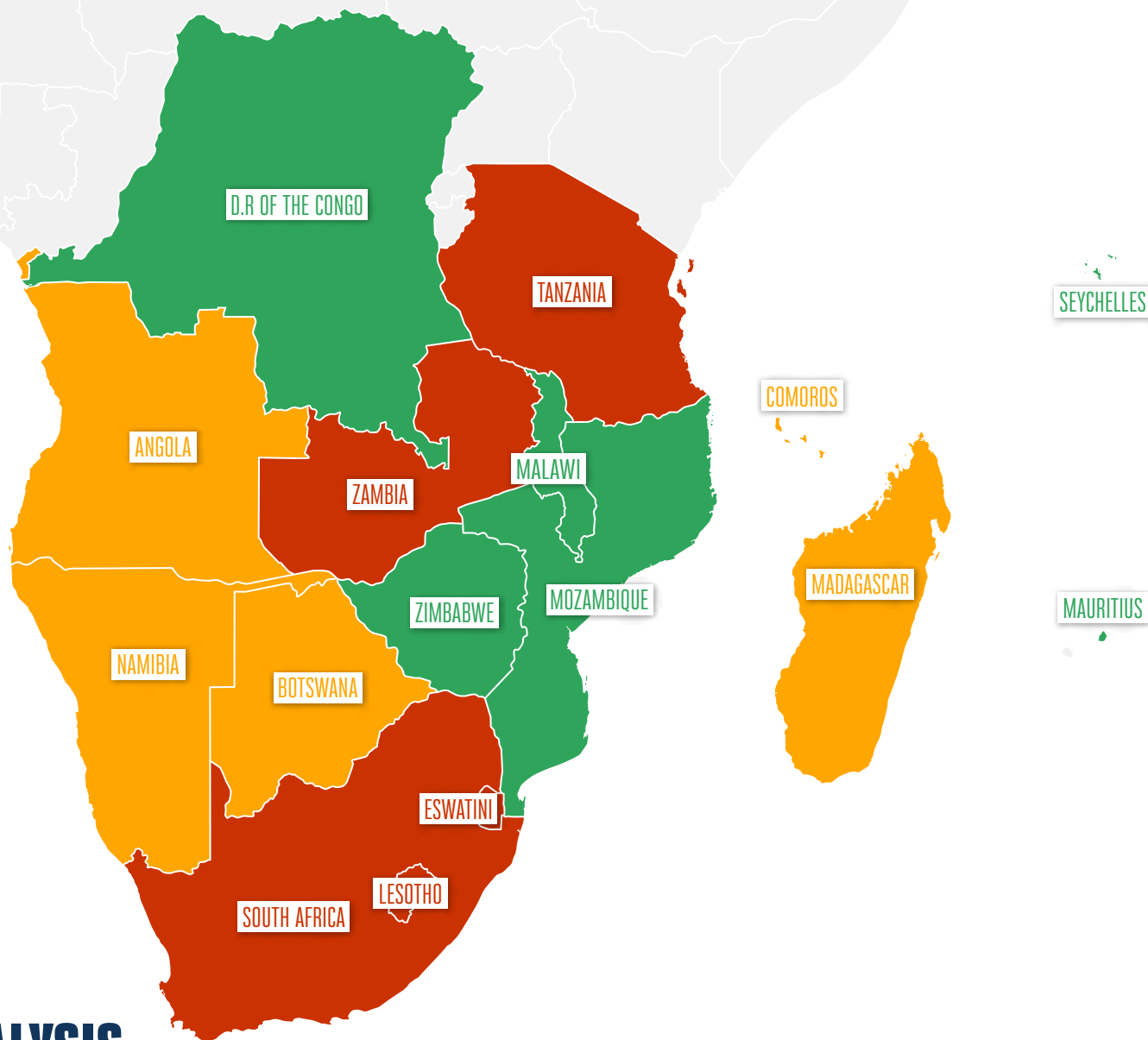
*The [Supreme Court of Appeal](#) declared the Marriage Act unconstitutional in as far as it did not specifically apply to Muslim marriages and declared that the Recognition of Customary Marriages Act will apply mutandis mutatis to religious marriages⁹

**The provisions of the Law of Marriage Act which permit marriage below the age of 18 have been struck down as unconstitutional by the [Court of Appeal of Tanzania](#), though the law is yet to be amended in compliance with the decision.¹⁰

⁸ Republic of Seychelles Immigration and Civil Status Department <http://www.ics.gov.sc/civil-status/getting-married>

⁹ President of the RSA v Women's Legal Centre Trust & Ors (2020) ZASCA 177.

¹⁰ The Attorney General v Rebeca Z Gyumi Civil Appeal 204 of 2017.



ANALYSIS

Key highlights from the data in Table 1 are as follows:

6/16 countries set the minimum age as 18, with no exceptions

Six out of the 16 countries (around 40%) - DRC, Malawi, Mauritius, Mozambique, Seychelles, and Zimbabwe - provide for the minimum age of 18 for both boys and girls with no exceptions.

5/16 countries set the minimum age as 18, but with exceptions

Five countries (around 30%) - Angola, Botswana, Comoros, Madagascar, and Namibia - set the minimum age as 18, but with exceptions. Of these five, Botswana specifically excludes customary and religious marriages from this protection, while the other four allow a court or other designated government official to consent to a marriage involving children younger than 18.

5/16 countries provide for a minimum age range between 15 and 18, with further exceptions also applicable

Five countries (around 30%) - Eswatini, Lesotho, South Africa, Tanzania, and Zambia - provide for a minimum age range between 15 and 18. In these countries, the minimum age of marriage is different for boys and girls (with the boys invariably having a higher age limit). In addition to these differences in age, all these five countries allow for judicial or parental consent to lower the age of marriage. Also, in some instances (like Eswatini and Lesotho), there are further customary exceptions to the law.

GAPS AND CHALLENGES

From the analysis above, one of the major challenges in legislation in the sub-region is the setting of a minimum age of marriage below 18 in many countries, with the minimum age set for girls often lower than that for boys. This is based on erroneous assumptions that girls mature faster than boys. It is also an indication of patriarchal notions of girls' and women's value being measured by their homemaking and reproductive functions. This results in girls being married off earlier, while boys continue with their education, hence economically placing young girls at a disadvantage. Setting a lower age of marriage for girls was found to be discriminatory by the court in [Tanzania](#); with the court ruling that the government should raise the minimum age of marriage for girls to 18.

The table also demonstrates that in several countries, a lot needs to be done to ensure that child marriage is prohibited under all circumstances, irrespective of the community in which a child is born. By leaving customary and religious marriages unregulated or providing explicit exceptions, states fail to protect the individual rights of the children who are part of these communities. While communities are entitled to their freedom of association and culture

and thus can practice their chosen customary and religious norms, the role of the state could be enhanced to ensure that these norms and practices do not interfere with individual fundamental rights. This aspect has been clearly stated in the constitution of some countries. For example, in Zimbabwe, while the Constitution states that 'every person is entitled to exercise the cultural life of their choice', this cannot not be inconsistent with the Bill of Rights.

In many countries, the provisions that permit parental/guardian or judicial/government consent for child marriage are contrary to what they purport to do i.e., protect the best interests of the child. Given the numerous undesirable consequences associated with child marriages, including violation of human rights, it is hard to justify in which circumstance a child marriage would be in the best interests of the child. Additionally, most laws which permit judicial or government consent for child marriages below the prescribed minimum age of 18 do not clearly provide guidelines for determining when such permission may be granted. In most of these countries, many of these exceptions also do not set an *absolute* minimum age of marriage, i.e., an age below which even a Judge or Minister should not grant permission, thereby putting even very young girls at risk of being legally allowed to marry.

RECOMMENDATIONS TO SADC MEMBER STATES

- Using the standards set by international human rights instruments that SADC Member States have committed to, domestic laws need to clearly set the minimum age of marriage as **18 for both boys and girls without exceptions**.
- Countries, where conflicting provisions in different legislations exist, should **harmonise them to remove ambiguity**. Ideally, the setting of the legal age for child marriage at 18 should be a legal provision which takes precedence over other existing legislation (as well as customary and religious laws, which may be uncoded) to avoid any conflict or ambiguity in interpretation.
- Member States should embark on the generation of information on a **regular** basis to identify opportunities and challenges for and to inform their policy formulation and legal reforms to eradicate child marriage.
- **Communities** should be engaged in policy formulation and legal reforms, particularly to encourage ownership of initiatives relating to customary and religious marriages.
- Member States can draw inspiration from the provisions of the SADC Model Law on Child Marriage on how to craft robust provisions that can help eradicate child marriages. Mozambique, for instance, demonstrates best practices for domesticating the SADC Model law through its *Prevention and Combating of Premature Unions Act 2019*.

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