

INTERNATIONAL LAW AND CHILD MARRIAGE IN AFRICA

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In recent years, civil society organizations in many countries around the world, as well as international organizations, such as UNICEF, have redoubled their efforts to end child marriage, prevent girls from marrying too young, and provide support for those girls that were already married as children. Child marriage is generally understood as a marriage or union—whether formal or informal—in which at least one of the parties is under 18 years of age. International organizations, such as the United Nations, have recognized child marriage as a violation of the human rights of the children involved and a practice that disproportionately affects women and girls globally. Human rights, including those of girl-children, are the purview of international law. Nevertheless, since the international community does not have a global government that can enact laws against child marriage and make certain that these laws are enforced, legal scholars have argued that the most important mechanism for the enforcement of international law, including international human rights law, is for each ratifying government to domesticate the treaties that they sign and ratify and hence, create rights that are justiciable in domestic courts. Where countries have not yet internationalized their national constitutional law, courts can use their interpretive power to bring each country's law into conformity with the provisions of international human rights instruments. An examination of two cases dealing with child marriage, one from the United Republic of Tanzania and the other from the Republic of Zimbabwe, shows that courts in these African countries are gradually developing a jurisprudence that effectively addresses the problem of child marriage and its impact on the rights of children.

Keywords: Human Rights, Forced Marriage, Children's Rights, Law and Development, Comparative Law.



INTRODUCTION

On March 8, 2016, International Women's Day, the U.N. Children's Fund ("UNICEF") and the U.N. Population Fund ("UNFPA") announced a new initiative, which both agencies argued, would help bring an end to child marriage by 2030.¹ The initiative, as made clear by UNICEF and UNFPA, "is part of a global effort to prevent girls from marrying too young and to support those already married as girls in 12 countries across Africa, Asia and the Middle East where child marriage rates are high."² As argued by the UNFPA's Executive Director, Dr. Babatunde Osotimehin, "[c]hoosing when and whom to marry is one of life's most important decisions. Child marriage denies millions of girls this choice each year."³ Dr. Osotimehin went on to state that "[a]s part of the global program, [the U.N. agencies] will work with governments of countries with a high prevalence of child marriage to uphold the rights of adolescent girls, so that girls can reach their potential and countries can attain their social and economic development goals."⁴

Child marriage is usually defined as "any formal marriage or informal union where one or both people are under 18 years old."⁵ A *forced marriage*, involves the situation in which "one or both people [to the marriage] do not consent to the marriage and pressure or abuse is used" to get them to acquiesce.⁶ The type of pressure imposed on parties to a forced marriage may include "threats, physical or sexual violence, and financial pressure."⁷ Since a child "cannot provide informed consent," child marriage is, by definition, forced. It is, therefore, a

1. Office of the U.N. Secretary-General's Envoy on Youth, *New UN Initiative aims to protect millions of girls from child marriage*, Mar. 8, 2016, <https://news.un.org/en/story/2016/03/523802-new-un-initiative-aims-protect-millions-girls-child-marriage#.Vt8pqfkrK71> (last visited on December 16, 2019).
2. *Id.*
3. *Id.*
4. *Id.*
5. ActionAid (U.K.), *Child Marriage*, <https://www.actionaid.org.uk/about-us/what-we-do/violence-against-women-and-girls/child-marriage>.
6. *Id.*
7. *Id.*

violation of a child's rights.⁸

According to the United Nations,

Child marriage, or early marriage, is any marriage where at least one of the parties is under 18 years of age. Forced marriages are marriages in which one and/or both parties have not personally expressed their full and free consent to the union. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.⁹

The U.N. has also stated that “[c]hild, early and forced marriage (CEFM) is a human rights violation and a harmful practice that disproportionately affects women and girls globally, preventing them from living their lives free from all forms of violence.”¹⁰ In addition to the fact that CEFM “threatens the lives and futures of girls and women around the world,” it also robs them of “their agency to make decisions about their lives, disrupting their education, making them more vulnerable to violence, discrimination and abuse, and preventing their full participation in economic, political and social spheres.”¹¹

Although child marriage affects both boys and girls, girl-children are more likely, than boy-children, to be forced into this practice. Child marriage affects virtually every region of the world and hence, it is a global problem. Nevertheless, it is most prevalent in sub-Saharan Africa and South Asia, particularly in Niger, Central African Republic, Bangladesh, and India.¹² ActionAid (U.K.), a global non-governmental organization that works to help women and girls living in poverty, has determined that “[i]n many communities across these regions, girls are being violently abducted before being forced to marry their captors,

8. *Id.*

9. Office of the U.N. Commissioner for Human Rights, *Child, early and forced marriage, including humanitarian settings*, <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx> (last visited on December 30, 2019).

10. *Id.*

11. *Id.*

12. *Id.*

usually many years older than them.”¹³ This article will deal exclusively with child marriage involving girl-children.

Another U.N. official, UNICEF Executive Director Anthony Lake, noted that “[t]he world has awakened to the damage [that] child marriage causes to individual girls, to their future children, and to their societies.”¹⁴ He argued further that the “new global program will help drive action to reach the girls at greatest risk—and help more girls and young women realize their right to dictate their own destinies.”¹⁵ Both UNICEF and UNFPA noted that unless drastic measures were taken to fight child marriage, “the number of girls and women married as children will reach nearly 1 billion by 2030—1 billion childhoods lost, 1 billion futures blighted.”¹⁶ The press release by UNICEF and UNFPA concluded that in addition to the fact that child marriage has a negative impact on national economies, it can also lead to the intergenerational transmission of poverty.¹⁷

The U.N. estimates that as many as 15 million girl-children are forced into child marriage each year.¹⁸ On September 25, 2015, the U.N. General Assembly adopted Resolution 70/1 called “Transforming our world: the 2030 Agenda for Sustainable Development.”¹⁹ The

13. *Id.*

14. Office of the UN Secretary-General’s Envoy on Youth, *supra* note 1.

15. *Id.*

16. *Id.*

17. Girls who marry as children are usually deprived of the opportunity to obtain an education and develop the skills and competencies that they need to function as productive adults. As a consequence, the economies of the countries of which they are citizens or residents, are deprived of these girls’ productive contributions to national output. In addition, these child-brides are likely to be susceptible to many pregnancy-related illnesses (e.g., obstetric fistula).

18. *Ending Child Marriage in Africa: Opening the Door for Girls’ Education, Health, and Freedom from Violence*, HUM. RTS WATCH, Dec. 9, 2015, <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa> (last visited on December 16, 2019).

19. U.N. General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, UGA Res. A/RES/70/1, Oct. 21, 2015, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement> (accessed on December 15, 2019).

resolution contained 17 Sustainable Development Goals,²⁰ which the U.N. and its Member States hope to achieve by 2030.²¹ Goal 1 is to “[e]nd poverty in all its forms everywhere”²² and Goal 5 is to “[a]chieve gender equality and empower all women and girls.”²³ Many scholars and development agencies have noted that child marriage and the sustainable development goals are interlinked. It is argued, for example, that “[c]hild marriage perpetuates poverty, inequality and insecurity and is an obstacle to global development” and that a failure to end child marriage will undermine the achievement of any development goals, including the U.N.’s Sustainable Development Goals.²⁴ As part of the effort to achieve gender equality, the U.N. and its Member States hope to “[e]liminate all harmful practices, such as child, early and forced marriage and female genital mutilation”²⁵ and do so by 2030.

In most of Africa, as much as 40 percent of the region’s girls marry before they attain the age of 18 years.²⁶ Of the 20 countries with the highest rates of child marriage in the world, 15 (or 75%) of them can be found in Africa.²⁷ The rate of child marriage in some countries in sub-Saharan Africa is extremely high—for example, in Niger, it is 77 percent; Central African Republic, 60%; and in Chad, 60% of girls marry before they attain the age of 18 years.²⁸ Human Rights Watch notes that unless

20. These goals are generally referred to as “the UN Sustainable Development Goals.” See UNGA Res. A/RES/70/1.

21. See *id.*

22. See *id.* at 15/35.

23. See *id.* at 18/35.

24. See Girls Not Brides, Sustainable Development Goals (SDGs), <https://www.girlsnotbrides.org/themes/sustainable-development-goals-sdgs/> (last visited on December 15, 2019). Girls Not Brides is “a global partnership of more than 1300 civil society organizations committed to ending child marriage and enabling girls to fulfil their potential.” See *Tanzania’s Supreme Court declares child marriage unconstitutional*, Girls Not Brides, June 5, 2019, <https://www.girlsnotbrides.org/tanzanias-supreme-court-declares-child-marriage-unconstitutional/> (last visited on December 15, 2019).

25. See UNGA Res. A/RES/70/1, at 18/35.

26. HUM. RTS WATCH, *supra* note 18.

27. *Id.*

28. *Id.*

there is effective intervention by national governments, with the help of domestic and international non-governmental organizations (NGOs), multilateral organizations, such as the United Nations and the African Union, as well as civil society in Africa, to bring to an end this harmful institution and practice, the number of girls marrying before they reach the age of 18 years is likely to double by 2050 and the continent “will surpass South Asia as the region with the highest numbers of child brides in the world.”²⁹

In January 2015, at Addis Ababa, Ethiopia, the African Union (“A.U.”) formally adopted a transformative program called *Agenda 2063: The Africa We Want* (“Agenda 2063”).³⁰ The A.U. called this program a “blueprint and master plan for transforming Africa into the global powerhouse of the future” and that it is “the continent’s strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under Pan-Africanism and African Renaissance.”³¹ Agenda 2063 sees child marriage as a major constraint to development generally and the achievement of the aspirations contained in its transformative program in particular.³² Hence, the A.U. hopes to eliminate “[a]ll forms of gender-based violence and discrimination (social, economic, political) against women and girls,” as well as “[a]ll harmful social practices (especially female genital mutilation and *child marriage*)” and “barriers to quality health and education for women and girls.”³³

Girls who marry before they are fully matured are often subjected to various types of human rights abuses. For example, such girl-children are forced to drop out of school and give up the opportunity to gain an education and acquire the skills that they need to function as productive adults; they are likely to suffer or face several serious health risks,

29. *Id.*

30. African Union (A.U.), *Agenda 2063: The Africa We Want*, Addis Ababa, Ethiopia, <https://au.int/en/agenda2063/overview> (last visited on December 15, 2019).

31. *Id.*

32. HUM. RTS WATCH, *supra* note 18; A.U., *supra* note 30.

33. A.U., *supra* note 30, at 8–9 (emphasis added).

many of them emanating from (1) early and multiple pregnancies; (2) sexual violence at the hands of their older husbands; and (3) domestic violence from their husbands and other members of their husband's extended family.³⁴ Most importantly, countries whose girl-children are forced to marry early lose the contributions that these girls could have made to the social, economic and political development of their respective countries if they, for example, had been allowed to attend school instead of being forced into marriage.

There is hope, especially in Africa, that national governments, with support from civil society, will take the lead in enacting laws to abolish child marriage and that domestic judiciaries will dutifully enforce these laws and make certain that they, as well as customary laws, are brought into conformity with international human rights instruments, especially since child marriage is considered a violation of the human rights of children.³⁵ In July 2015, the U.N. Human Rights Council adopted a resolution in which it recognized "child and forced marriage as a human rights violation"³⁶ and noted that "child, early and forced marriage is a harmful practice that violates, abuses or impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls, and underscoring the human rights obligations and commitments of States to promote and protect human rights and fundamental freedoms of women and girls and to prevent and eliminate the practice of child, early and forced marriage."³⁷

With respect to Africa, there is hope that this insidious practice will eventually be eliminated, especially given the fact that some African

34. HUM. RTS WATCH, *supra* note 18.

35. The U.N. has noted that child and forced marriage are a violation of human rights. See, e.g., Office of the U.N. Commissioner for Human Rights, *Child and forced marriage: a violation of human rights*, Nov. 3, 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/ChildForcedMarriage.aspx> (last visited on December 15, 2019). See also UNICEF, *Child marriage is a violation of human rights, but is all too common*, Oct. 2019, <https://data.unicef.org/topic/child-protection/child-marriage/> (last visited on December 15, 2019).

36. U.N. Comm. for Hum. Rts, *supra* note 35.

37. U.N. General Assembly, *Child, early and forced marriage*, U.N. GA Res. A/C.3/73/L.22/Rev. 1 (Nov. 12, 2018), <https://undocs.org/A/C.3/73/L.22/Rev.1> (Dec. 15, 2019).

countries have already taken the leadership to engage their populations in national dialogue on the dangers of the practice and how to end it. For example, in 2019, Ethiopia launched what it referred to as a “National Roadmap to End Child Marriage, FGM.”³⁸ Although it is critical that each African country take concrete steps to end child marriage, it is important to note that there is “no single solution” to this problem.³⁹ However, one promising way to confront child marriage in the continent calls for each African country “to commit to comprehensive change that includes a range of measures, including ensuring legal reform and enforcement, access to quality education, and sexual and reproductive health information and services; promoting girls’ empowerment; and changing harmful social norms.”⁴⁰

In other countries, judges have used their powers to interpret national constitutions, to rule against child marriage. For example, in October 2019, the Tanzania Court of Appeal upheld a landmark ruling by the Tanzania High Court against child marriage. The High Court, in the case *Gyumi v. Attorney General*,⁴¹ had held that the differential treatment of girls and boys by the impugned provisions (§§ 13 & 17 of the Marriage Act CAP R.E. 2002), which granted permission to the girl-child to marry and to engage in underage marriage with the consent of a third party (e.g., a parent or guardian), was discriminatory and violative of the right to equality under the Constitution of the United Republic of Tanzania.⁴² The Attorney General of the United Republic of Tanzania, who was a respondent in this civil action, appealed the High Court’s decision to the Court of Appeal, which subsequently upheld the High Court’s decision.⁴³ This case will be examined in greater detail

38. See *Ethiopia Launches National Roadmap to End Child Marriage, FGM*, EZEGA NEWS, Aug. 14, 2019, <https://www.ezega.com/News/NewsDetails/7199/Ethiopia-Launches-National-Roadmap-to-End-Child-Marriage-FGM> (last visited on December 15, 2019).

39. HUM. RTS WATCH, *supra* note 18.

40. *Id.*

41. *Rebeca Z. Gyumi v. Attorney General*, Miscellaneous Civil Cause No. 5 of 2016 (High Court of the United Republic of Tanzania), Mar. 3, 2016.

42. *Gyumi v. A.G.*, *supra* note 41, at 26–27.

43. *Attorney-General v. Rebeca Z. Gyumi*, Civil Appeal No. 204 of 2017, July 23–24, 2019.

later in this article.

In 2016, the Constitutional Court of Zimbabwe (“CCZ”), in the case *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*,⁴⁴ held that “s 22(1) of the Marriage Act and any law, custom and practice which authorizes child marriage is unconstitutional.”⁴⁵ This case will also be discussed more thoroughly later in the article.

Transformative leadership is critical for garnering the political will that is needed in each African country to promulgate and implement programs to fully and effectively eliminate child marriage. This is especially true in African countries where tradition, custom and religion undergird harmful practices such as child marriage. In fact, in many African countries, various traditional practices, including, for example, female genital mutilation (“FGM”), breast ironing, and child marriage, are granted special exemption from the country’s laws. In addition, at least 20 African countries grant exemptions for girl-children to get married with either a parent’s consent⁴⁶ and/or the approval of a court.⁴⁷

Given the fact that many domestic and international organizations consider child marriage a human right violation, as well as a practice that is detrimental to children, one wonders why this practice remains pervasive throughout many African countries. Below, this article will take a look at some of the causes of child marriage in Africa.

44. *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*, Judgment No. CCZ 12/2015, Constitutional Application No. 79/14.

45. *Mudzuru & Tsopodzi v. Min. of Justice and Others*, *supra* note 44, at 54.

46. For example, girl-children can get married, with parental consent, in Burkina Faso (at 17 years), Cameroon (15), Mozambique (16), and Zimbabwe (16). See Belinda Maswikwa, Linda Richter, Jay Kaufman & Arijit Nandi, *Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa*, 41 INTERNATIONAL PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 58, 66 (2015). Note, however, that Cameroon does not have a minimum age for marriage. See Maswikwa, et al., *id.* at 59.

47. Uganda, which has set the minimum age for marriage at 18 years, allows girls to marry before they reach age 18 years, with court approval. Maswikwa, et al., *supra* note 46, at 66.

I. BACKGROUND

A. Causes of Child Marriage in Africa

Although there are many reasons why many African girl-children are forced into marriage, one of the most important is *poverty*. Research shows that parents in such countries as Malawi, South Sudan, Tanzania, and Zimbabwe, who are financially unable to properly care for all their children, including feeding, clothing, and sending them to school, often see the marriage of a daughter and the bride price that comes along with such marriage as a way to ease the family's financial burden. To the family, the marriage of a girl-child provides at least two important benefits—the *bride price* paid by the prospective husband's family, which in the case of South Sudan and Ethiopia, can consist of a lot of cows, represents a significant amount of wealth to the girl-child's family. Second, once the girl-child is married and taken to her husband's house, her welfare is no longer the responsibility of her birth family but that of the husband's.⁴⁸ Sending the girl-child to her husband means that there is now one less child to feed, clothe, or educate.

In their study of risk factors associated with child marriage, Hotchkiss, et al. note that the practice is “driven by poverty, social norms, and discrimination against girls,” and that it has emerged as an important public concern because of “increased concerns among reproductive health advocates about the harmful consequences for young women marrying too early.”⁴⁹ A study conducted in North India determined that “due to economic necessities many parents withdrew their daughters from school as soon as they reached puberty and married them off” since it was generally believed that “[a] married girl living with her husband and in-laws meant one less mouth to feed or

48. See, e.g., *Ending Child Marriage in Africa: Opening the Door for Girls' Education, Health, and Freedom from Violence*, HUM. RTS. WATCH, Dec. 9, 2015, <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa#> (last visited on December 17, 2019).

49. David R. Hotchkiss, et al., *Risk factors associated with the practice of child marriage among Roma girls in Serbia*, 16 BMC INT'L HEALTH & HUM. RTS. 1 (2016).

worry about.”⁵⁰ In a recent study published in *Global Citizen*, Daniele Selby and Carmen Singer argued that “[i]n cultures that do not see girls and women as potential wage earners, [they] may be considered a financial burden to the family” and that “[i]n these cases, families living in poverty who have several children may arrange a marriage for their child to reduce their economic burden: One less daughter to take care of means one less mouth to feed and one less education to pay for.”⁵¹

In another study of child marriage, Nawal M. Nour identifies what she refers to as “[t]hree main forces [that] drive child marriages.”⁵² These three drivers, according to Nour, are “poverty, the need to reinforce social ties, and the belief that [child marriage] offers protection” to the child.⁵³ While arguing that “[c]hild marriage is first and foremost a product of sheer economic need,” Nour notes that “[g]irls are costly to feed, clothe, and educate,” and that “they eventually leave the household,” taking along with them any human capital that they may have developed or acquired.⁵⁴ In addition to the fact that the marriage of a daughter brings to the family a certain amount of wealth through the payment of a bribe price, which can include cattle and other farm animals, the marriage can also improve the social standing of the girl-child’s family, especially if their daughter is married into a “good” family.⁵⁵

In a study of Malawi and Mozambique, Gethin Chamberlain determined that “[a]s global warming exacerbates drought and floods, farmers’ incomes plunge—and girls as young as 13 are given away [in marriage] to stave off poverty.”⁵⁶ The Chamberlain study also found

50. See CONSTANZE WEIGI, *REPRODUCTIVE HEALTH BEHAVIOR AND DECISION-MAKING OF MUSLIM WOMEN: AN ETHNOGRAPHIC STUDY IN A LOW-INCOME COMMUNITY IN URBAN NORTH INDIA* 132 (2007).

51. Daniele Selby & Carmen Singer, *Child Marriage: Everything You Need to Know*, *GLOBAL CITIZEN*, Aug. 27, 2019, <https://www.globalcitizen.org/en/content/child-marriage-brides-india-niger-syria/> (last visited on December 18, 2019).

52. Nawal M. Nour, *Child Marriage: A Silent Health and Human Rights Issue*, 2 *REV. OBSTET. & GYNECOL.* 51, 53 (2009).

53. *Id.* at 53.

54. *Id.*

55. *Id.*

56. Gethin Chamberlain, *Why climate change is creating a new generation of*

that families in both Malawi and Mozambique that were trapped in poverty often believed that “[f]or the good of the rest of the family, a daughter had to be sacrificed. She would be taken out of school and found a husband, one less mouth to feed.”⁵⁷ In some cases, the decision to marry came from the girl-child, who, frustrated by poverty and the lack of access to food and other basic necessities, believed that marriage would allow her to go to a new family that could feed and clothe her and provide her with the basic necessities of life.⁵⁸

Families trapped in extreme poverty often find themselves in debt and see their daughters as a way to settle their debts. In Nigeria, for example, there is a tradition called “money marriage” in which girl-children are sold to old men to settle family debts. For example, in southern Nigeria’s Becheve community (in Nigeria’s Cross River State), “[g]irls as young as five . . . are still being sold to settle their parents’ debt as part of a tradition known as ‘money marriage.’”⁵⁹

In a study of Cameroon published in 2018, Nkwain Adeline Yafi determined that “[a]s a result of poverty, young and underage girls in most rural communities in Cameroon are forced to marry men old enough to be their fathers.”⁶⁰ She went on to note that in many rural

child brides, THE GUARDIAN, Nov. 17, 2017, <https://www.theguardian.com/society/2017/nov/26/climate-change-creating-generation-of-child-brides-in-africa> (last visited on December 18, 2019).

57. *Id.*

58. *Id.*

59. *See Nigeria’s young daughters are sold as “money wives,”* ALJAZEERA, Sept. 21, 2018, <https://www.aljazeera.com/news/2018/09/nigerias-young-daughters-sold-money-wives-180921153424671.html> (last visited on December 18, 2019). *See also Focus: “Money wives”: Nigerian girls sold off to settle debts,* FRANCE 24, Sept. 6, 2019, <https://www.france24.com/en/20190906-focus-nigeria-child-brides-girls-money-wives-marriage-forced-labour-rape-debts> (last visited on December 18, 2019); Philip Obaji, Jr., *Child Brides in Africa Are Advertised on Facebook and Sold to Old Men*, DAILY BEAST, Apr. 4, 2019, <https://www.thedailybeast.com/child-brides-in-africa-are-advertised-on-facebook-and-sold-to-old-men> (last visited on December 19, 2019).

60. Nkwain Adeline Yafi, *Poverty to Early Marriages and Early Marriages to Poverty: The Endless Chain in Rural Communities in Cameroon*, HUNGER NOTES, July 23, 2018, <https://www.worldhunger.org/poverty-to-early-marriages-and-early-marriages-to-poverty-the-endless-chain-in-rural-communities-in-cameroon/> (last visited on December 19, 2019).

areas in Cameroon, poverty is the main cause of child marriage and that many families force their girl-children into marriage to old men in order to minimize the burden of having to feed, clothe, and generally care for them. In addition, some Cameroon parents were found to “arrange marriages between their children and [the family’s] creditors as a way of settling debts.”⁶¹

In a study of child marriage completed in 2014, the U.N. International Children’s Emergency Fund (UNICEF) noted that “more than 700 million women alive today were married before their 18th birthday” and that “[m]ore than one in three (about 250 million) entered into union before age 15.”⁶² The UNICEF study noted that although boys are also forced into marriage as children, “girls are disproportionately affected.”⁶³ For example, in Niger, while “77 percent of women aged 20 to 49 were married before age 18,” it was determined that only “5 percent of men in the same age group” were married before they attained the age of 18 years.⁶⁴ In Mauritania and Nigeria, “more than half of adolescent girls aged 15 to 19 who are currently married have husbands who are 10 or more years older than they are.”⁶⁵ UNICEF also noted that child marriage is quite common in areas of the world (e.g., sub-Saharan Africa and South Asia) that suffer from the highest rates of extreme poverty.

Girl-children, however, do not face the same risk of becoming forced into marriage, even within the same country. For example, UNICEF determined that in Ethiopia, “the rate of child marriage is three times higher in the northern region of Amhara (75 percent) than in the capital city of Addis Ababa (25 percent).”⁶⁶ In fact, “[t]here is also a substantial gap in the prevalence of child marriage between the poorest and richest. Females in the poorest quintile are 2.5 times more likely to marry in childhood than those living in the wealthiest quintile.

61. Yafi, *supra* note 60.

62. UNICEF, *Ending Child Marriage: Progress and prospects*, July 2014, <https://data.unicef.org/resources/ending-child-marriage-progress-and-prospects/> (last visited on December 19, 2019).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

. . . This difference is especially striking in some countries in West and Central Africa and in Latin America and the Caribbean, where the prevalence of child marriage in rural areas is about twice the level found in urban areas.”⁶⁷ The UNICEF study determined conclusively that in every region of the world, girl-children from poor families are most at risk of being forced into child marriage.⁶⁸

An article published in South Africa’s *Daily News* on November 3, 2017,⁶⁹ noted that “[g]irls as young as 12 are getting married with full consent of their parents—and then dropping out of school.”⁷⁰ The article went on to note that many girl-children in South Africa “are being sold to ‘lascivious’ men by poverty-stricken parents, who cannot afford to feed them and consider them a drain on their resources.”⁷¹ Right from the time they are born, many of these poor parents see their girl-children as important “sources of revenue” and not as daughters who must be cherished and treasured as human beings.⁷² Barbara Cole, the article’s author, also noted that “[t]he conundrum is that the age of sexual consent in South Africa is 16, so men could be charged with statutory rape. However, having been paid, parents are not likely to lay charges against their son-in-law.”⁷³ It was noted that “patriarchy, reinforced by cultural beliefs and practices, values the life of a son far higher than that of a daughter because of a boy carrying the family name, continuing the family business and contributing to the home.”⁷⁴ Hence, in many families throughout the continent, girl-children, especially among poor rural families, are seen as “economic assets” that can be converted into various forms of wealth (e.g., cows) that can be used to provide for the upkeep of other families members, including

67. *Id.*

68. *Id.*

69. Barbara Cole, *South African Child Brides ‘Sold off to Lascivious Men,’* DAILY MAIL, Nov. 3, 2017, <https://www.iol.co.za/dailynews/south-african-child-brides-sold-off-to-lascivious-men-11839988> (last visited on December 20, 2019).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

especially male children.

In the northern parts of Tanzania, child marriage is facilitated through the process generally referred to as “kupura,” which involves “the snatching of girls in broad daylight as they walk to school; a three-syllabled euphemism that downplays their long-term physical and sexual abuse.”⁷⁵ Despite its brutal nature and the fact that it subjects girl-children to a life filled with violence and sexual exploitation, northern Tanzanian communities, such as the people of Shinyanga Region,⁷⁶ accept the practice as part of their traditions and culture.⁷⁷ In his study of *kupura* in northern Tanzania, Ellison determined that the practice “is so prevalent in the region that when a girl disappears, her parents will suspect what has happened. But rather than calling the police, they will seek the man out not to rescue their child, but to negotiate the dowry—or bride price—in cattle.”⁷⁸

Among many groups in the Shinyanga Region of Tanzania, girl-children are seen almost exclusively as “a short-term investment for poor, rural households—cash cows that can boost a family’s financial position at the expense of a girl’s schooling and wellbeing.”⁷⁹ Tanzania’s Law of Marriage Act, 1971⁸⁰ sets the minimum age for the marriage of

75. See Marc Ellison, *Tales of a child bride: ‘My father sold me for 12 cows’*, ALJAZEERA, July 12, 2016, <https://www.aljazeera.com/indepth/features/2016/07/tales-child-bride-father-sold-12-cows-160711100933281.html> (last visited on December 20, 2019).

76. Shinyanga Region is one of the 31 administrative regions in the United Republic of Tanzania. See, e.g., LETICIA K. NKONYA, *RURAL WATER MANAGEMENT IN AFRICA: THE IMPACT OF CUSTOMARY INSTITUTIONS IN TANZANIA* 46 (2008) (describing, *inter alia*, the Shinyanga Region of Tanzania).

77. See P. Stanley Yoder, Joe L. P. Lugalla & Richard F. Sambaiga, *Determinants of the Duration of Birth Intervals in Tanzania: Regional Contrasts and Temporal Trends*, DHS Qualitative Research Studies No. 1933 (International Health and Development, ICF International, Calverton, Maryland, U.S., Sept. 2013) 33 (providing a more rigorous examination of the practice of *kupura* in northern Tanzania generally and the Shinyanga in particular).

78. Ellison, *supra* note 75.

79. *Id.*

80. Government of the United Republic of Tanzania, The Law of Marriage Act, 1971, as amended by Act 23/73, Act 15/80 and Act 9/96, http://www.tanzania.go.tz/egov_uploads/documents/Marriage%20Ordinance,%20%28cap%2029%29_1.pdf (last visited on December 20, 2019).

a male at 18 years and of a female at 15 years. However, a girl who is 14 years old can marry if judicial approval is granted.⁸¹ In 2016, the High Court of Tanzania held that the Law of Marriage Act “must be revised to eliminate the inequality between the minimum age of marriages for boys and girls.”⁸² Children’s rights advocates in Tanzania welcomed the ruling and noted that it sent a clear message to Tanzanians that “neither religion nor custom can be used as an excuse to violate children’s rights.”⁸³ The Attorney-General, who was the respondent in the case, appealed the High Court’s decision to the Court of Appeal of Tanzania. On October 23, 2019, the Court of Appeal upheld the High Court’s decision, effectively rendering child marriage illegal under the laws of Tanzania.⁸⁴

Parents who force their girl-children into early marriage often do so because they believe that they are saving them from a life ravaged by and filled with poverty. Nevertheless, girl-children who are forced into child marriage are denied a normal childhood—“[t]hey are often socially isolated—cut off from family and friends and other sources of support—with limited opportunities for education and employment.”⁸⁵ Without the education and training necessary for them to develop the skills and competencies that they need to function as productive adults, these girl-children are subjected to lifelong poverty and hence, would not have been able to escape the poverty that pervaded the childhood that was cut short by their parents’ decision to force them into marriage.

Despite the fact that many African countries have made efforts to establish 18 years as the minimum age for marriage for both boys and girls, the continent continues to struggle to come to grips with the pervasiveness of child marriage. For example, UNICEF’s eastern and

81. The Law of Marriage Act, 1971 (Tanzania), § 13(1) & § 13(2).

82. Girls Not Brides, *High Court Judgment in Tanzania Rules Age of Marriage Laws Discriminatory and Unconstitutional*, GIRLS NOT BRIDES, July 13, 2016, <https://www.girlsnotbrides.org/high-court-tanzania-child-marriage/> (last visited on December 20, 2019).

83. *Id.* See also *Rebeca Z. Gyumi v. Attorney General*, Miscellaneous Civil Cause No. 5 of 2016 (High Court of the United Republic of Tanzania), Mar. 3, 2016.

84. *Attorney-General v. Rebeca Z. Gyumi*, Civil Appeal No. 204 of 2017, July 23–24, 2019.

85. UNICEF, *supra* note 62.

southern Africa chief of communication, James Elder, has noted that in southern and eastern Africa, “22 underaged children get married every minute.”⁸⁶ This is due partly to the existence of several gaps in the national laws that regulate marriage, as well as their enforcement in these regions of the continent. Laws and institutions are very important to any efforts to eliminate child marriage in the continent. For example, while amending the national constitution to set a minimum age for marriage at, say, 18 years, is important, such action would not be effective if the country does not have a judiciary that has the independence and capacity to enforce the laws and do so without political interference, especially from the executive branch of government.⁸⁷ It is not enough that a country establish a legal minimum age for marriage at 18 years. While it is important that each African country should set the minimum age for marriage at 18 years, as suggested by the African Union,⁸⁸ the country must have institutions that adequately constrain the State and prevent civil servants and political elites from placing themselves above the law, as well as a legal and judicial system that can fully and effectively enforce the laws. In performing their interpretive role, the courts should ensure that national laws that regulate marriage, including customs and traditions, are in conformity with provisions of

86. See Riaan Grobler, ‘Overwhelming’ stats: 22 underaged children get married every minute, highest prevalence in Africa, NEWS24, June 6, 2019, <https://www.news24.com/SouthAfrica/News/hold-for-sun-am-shock-stats-22-underaged-children-get-married-every-minute-highest-percentage-in-africa-20190607> (last visited on December 20, 2019).
87. As remarked by Justice Patricia Timmons-Goodson, a retired justice of the Supreme Court of the U.S. State of North Carolina and a past Secretary of the ABA Judicial Division’s Appellate Judges Conference, “[i]f a nation has no independent judiciary, rights are merely ‘empty promises.’” See Patricia Timmons-Goodson, *Judicial Independence*, ABA JOURNAL, Mar. 1, 2018, http://www.abajournal.com/news/article/empty_promises_a_nation_without_an_independent_judiciary (last visited on December 20, 2019).
88. African Union, African Charter on the Rights and Welfare of the Child, July 11, 1990, CAB/LEG/24.9/49 (1990), <https://www.acerwc.africa/about-the-charter/> (December 19, 2019). For example, according to Article 21(2) of the African Charter on the Rights and Welfare of the Child, “[c]hild 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.” See *id.* art. 21(2).

international human rights instruments.

In addition to an independent judiciary that is capable of fully and effectively enforcing the laws, as well as checking on the exercise of government power, each African country must also have police forces that have the training and the facilities to assist in the enforcement of laws against child marriage and other practices that harm children. In a study of child marriage in Africa, Human Rights Watch determined that “[a]lthough many countries [in the continent] have established 18 as the minimum age of marriage for both boys and girls, weak enforcement has meant these laws have had little impact. *Police may not have adequate training on dealing with these cases, do not see it as their job to prevent child marriages, or defer to the parents’ wishes.*”⁸⁹

The law should also require that all births and marriages must be registered in a registry maintained by the government. Such a registration system can be decentralized so that each sub-national government (e.g., a city or Local Government Area (LGA)) can maintain its own registry. Unfortunately, as noted by Human Rights Watch, throughout the continent, most births and marriages are usually not registered, even though such registrations can help “prove the age of spouses at the time of marriage” and provide police and judicial officials with the information that they need to enforce laws against child marriage.⁹⁰ Human Rights Watch notes that, in addition to the fact that “only 16 percent of children in Tanzania under age 5 have been registered with civil authorities, and only half of these children received birth certificates,” it is often the case that “[b]irth certificates are . . . also forged by corrupt officials who may accept bribes and knowingly facilitate child marriages.”⁹¹

Pervasive bureaucratic corruption in many African countries, especially at the local level, can frustrate the ability of civil authorities to fully and effectively enforce laws against practices, e.g., child marriage, that harm children. In fact, where corruption is pervasive, the police

89. *Ending Child Marriage in Africa: Opening the Door for Girls’ Education, Health, and Freedom from Violence*, HUM. RTS WATCH, Dec. 9, 2015, <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa> (last visited on December 19, 2019).

90. HUM. RTS WATCH, *supra* note 48.

91. *Id.*

might not fully investigate claims of underage marriage. Even if the police are willing and able to fully investigate claims of underage marriage, corrupt magistrates may become complicit in perpetuating crimes against children. For example, men who marry children may pay money to magistrates or other judicial officers to avoid being convicted of child sexual abuse and other forms of exploitation. During their work in Tanzania, Human Rights Watch investigators were informed by police officers of some of the tactics that were utilized by magistrates to deny justice to victims of child abuse. For example, “[a] police officer from the Police Gender and Children’s Desk in Moshi, Tanzania, told Human Rights Watch that some of the cases taken to court for prosecution are delayed or are not completed because perpetrators pay money to the magistrates, who then postpone and adjourn cases indefinitely. The long delays eventually cause victims and witnesses to give up and stop coming to court.”⁹²

Throughout the continent, many African countries have several overlapping legal systems, which are often quite confusing to victims who are seeking help in resolving a legal issue. Defenders of children often struggle to determine which law governs such issues as child marriage—civil, customary or religious law. In addition, religious leaders may not look kindly to civil authorities who are trying to enforce laws against practices, such as child marriage, which the religious authorities believe should be regulated by religious laws. Customary practices and religious beliefs are a very important cause of child marriage in many countries in Africa. As argued by Human Rights Watch, “[t]raditional beliefs about gender roles and sexuality and women and girls’ subordination undergird many customary practices, such as payment of dowry or bride price, which perpetuate child marriage.”⁹³ In addition, “[i]n a context of limited economic resources and opportunities, girls are often seen as economic assets whose marriages provide cattle, other animals, money, and gifts.”⁹⁴ Research has shown that in countries, such as Zimbabwe, South Africa and Malawi, “child marriages are linked to harmful practices that are embedded in culture” and that “[l]aw reform to end child marriage,

92. *Id.*

93. *Id.*

94. *Id.*

Mbaku

therefore, is a difficult task since it presents a potential conflict between children's rights and cultural rights."⁹⁵

Religious beliefs are a major driver of child marriage in many communities throughout Africa. For example, Human Rights Watch has determined that "[a]mongst Zimbabwe's religious sects, particularly in the Apostolic faith where religion combines with traditional culture, girls often marry much older men at a very young age."⁹⁶ Investigators from Human Right Watch were told by midwives from the Johwane Masowe Shonhiwa Apostolic faith that "[o]ur church doctrine is that girls must marry when they are between 12 and 16 years old to make sure they do not sin by having sexual relations outside marriage. As soon as a girl reaches puberty any man in the church can claim her for a wife."⁹⁷

Like members of Zimbabwe's Apostolic communities, many parents in other parts of the continent fear that if their daughters do not marry early, they may engage in sexual activities that can lead to a loss of their virginity and render them unfit for marriage. A girl who has lost her virginity outside marriage would no longer be able to command a good bride price and hence, would be of significantly diminished economic value to her parents. Forcing the girl-child into early marriage ensures that the child would not lose her virginity before she can secure a husband.

In a country, such as South Sudan, dowry is considered an important part of the cultures of many ethnocultural groups. The payment of dowry, noted Human Rights Watch, "is a key driver of child marriage in South Sudan, where families see their daughters as sources of wealth."⁹⁸ Among Kenya's more than 40 ethnocultural groups, current practice is that "a marriage is not considered legal unless a bride price has been paid, usually in the form of cows."⁹⁹ In fact, the custom of paying bride

95. Lea Mwanbene, *Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi*, 18 AFR. HUM. RTS. L. J. 527, 527 (2018).

96. HUM. RTS WATCH, *supra* note 48.

97. *Id.*

98. *Id.*

99. *Kenyan bid to ban bride-price payments*, BBC NEWS, Nov. 9, 2012, <https://www.bbc.com/news/world-africa-20268785> (last visited on December 19, 2019).

price is so important to many ethnocultural groups in Kenya that “[e]ven couples married in a religious or civil ceremony will often not be considered bound in the traditional sense by their families unless a payment is made.”¹⁰⁰

B. Costs of Child Marriage in Africa

The most important costs of child marriage to *African societies* are economic—child marriage forces girl-children to drop out of school or to never-go to school. For example, as a study carried out by the World Bank with support from the Children’s Investment Foundation and the Global Partnership for Education¹⁰¹ shows, “[e]ducation matters for children, but even more so for girls than for boys because of the link for girls between dropping out of school and marrying or having children early.”¹⁰² When children fail to complete secondary school or are not able to acquire the skills that they need to evolve into economically competitive and productive adults, the potential costs are most likely to be quite high in terms of lost or foregone earnings. In a study of South African youth, it was determined that “failure to complete secondary schooling satisfactorily (with good grades for example) and to advance to further studies is widespread” and that it “affects later productivity, while the lost earnings and lack of skill accumulation may make it difficult to escape poverty.”¹⁰³

While child marriage may impose significant economic costs on African communities, it is important to note that the girl-child herself, who is forced into marriage, is most likely to be trapped in a life characterized by significantly high health risks, extreme poverty, domestic violence at the hands of her much older husband and his extended family, and increased risk of premature death.

100. *Id.*

101. QUENTIN WODON, ET AL., *THE COST OF NOT EDUCATING GIRLS: EDUCATING GIRLS AND ENDING CHILD MARRIAGE: A PRIORITY FOR AFRICA* (2018).

102. *Id.* at 5.

103. Cecil Mlatsheni, *The Challenges Unemployment Imposes on Youth*, in *SHAPING THE FUTURE OF SOUTH AFRICA’S YOUTH: RETHINKING POST-SCHOOL EDUCATION AND SKILLS TRAINING* 31, 37 (Helene Perold, Nico Cloete and Joy Papier eds., 2012).

In a study of child marriage among Roma girls in Serbia, Hotchkiss, et al. determined that the consequences for child marriage include “dropping out of school; health risks that result from early sexual activity and pregnancy, including sexually transmitted diseases and maternal mortality; being prevented from taking advantage of economic opportunities, and if they have children, child malnutrition and mortality.”¹⁰⁴ Hotchkiss and his colleagues also noted the increased global concern that “child marriage deprives girls of their basic human rights and puts them at risk for harmful practices and disadvantage, including exploitation, intimate partner violence, and abuse.”¹⁰⁵

Failing to educate girl-children is especially costly to African communities, particularly because of “the close relationships between educational attainment, child marriage, and early childbearing, and the risks that they entail for young mothers and their children.”¹⁰⁶ The World Bank study also determined that “[w]omen with primary education (partial or completed) earn 19 to 30 percent more than those with no education at all” while “women with secondary education may expect to make more than twice as much, and women with tertiary education almost five times as much as those with no education.”¹⁰⁷ For the girl-child in Africa who is deprived of the opportunity to attend school because she is forced into marriage at a very early age, “[s]econdary and tertiary education are also associated with higher labor force participation, and especially full-time work.”¹⁰⁸

The World Bank also determined that “women with a secondary education [were] more likely to state that they [had] enough money to buy food versus women with primary education or less.”¹⁰⁹ With respect to the impact of child marriage on the earnings potential of girl-children when they attain adulthood, the World Bank study determined that “women who married early may have earnings on

104. David R. Hotchkiss, et al., *Risk factors associated with the practice of child marriage among Roma girls in Serbia*, 16 BMC INT’L HEALTH & HUM. RTS. 1 (2016).

105. *Id.* at 1.

106. WODON, ET AL., *supra* note 101, at 5.

107. *Id.* at 6.

108. *Id.*

109. *Id.*

average eight percent lower across 12 [African] countries than if they had married after 18.”¹¹⁰

While it has been determined that “[e]ach additional year of secondary education is associated with lower risks of marrying early as a child and having a child before age 18,” it is important to realize that the problem for the girl-child in Africa is that due to several complicating factors (e.g., poverty), she is not likely to have the opportunity to enter school and complete her studies. Such a child, especially if she is born into a poor rural family, is most likely to be forced into early marriage and deprived of the opportunity to attend school.¹¹¹

In addition to providing girls with the skills that they need to function competitively and productively as adults, education can also significantly enhance their ability to obtain and process the information that they need to make effective decisions regarding their healthcare, nutrition, and other issues critical to their overall well-being. In addition, education of girls, especially through the secondary level, significantly enhances their ability to make decisions within the household. Such educated women, the World Bank determined, are more likely to register the birth of their children, a process that could contribute positively to efforts to end child marriage.¹¹² Specifically, the World Bank study of the costs of not educating girls determined that (1) there were “[l]ower earnings for women in adulthood due to child marriage,” which also led to “losses in human capital wealth defined as the present value of the future earnings of the labor force”;¹¹³ (2) child marriage and early child bearing are most likely to produce stunted children who would suffer losses in earnings in adulthood; and (3) “[c]ild marriage is associated with higher rates of fertility and population growth,” which in turn “reduces levels of total wealth per person, especially in countries that have high population growth.”¹¹⁴

110. *Id.*

111. *Id.* at 7.

112. *Id.*

113. *Id.* at 9. The World Bank determined that “[t]he loss in human capital wealth incurred today because women were married early in their youth is estimated at U.S. \$63 billion for 12 countries that account for half of the [African] continent’s population.” *See id.* at 9.

114. *Id.* at 10. *See also* Sean Cavanaugh, *The Cost of Not Educating Girls: \$30 Trillion*,

In its conclusion, the World Bank noted that “low educational attainment for girls and child marriage can have pervasive potential impacts ranging from lower earnings and standards of living to lower psychological well-being and agency for girls and women.”¹¹⁵ Each African country, then, must eliminate child marriage and enhance the ability of girl-children to complete both primary and secondary school. As part of the process to enhance the education of girl-children, African countries should not just abolish child marriage. They should also seek to achieve universal primary and secondary education and in doing so, they should see universal education as an investment in the future of their children, particularly, their girl-children.

Child marriage has other life-long negative consequences for the girl-child. In addition to “completely halting or crippling a girl’s ability to realize a wide range of human rights,” child marriage can compromise a girl’s overall well-being, her self-esteem, deprive her of consensual marriage, and push her into a household environment fraught with violence, discrimination and forced servitude. In fact, many anti-slavery activists have argued that, under certain circumstances, child marriage can be considered slavery. They state that child marriage becomes slavery if, at the very least, “the child has not genuinely given their free and informed consent to enter the marriage; the child is subjected to control and a sense of ‘ownership’ in the marriage itself; [and] the child cannot realistically leave or end the marriage, leading potentially to a lifetime of slavery.”¹¹⁶

Forcing girl-children into early marriage also violates many of the rights that are guaranteed girls and women by many national constitutions in the African countries and also by various international

EDWEEK: MARKETING BRIEF (K-12 INTEL FOR BUSINESS LEADERS, July 24, 2018 (noting, *inter alia*, that “[t]he failure to provide girls with education through secondary school comes at a high cost to their health and well-being—and a staggering cost to the world economy, to the tune of \$15 trillion to \$30 trillion in lost earnings and productivity”), <https://marketbrief.edweek.org/marketplace-k-12/cost-not-educating-girls-30-trillion/> (last visited on February 11, 2020).

115. WODON, ET AL., *supra* note 101, at 12.

116. *Child Marriage*, ANTI-SLAVERY INTERNATIONAL (U.K.), <https://www.antislavery.org/slavery-today/child-marriage/> (last visited on December 21, 2019).

human rights instruments. As made clear by Zimbabwe's Deputy Chief Justice Luke Malaba and eight other justices of the Constitutional Court of Zimbabwe in the case, *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*,¹¹⁷ "[i]n light of the overwhelming empirical evidence on the harmful effects of early marriage on girl children, no law which authorizes such marriage can be said to do so to protect 'the best interests of the child.'"¹¹⁸ Noting that § 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 sets the minimum age for marriage in Zimbabwe at 18 years of age,¹¹⁹ Malaba DCJ then held that "s 22(1) of the Marriage Act [Chapter 5: 11] or any law, practice or custom authorizing a person under eighteen years of age to marry or to be married is inconsistent with the provisions of 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down."¹²⁰ As will be discussed later in this article, in its analysis of the issues in *Mudzuru and Tsopodzi*, Malaba DCJ made references to various international human rights instruments and used them as an interpretive tool in an effort to bring constitutional practice in the country in conformity with international law.¹²¹

Of particular interest to this article is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Maputo Protocol"), which calls on the governments of States Parties to "ensure that women and men enjoy equal rights and

117. *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*, Judgment No. CCZ 12/2015, Constitutional Application No. 79/14.

118. *Id.* at 50.

119. § 78 states specifically as follows: "(1) Every person who has attained the age of eighteen years has the right to found a family." "(2) No person may be compelled to enter into marriage against their will." The Constitution of Zimbabwe Amendment (No. 20) Act, 2013, <https://zimlil.org/zw/legislation/act/2013/amendment-no-20-constitution-zimbabwe> (accessed on December 21, 2019), art. 78(1–2).

120. *Mudzuru and Tsopodzi*, *supra* note 117, at 55 (emphasis added).

121. *Mudzuru and Tsopodzi*, *supra* note 117. Some of the international human rights instruments consulted included the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Universal Declaration of Human Rights (UDHR), and the Convention on the Rights of the Child (CRC). *See id.* at 227–28.

are regarded as equal partners in marriage” and “enact appropriate national legislative measures to guarantee that: (b) the minimum age of marriage for women shall be 18 years”¹²² and the African Charter on Human and Peoples’ Rights (“the African Charter”), which imposes an obligation on States Parties to “ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as in international declarations and conventions.”¹²³

Child marriage, it has been argued by several scholars and civil society groups, is a violation of human rights.¹²⁴ The Universal Declaration of Human Rights (“UDHR”) recognizes the free and full consent of individuals to marriage. Article 16(2) of the UDHR states that “[m]arriage shall be entered into only with the free and full consent of the intending spouses.”¹²⁵ Unfortunately for the girl-child in Africa, free and full consent to marriage cannot be said to exist when she, as a partner in child marriage, is still a child, who by definition, is immature and hence, incapable of fully and freely granting consent to the union. Besides the UDHR, other international human rights instruments also deal with the issue of full and free consent to marriage. For example, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages speaks specifically to consent, the minimum age for marriage and the need to register all marriages.¹²⁶ These international human rights instruments and how they treat early marriage will be examined in more detail later in this article.

Throughout the continent, parents and other heads of family (e.g.,

122. African Union, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, July 11, 2003, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>, art. 6(b).
123. African Union, *African Charter on Human and Peoples’ Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 18(3).
124. UNICEF Innocenti Res. Ctr, *Early Marriage: Child Spouses*, 7 INNOCENTI DIGEST 2 (2001).
125. U.N. General Assembly, Universal Declaration of Human Rights, UNGA Res. 217 A(III) (December 10, 1948), art. 16(2).
126. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UNGA Res. 1763 A (XVII) (Nov. 7, 1962), arts. 1, 2 & 3.

uncles) force girl-children into marriage with absolutely no regard for the implications of these unions for the human rights of these children. Instead, the emphasis is placed on what benefits the adults believe would accrue to the girl-child's family from the marriage. For most of these families, child marriage is simply an economic arrangement that provides them with farm animals and other consumer goods and supposedly protects their girl-children from the sexual advances of men. In addition to the fact that this forced marriage of underage girls places them in homes where they are most likely to be sexually exploited and abused, they are effectively denied the right to self-actualization.¹²⁷

Child marriage in Africa and other parts of the world has been linked to many health consequences, including, for example, early childbearing and the latter's many complications. After the girl-child is married, she is taken to her new husband's house where she is expected to assume and play the role of "wife, domestic worker, and, eventually, mother."¹²⁸ Because husbands in child marriages are usually significantly much older than the children they marry, they usually have virtually nothing in common with their wives. As a consequence, the girl-child is likely to find herself isolated, depressed, rejected by other members of her new family (other wives, since most of these marriages are likely to be polygamous) and unable to develop any friendships and other welfare-enhancing relationships.¹²⁹

Noel D. Mbirimtengerenji argues that in many communities in Africa, the "[y]oung married girl is exposed to torture, abuse, and the risk of the deadly HIV/AIDS infection."¹³⁰ Many African parents who push their daughters into early marriage claim that they are doing so in order to protect them from HIV/AIDS and other sexually transmitted

127. See, e.g., RACHEL VOGELSTEIN, *ENDING CHILD MARRIAGE: HOW ELEVATING THE STATUS OF GIRLS ADVANCES U.S. FOREIGN POLICY OBJECTIVES* 1 (2013) (noting, *inter alia*, that "[t]he practice of child marriage is a violation of human rights," as a well as "a threat to the prosperity and stability of the countries in which it is prevalent."); GAYLE TZEMAH LEMMON & LYNN S. ELHARAKE, *CHILD BRIDES, GLOBAL CONSEQUENCES: HOW TO END CHILD MARRIAGE* 1, 7 ((noting, *inter alia*, that child marriage is a human rights issue).

128. Nour, *supra* note 52, at 53.

129. *Id.* at 53–54.

130. Noel Dzimnenani Mbirimtengerenji, *Is HIV/AIDS Epidemic Outcome of Poverty in Sub-Saharan Africa?*, 48 CROAT MED. J. 605, 611 (2007).

infections.¹³¹ Research has shown, however, that the opposite is true. Without a significant level of education and maturity, as well as the skills necessary to grant her economic independence, the married girl-child is deprived of the ability to effectively challenge the husband when he tries to engage in unsafe sexual practices.¹³²

In addition, medical researchers note that the girl-child's "virginal status and physical immaturity increase the risk of HIV transmission secondary to hymenal, vaginal, or cervical lacerations."¹³³ Dr. Nour notes that "[o]ther sexually transmitted infections, such as herpes virus type 2, gonorrhea, and chlamydia, are also more frequently transmitted and enhance the girls' vulnerability to HIV."¹³⁴ Finally, research has determined that "child marriage also increases the risk of human papillomavirus transmission and cervical cancer."¹³⁵

Pregnancy is particularly risky for girl-children. Public health researchers have determined that "[p]regnant girls in malaria regions . . . [have] a higher risk for infection. Their highest risk is during their first pregnancy. Pregnancy not only increases the risk of acquiring malaria, but pregnant girls under the age of 19 have a significantly higher malaria density than pregnant women over the age of 19."¹³⁶ In addition, these girl-children are also likely to suffer a "significant risk of malaria-related complications such as severe anemia, pulmonary edema, and hypoglycemia."¹³⁷

During labor and delivery, the pregnant girl-child is also susceptible to many health problems. Research has determined, for example, that "[f]orty-five percent of girls in Mali, 42% in Uganda, and 25% in Ethiopia have given birth by the age of 18 years."¹³⁸ In addition to the fact that "girls between the ages of 10 and 14 years are 5 to 7 times more

131. Nour, *supra* note 52, at 54. See also Mbirimtengerenji, *supra* note 117, at 611.

132. Nour, *supra* note 52, at 54.

133. *Id.* at 54.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* In comparison, the rates in developed countries are significantly lower: 1% in Germany; 2% in France; and 10% in the United States. See *id.*

likely to die in childbirth,” these girls usually have “small pelvises and are not ready for child-bearing. Their risk for obstetric fistula is 88%.”¹³⁹ An article published by the Washington, D.C.-based Population Reference Bureau (“PRB”) details some of the destructive health effects of labor and delivery by girl-children in Ethiopia and the hopeless situation that these underage mothers find themselves in.¹⁴⁰ According to the PRB,

Wobete Falaga, who is from a village in the northern Gojam province in Ethiopia’s Amhara region, was only 13 when she became pregnant. Married at 11, just before her first menstrual period, her small underdeveloped body was not ready for the stress of childbirth. After five days of grueling labor at home, her child was finally born, but it was dead.

As a result of the long, strenuous labor, Wobete suffered crippling injuries. There was a hole, or fistula, between her bladder and vagina and another between her vagina and rectum. The damage left her body unable to control its normal excretory functions, and urine and feces were constantly dripping down her legs. Her husband quickly rejected her, sending her home to her family.¹⁴¹

Obstetric fistulas affect as many as 2 million women around the world, the majority of them in Africa.¹⁴² Once they contract fistulas, many of these girls are either divorced or simply abandoned by their husbands and their families. Studies conducted by the U.N. Population Fund (“UNFPA”) in 2003 determined that “most fistula patients [in Africa] were poor, uneducated teenagers who developed a fistula while giving birth to their first child. Some were as young as 12.”¹⁴³

139. *Id.*

140. *Married as Children, Women with Obstetric Fistulas Have No Future*, Population Reference Bureau (PRB), Mar. 2004, Washington, D.C., <https://www.prb.org/marriedaschildrenwomenwithobstetricfistulashavenofuture/> (last visited on December 22, 2019).

141. *Id.*

142. Katy Migiro, *Teenage brides suffer pain and shame of fistula*, REUTERS HEALTH NEWS, Aug. 4, 2011, <https://www.reuters.com/article/us-childmarriage-fistula/teenage-brides-suffer-pain-and-shame-of-fistula-idUSTRE7731E520110804> (last visited on December 22, 2019).

143. *Quoted in id.*

In general, medical science has determined that “[w]hen a mother’s hips are too small for the baby’s head to pass through, it presses down on her pelvic bone, cutting off blood supply and causing the tissue to die. The resulting hole causes urinal or fecal incontinence.”¹⁴⁴ In the process, the child usually dies. According to Kate de Rivero of the Women and Health Alliance, “[p]regnancy at an early age is a huge risk factor for obstructed labor, as a girl’s body has not fully matured and the pelvis is small.”¹⁴⁵ Hence, it is not only the girl-child forced to be a mother who is at risk in pregnancy, labor and delivery. The child she is carrying is also at risk of being born prematurely or worse, stillborn.¹⁴⁶

Migiro notes that “[a]part from the biological risks, girls who marry at a young age do not have the power to make decisions about their own bodies, including on how and where to give birth.”¹⁴⁷ In fact, in such marriages, the husband or other older members of his family (e.g., his mother) make the decisions regarding issues such as prenatal care, where the child will be delivered, etc. Hence, the girl-child-turned pregnant wife is unlikely to stand up to her husband and demand that she should be taken to a hospital when she is in labor. Migiro notes that according to the UNFPA, “[i]n Niger, where 15 is the average age of marriage, 85 percent of women deliver at home.”¹⁴⁸

Dr. Nour’s research has determined that “[m]others under the age of 18 have a 35% to 55% higher risk of delivering a preterm or low-birthweight infant than mothers older than 19 years.”¹⁴⁹ In addition, Dr. Nour has found that the “infant mortality rate is 60% higher when the mother is under the age of 18 years” and that “even after surviving the first year, children younger than 5 years had a 28% higher mortality rate in the young mothers cohort.”¹⁵⁰ This relatively high morbidity and mortality rate, it has been determined, is due to “the young mothers’ immaturity, lack of access to social and reproductive services, and

144. *Id.*

145. *Quoted in id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Nour, *supra* note 52, at 54.

150. *Id.*

higher risk for infectious diseases.”¹⁵¹

A fully matured and healthy reproductive life is important, not just for the mother but also for the child. Such maturity will significantly “reduce infant and maternal mortality,” especially in Africa’s rural areas and extremely poor urban settlements, which often lack access to even the most rudimentary and basic health care services. Unfortunately, “[c]hild marriage is counter-productive to any effort targeted at improving the health of mothers, enhancing the survival of mother and child and in tackling child and maternal death.”¹⁵² Hence, a policy priority for virtually all African countries is to end child marriage, a practice that is detrimental to children in particular and society as a whole.

An area that has been totally neglected in the study of child marriage in Africa and other parts of the world (e.g., South Asia) where this insidious practice is common, is the potential contributions of girl-children who are forced into early marriage, to political development in their communities. It is true that girl-children who are forced into child marriage lose the opportunity to obtain an education and develop the skills that they need to evolve into economically productive and competitive adults. Thus, girls who may have grown up to be engineers, lawyers and judges, economists, physicians, novelists, and experts in other fields of human endeavor, are instead, through child marriage, forced into a life of servitude in the house of some adult male.

However, what is little discussed is the lost opportunities for these girl-children to grow up and evolve into major contributors to political development in their communities. Hence, throughout the continent, many girl-children are not being allowed to grow up and become part of the transformative political leadership that the continent needs to deal with its multifarious problems. As a consequence, political governance in many countries in the continent today is still dominated by men, with women pushed to the margins. In 2013, Africans developed what they claim is a “strategic framework for the socio-economic transformation of the continent over the next 50 years.”¹⁵³ That transformative program

151. *Id.*

152. UKWUOMA AMSTRONG, CHILD MARRIAGE IN NIGERIA: THE HEALTH HAZARDS AND SOCIO-LEGAL IMPLICATIONS 36 (2014).

153. African Union, Directorate of Strategic Policy Planning, *Agenda 2063: The Africa We Want—General Briefing Kit*, <https://www.un.org/en/africa/osaa/pdf/>

is called *Agenda 2063: The Africa We Want* (“Agenda 2063”) and it was officially adopted by the Assembly of Heads of State and Government of the African Union in Addis Ababa, Ethiopia, in January 2015.¹⁵⁴

Agenda 2063’s heart are seven aspirations, which Africans hope to achieve fully and completely by 2063. Some of these aspirations include a prosperous continent “based on *inclusive* growth and sustainable development,”¹⁵⁵ “[a]n Africa of good governance, democracy, *respect for human rights*, justice and the rule of law,”¹⁵⁶ and “[a]n Africa whose development is people-driven, relying on the potential of African people, *especially its women and youth*, and caring for children.”¹⁵⁷ Africa will not be able to accomplish or achieve all these aspirations and do so on time if it pushes 50 percent of its human resources (i.e., girls and women) to the political and economic margins through child marriage and other practices that harm girls and women. Perhaps, more important is the fact that the transformational leadership that is needed to enhance the ability of Africa and Africans to fully implement Agenda 2063 and ensure its success must include women and young girls. That cannot happen if African countries do not eliminate child marriage and other practices that abuse, exploit and underdevelop children, particularly girl-children. Hence, ending child marriage in the continent must be part of the effort to promote the ideals of Agenda 2063.

au/agenda2063-presentation.pdf (last visited on December 23, 2019).

154. *Id.*

155. *Id.* at 2 (Aspiration 1) (emphasis added).

156. *Id.* at 3 (Aspiration 1) (emphasis added). In explaining Aspiration 3, the AU noted by 20163, Africa will “a continent where democratic values, culture, practices, universal principles of human rights, *gender equality*, justice and the rule of law are entrenched.” See *id.* at para. 28.

157. *Id.* at 8 (Aspiration 6) (emphasis added).

II. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS THAT ADDRESS CHILD MARRIAGE

Many international human rights instruments have provisions that deal with various aspects of marriage, including minimum age for marriage, consent, equality within marriage, and the rights of women within these marriages. Below, we briefly examine them.

A. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (“UDHR”), adopted by the UN General Assembly in 1948, is considered part of the International Bill of Human Rights.¹⁵⁸ The UDHR contains three articles that deal specifically with issues that are important to the rights of children. First, article 25(2) states that “[m]otherhood and *childhood* are entitled to special care and assistance. All *children*, whether born in or out of wedlock, shall enjoy the same social protection.”¹⁵⁹ In 1948, the UN General Assembly proclaimed the UDHR as:

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping [the UDHR] constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States and themselves and among the peoples of territories under their jurisdiction.¹⁶⁰

158. *Universal Declaration of Human Rights* (UDHR) U.N. G.A. Res. 217 (III) (December 10, 1948). The other international instruments that form the International Bill of Human Rights are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICECSR).

159. UDHR, *supra* note 158, art. 25(2) (emphasis added).

160. *Id.* at prmb. (emphasis added).

Implied in this declaration, then, is that each Member State is expected to make certain that within its domestic jurisdiction, these rights and freedoms are respected and protected. Article 25(2) imposes an obligation on Member States to make sure that *childhood* is given *special care and assistance*¹⁶¹ and that all children are provided *social protection*.¹⁶² Forcing girl-children into child marriage does not conform with the rights and freedoms granted children in art. 25(2) of the UDHR and hence, is a violation of the UDHR.

Second, Article 26 of the UDHR deals with the right to education. It states that “[e]veryone has the *right to education*. Education shall be free, at least in the elementary and fundamental stages.”¹⁶³ In addition, “[e]ducation shall be directed to the *full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms*.”¹⁶⁴ Child marriage deprives the African girl-child of the right to develop her personality and acquire the skills that she needs to function as a contributing member of her community. Hence, child marriage is antithetical to the provisions of Article 26 of the UDHR.¹⁶⁵

Finally, article 16 deals with marriage. In Art. 16(1), it is stated that “[m]en and women of *full age*, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”¹⁶⁶ The right to marry is granted to “men and women of full age” and not to “children.”¹⁶⁷ In addition, art. 16(1) provides for “equality” between the parties during marriage and when the marriage is dissolved.¹⁶⁸ Under article 16(1), then, children are not qualified to marry and found a family and because children are immature and do not have the capacity to stand up to their husbands, there cannot be

161. *Id.* art. 25(2) (emphasis added).

162. *Id.*

163. *Id.* art. 26(1) (emphasis added).

164. *Id.* art. 26(2) (emphasis added).

165. *Id.* art. 26.

166. *Id.* art. 16(1) (emphasis added).

167. *Id.*

168. *Id.*

equality between the parties in a child marriage.

Article 16(2) deals with consent to marry. It states that “[m]arriage shall be entered into only with the free and full consent of the intending spouses.”¹⁶⁹ In a child marriage, one party, the child, is immature and incapable of freely and fully giving consent. Hence, child marriage does not conform to the provisions of Art. 16(2) and is, indeed, a violation of the UDHR.

B. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”) provides many protections for children.¹⁷⁰ Specifically, art. 24(1) states that “[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to *such measures of protection as are required by his status as a minor*, on the part of his family, society and the State.”¹⁷¹ The child is recognized as a minor and hence, must be treated as such. Article 24(1), read together with article 23, shows that children cannot get married. First, children, as per art. 24(1), are minors and, as per art. 23(2), only “*men and women* of marriageable age” are granted the right to marry.¹⁷² Second, art. 23(2) speaks in terms of “men” and “women” and not “children”—that is, only men and women are granted the right to marry. Children do not have and cannot exercise the right to marry. In addition, art. 23(3) states that “[n]o marriage shall be entered into without the free and full consent of the intending spouses.”¹⁷³ As discussed earlier, children are immature and do not have the capacity to freely and fully consent to marriage. Hence, child marriage also offends the provisions of arts. 23 & 24 of the ICCPR.

The U.N. Human Rights Committee (“UNHRC”) is the body

169. UDHR, *supra* note 158, art. 16(2).

170. International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171 (December 16, 1966).

171. *Id.* art. 24(1).

172. *Id.* arts. 23(2) & 24(1).

173. *Id.* art. 23(3). Similar provisions are provided in the International Covenant on Economic, Social and Cultural Rights (ICESCR). See *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (December 16, 1966).

empowered to provide authoritative interpretations of the ICCPR and the UNHRC has done so through its General Comments. For example, CCPR General Comment No. 28 interprets Article 3.¹⁷⁴ Article 3 of the ICCPR states that “States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”¹⁷⁵

In its interpretation, the UNHRC notes that this art. 3 of the ICCPR imposes a positive obligation on States Parties to ensure that all “human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality.”¹⁷⁶ This implies that each State Party is obliged to eliminate all forms of sex discrimination, especially as applies to the enjoyment of the rights contained in or guaranteed by the ICCPR. The steps that each State Party must take to ensure that all individuals fully enjoy the rights set forth in the ICCPR include “the removal of obstacles to the equal enjoyment of such rights, the education of the population and State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings in the Covenant.”¹⁷⁷

Perhaps, more important, is that the State must not just “adopt measures of protection,” but must also actively undertake action to empower women and enhance their ability to enjoy these rights. This can include making certain that “traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to enjoyment of all Covenant rights.”¹⁷⁸

174. Office of the U.N. High Commissioner for Human Rights, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, Adopted at the Sixty-eighth session of the Human Rights Committee, on March 29, 2000, CCPR/C/21/Rev. 1/Add. 10, [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/b\)GeneralCommentNo28Theequalityofrightsbetweenmenandwomen\(article3\)\(2000\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/b)GeneralCommentNo28Theequalityofrightsbetweenmenandwomen(article3)(2000).aspx) (last visited on December 24, 2019). The UNHRC notes that General Comment No. 28 is an update of General Comment No. 4 (13th Session 1981) and this was made necessary by the “experience [the Committee] has gathered in its activities over the last 20 years.” *Id.* at para. 1.

175. *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (December 16, 1966), art. 3.

176. CCPR General Comment No. 28, *supra* note 174, at para. 2.

177. *Id.* at para. 3.

178. *Id.* at para. 5.

Given the fact that child marriage in many African communities is often justified on traditional, religious and cultural grounds, the State must actively seek to abolish such harmful practices.

The UNHRC in its *General Comment No. 28* also notes that States must take measures to “eliminate trafficking of women and children, within the country or across borders,” as well as protect them from “forced prostitution” and “from slavery,” which in many cases, is often “disguised, inter alia, as domestic or other kinds of personal service.”¹⁷⁹ Anti-Slavery International (U.K.) has argued that although “[m]any marriages involving children will not amount to slavery, particularly between couples aged 16 to 18 years,” however, “many married children can experience levels of suffering, coercion and control that meet international legal definitions of slavery and slavery-like practices, including servile marriage, child servitude, child trafficking and forced labor.”¹⁸⁰ Catherine Turner of the non-governmental organization, Anti-Slavery International, writing for Girls Not Brides, has produced three criteria that can be used to determine if child marriage qualifies as slavery: “firstly, if the child has not genuinely given their free and informed consent to enter the marriage; secondly, if the child is subjected to control and a sense of ‘ownership’ in the marriage itself, particularly through abuse and threats, and is exploited by being forced to undertake domestic chores within the marital home or labor outside it, and/or engage in non-consensual sexual relations; and thirdly, if the child cannot realistically leave or end the marriage, leading potentially to a lifetime of slavery.”¹⁸¹ Turner notes that “it is possible for children to get married and not be subjected to slavery, particularly involving

179. CCPR General Comment No. 28, *supra* note 174, at para. 13

180. *Out of the Shadows: Child Marriage and Slavery*, Anti-Slavery International (UK), para. 3, <https://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/AntiSlaveryInternational2.pdf> (accessed on December 24, 2019).

181. Catherine Turner & Girls Not Brides, *When Does Child Marriage Become Slavery?*, ANTI-SLAVERY INT’L & GIRLS NOT BRIDES, Apr. 25, 2013, <https://www.girlsnotbrides.org/when-does-child-marriage-become-slavery/> (last visited on December 24, 2019). See also Catherine Turner, *Out of the Shadows: Child Marriage and Slavery*, ANTI-SLAVERY INT’L, Apr. 2013, https://www.antislavery.org/wp-content/uploads/2017/01/child_marriage_final-1.pdf (last visited on February 11, 2020).

couples who are both aged 16 to 18 years.”¹⁸² She argues, however, that “the younger a child is upon marriage, clearly the more vulnerable to non-consensual and exploitative marriages they are” and that “our study suggests that a potentially high proportion of the millions of children in child marriage globally could be in slavery as a result.”¹⁸³

General Comment No. 28 notes that States Parties must treat “men and women equally in regard to marriage” as mandated by art. 23 of the ICCPR.¹⁸⁴ Note that art. 23(2) speaks of “[m]en and women of marriageable age” and hence, the right to marry is granted exclusively to men and women and not to children.¹⁸⁵ This is made clear in article 23(3), which states that “[n]o marriage shall be entered into without the free and full consent of the intending spouses.”¹⁸⁶ The UNHRC, in *General Comment No. 28*, notes that “[m]any factors may prevent women from being able to make the decision to marry freely. One factor relates to the minimum age for marriage. That age should be set by the State on the basis of equal criteria for men and women. These criteria should ensure women’s capacity to make an informed and uncoerced decision.”¹⁸⁷ Girl-children, by virtue of their immaturity, cannot be said to have the “capacity to make an informed and uncoerced decision,” especially when their parents are forcing them to marry in order to improve the family’s financial situation, get the family out of debt, or generally improve the family’s social and economic situation.¹⁸⁸

In addition, argues the UNHRC, it is often the case that in some States, “either by statutory or customary law a guardian, who is generally male, consents to the marriage instead of the woman herself, thereby preventing women from exercising a free choice.”¹⁸⁹ Throughout many

182. Turner, *supra* note 181.

183. *Id.*

184. CCPR General Comment No. 28, *supra* note 174, at para. 23

185. ICCPR, *supra* note 170, art. 23(2).

186. *Id.* art. 23(3).

187. CCPR General Comment No. 28, *supra* note 174, at para. 23.

188. GAYLE TZEMACH LEMMON & LYNN S. ELHARAKE, CHILD BRIDES, GLOBAL CONSEQUENCES: HOW TO END CHILD MARRIAGE 35 (2014) (identifying poverty as a major driver of child marriage).

189. CCPR General Comment No. 28, *supra* note 174, at para. 23.

subcultures in the African countries, the girl-child's father or uncle is usually the person who makes the decision regarding marriage and not the girl herself.¹⁹⁰

General Comment No. 28 also noted that social attitudes often nullify the ability of a girl to fully and freely decide on whether to proceed with a marriage or not. In fact, in many African communities, girl-victims of rape are often coerced by their kin folk and other members of society to marry their rapists as a way to save face for both the girl's family and that of the rapist.¹⁹¹ The UNHRC, in its ICCPR Concluding Comments on Guatemala, has criticized, as violative of the ICCPR, "the existence of a legal provision exempting a rapist from any penalty if he marries the victim."¹⁹² The UNHRC, in its ICCPR Concluding Comments on Zimbabwe, told the Government that it was concerned about "continued practices, in violation of various provisions of the Covenant, including articles 3 and 24, such as *kuzvarita* (pledging of girls for economic gain), *lobola* (bride price), female genital mutilation, early marriage, the statutory difference in the minimum age of girls and boys for marriage" and asked these practices be abolished.¹⁹³ The

190. See, e.g., Sharon Lafraniere, *Forced to Marry Before Puberty, African Girls Pay Lasting Price*, N.Y. TIMES, May 27, 2005, <https://www.nytimes.com/2005/11/27/world/africa/forced-to-marry-before-puberty-african-girls-pay-lasting-price.html> (accessed on December 24, 2019) (describing, *inter alia*, the case of Mwaka, an 11-year old Malawian girl, who was forced by her father to marry a man who was old enough to be her father in order to settle a family debt).

191. See, e.g., Zainab Salbi, *When you're forced to marry your rapist*, WOMEN IN THE WORLD, July 29, 2015, <https://womenintheworld.com/2015/07/29/when-youre-forced-to-marry-your-rapist/> (noting, *inter alia*, that it is quite common in the Middle East and North Africa for girls to be forced to marry their rapist). See also CCPR General Comment No. 28, *supra* note 174, at para. 24.

192. U.N. Human Rights Committee, ICCPR Concluding Comments, Guatemala, A/56/40 (2001), para. 85(24). The document can also be found at Report of the Human Rights Committee, Vol. I, UN General Assembly Official Records, Fifty-sixth Session, Supplement No. 40 (A/56/40) (2001), para. 85(23), file:///Users/jmbaku/Downloads/N0160226%20(1).pdf (last visited on December 24, 2019).

193. U.N. Human Rights Committee, ICCPR Concluding Comments, Zimbabwe, A/53/40 (1998), par. 214. The document can also be found at Report of the Human Rights Committee, Vol. I, UN General Assembly Official Records, Fifty-third Session, Supplement No. 40 (A/53/40) (1998), para. 214, <https://undocs.org/pdf?symbol=en/A/53/40%5BVOL.I%5D> (last visited on December 24,

Committee also noted, in its review of Sudan, that [t]he State Party should repeal all legal provisions hindering women's free choice of spouse, as well as all other rules differentiating between men's and women's rights to marry and within marriage."¹⁹⁴ The Committee also indicated that it was "concerned about the absence of a legal provision on a minimum age for marriage and strongly [recommended] that such a provision be adopted forthwith."¹⁹⁵ In *Concluding Comments* on Nigeria, the Committee recommended that Nigerian authorities take steps, particularly through "education, to overcome certain traditions and customs, such as female genital mutilation and forced marriages which are incompatible with the equality rights of women."¹⁹⁶

C. Convention on the Rights of the Child

The Convention on the Rights of the Child ("CRC"),¹⁹⁷ which entered into force on September 2, 1990, "recognizes that children are entitled to human rights in their own right" and this "reflects a paradigm shift away from the view of the child as a beneficiary of privileges bestowed at the discretion [of] the family, community and the State towards a more progressive view of the child as the bearer of legal rights under international law."¹⁹⁸

2019).

194. *Id.* at para. 122.

195. *Id.*

196. U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee, Nigeria*, UN Doc. A/51/40, paras. 267–305 (1996), para. 296, <http://hrlibrary.umn.edu/hrcommittee/nigeria1996.html> (last visited on December 24, 2019).

197. Office of the U.N. Commissioner for Human Rights, *Convention on the Rights of the Child*, U.N. G.A. Res. 44/25 (Nov. 20, 1989); 1577 U.N.T.S. 3 (November 20, 1989), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed on December 26, 2019).

198. UNICEF, Division of Policy and Practice, *Child Marriage and the Law: Legislative Reform Initiative Paper Series*, Apr. 2007, at 5, <https://www.un.org/ruleoflaw/blog/document/child-marriage-and-the-law-legislative-reform-initiative-paper-series/> (Dec. 26, 2019). Note that in the Preamble to the CRC, it is noted that the Universal Declaration of Human Rights and the International Covenants on Human Rights (i.e., ICCPR & ICESCR) have "proclaimed and

The CRC contains several provisions that deal directly or indirectly with child marriage. Article 1 defines the expression “child” and hence, provides an important legal tool/standard for States Parties to use to interpret domestic laws related to child marriage. According to art. 1, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”¹⁹⁹

Article 2 of the CRC guarantees the child freedom from discrimination “on any grounds”—including “sex, religion, ethnic or social origin, birth or other status.”²⁰⁰ This provision is important because child marriage in many African communities is often related to legal, as well as, customary and traditional practices, that discriminate against girl-children. For example, in the case *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*,²⁰¹ the Constitutional Court of Zimbabwe was called upon to decide whether the fundamental rights of girl-children were infringed by the Marriage Act § 22(1) and any other laws (including the Customary Marriages Act) that authorize girl-children who have attained the age of 16 years to marry in contravention of the Constitution.²⁰² The applicants in *Mudzuru & Tsopodzi* complained

agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, *birth* or other status.” CRC, *supra* note 197, at pmb. Emphasis added.

199. CRC, *supra* note 197, art. 1.

200. *Id.* art. 2.

201. *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*, Judgment No. CCZ 12/2015, Constitutional Application No. 79/14.

202. Section 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) of 2013 had set the minimum age for marriage at 18 years. However, § 22 (1) of the Marriage Act of Zimbabwe had differential minimum age for marriage for boys and girls: “No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable.” Government of Zimbabwe, *Marriage Act* (Chapter 5: 11), § 22(1); the Customary Marriages Act (Zimbabwe) did not provide for a minimum age limit of eighteen years in respect of any marriage contracted under this Act. See *Customary Marriages Act* (Chapter 5: 07) (Zimbabwe).

that § 22(1) of the Marriage Act violated the Constitution of Zimbabwe by setting the marriage age for girls below that permitted by the Constitution (§ 78(1)) and that the Customary Marriages Act was unconstitutional because it did not provide for a minimum of 18 years for marriages contracted under customary law. The Constitutional Court agreed with the applicants and declared § 22(1) of the Marriage Act and the Customary Marriages Act unconstitutional.²⁰³

Article 3 of the CRC formally introduces the “best interests of the child” principle, which is now recognized in international law as the standard for dealing with issues (e.g., adoption, custody) related to children.²⁰⁴ If, “[i]n all actions concerning children,” both state- and non-state actors are required to take as the primary consideration, “the best interests of the child,” then all States Parties must abolish *child marriage* and a child must never be forced into marriage since that action would not be in the best interests of the child.²⁰⁵

In addition to the fact that States Parties “recognize that every child has the inherent right to life,” Art. 6 of the CRC imposes an obligation on States Parties “to ensure to the maximum extent possible the survival and development of the child.”²⁰⁶ Given the fact that research has determined that child marriage is detrimental to the welfare and development of the child, particularly the girl-child, this harmful practice must be abolished in all African countries.²⁰⁷ Research conducted by Dr. Nawal M. Nour on child marriage in Africa has determined that the practice leads to “increased risk for sexually transmitted diseases, cervical cancer, malaria, death during childbirth,

203. See *Mudzuru & Tsopodzi*, *supra* note 201 at 1.

204. CRC, *supra* note 197, art. 3. Article 3(1) states that “[i]n 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.*”

205. CRC, *supra* note 197, art. 3(1).

206. *Id.* art. 6(1–2).

207. In addition to the fact that child marriage can deprive children of the opportunity to attend school and acquire the skills that they need to function competitively in the economy as adults, it can also seriously endanger the physical and mental health of child brides, including creating health problems, such as obstetric fistula, that can kill them.

and obstetric fistulas.”²⁰⁸

Article 12 of the CRC asks States Parties to “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child.”²⁰⁹ If Art. 12 of the CRC is read together with art. 16(2) of the Universal Declaration of Human Rights,²¹⁰ a child cannot legally marry—first, child marriage is a matter affecting the child and in African communities that practice child marriage, children are not usually granted the right to express an opinion; second, for the purpose of “free and full consent” as mandated by the UDHR, children, as a result of their immaturity, do not have the capacity to grant free and full consent to marriage. Hence, child marriage would offend Art. 12 of the CRC and Art. 16 of the UDHR.²¹¹

Children are granted the right to protection “from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”²¹² Child marriage offends this article, especially that which is contracted between a child and an adult, since it invariably results in the maltreatment, exploitation, and abuse (including sexual abuse) of children. For example, research conducted by ECPAT International has determined that child marriage is a major “*channel* to sexual abuse and exploitation of children, including of a commercial nature” and that it is also “*a form of sexual abuse and exploitation of the underage individuals involved.*”²¹³

208. Nawal M. Nour, *Health Consequences of Child Marriage in Africa*, 12 EMERGING INFECTIOUS DISEASES 1644, 1644 (2006).

209. CRC, *supra* note 197, art. 12.

210. Article 16(2) of the Universal Declaration of Human Rights states as follows: “Marriage shall be entered into only with the free and full consent of the intending spouses.” *Universal Declaration of Human Rights*, U.N. G.A. Res. 217 A(III) (December 10, 1948), art. 16(2).

211. See CRC, *supra* note 197, art. 12 & UDHR, *supra* note 210, art. 16(2).

212. See CRC, *supra* note 197, art. 19.

213. ECPAT International, *Thematic Report: Unrecognized Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage*, ECPAT & PLAN INT’L, Oct. 2015, <https://www.girlsnotbrides.org/resource-centre/unrecognised-sexual-abuse-and-exploitation-of-children-in-child-early-and-forced-marriage/> (accessed on December 26, 2019), at 46. ECPAT

Article 24 of the CRC guarantees children the right to “the highest attainable standard of health” and for them to be able to have access to health care services and to be protected from “traditional practices” that are “prejudicial” to their health.²¹⁴ Child marriage offends the provisions in this article since, for example, it prevents children from attaining the highest standard of health possible—child marriage, as research as determined, often exposes the child to a higher risk of contracting sexually transmitted infections, including HIV.²¹⁵ In addition, many girl-children in Africa who are forced into early marriage, are often exposed to significant levels of domestic violence.²¹⁶ Throughout Africa, child marriage is considered an intricate part of the traditions and customs of many communities. Like female genital mutilation (“FGM”), child marriage is a traditional practice that is prejudicial to the health of children and hence, offends the provisions of art. 24 of the CRC.

Articles 28 and 29 of the CRC recognize the right of children to education “on the basis of equal opportunity.”²¹⁷ States Parties are directed to use education to develop the child’s “personality, talents and mental and physical abilities to [the] fullest potential.”²¹⁸ Children who are forced into marriage are usually deprived of the opportunity to attend school and gain the skills and competencies that they need to function as productive adults and participate fully and effectively in political governance.²¹⁹ In addition to the fact that depriving children

International, which was formerly known as End Child Prostitution and Trafficking, is a global network of civil society organizations that works to end the sexual exploitation of children.

214. See CRC, *supra* note 197, art. 24.

215. UNICEF & Girls Not Brides, *Advancing the Evidence Base on Child Marriage and HIV*, White Paper, Apr. 2019, at 14.

216. See, e.g., RACHEL Kidman, *Child marriage and intimate partner violence: a comparative study of 34 countries*, 46 INT’L J. EPIDEMIOLOGY 662 (2017) (arguing, *inter alia*, that early marriage is associated with increased sexual and physical violence).

217. See CRC, *supra* note 197, arts. 28 & 29.

218. See *id.* art. 29(1)(a).

219. See, e.g., Quentin Wodon, *Child marriage and education: impacts, costs, and benefits*, GLOBAL PARTNERSHIP FOR EDUCATION & THE WORLD BANK, June 29, 2017, <https://www.globalpartnership.org/blog/child-marriage-and-education->

of the opportunity to obtain an education significantly reduces their earnings potential, it also “results in diminished access to assets, resources and social support systems and limits the ability of married girls to exercise choice and agency in their lives.”²²⁰

In addition to the fact that Art. 34 obligates States Parties to “undertake to protect the child from all forms of sexual exploitation and sexual abuse,” this article also imposes an obligation on States Parties to “take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performance and materials.”²²¹ Child marriage, especially that between a child and an adult, is, by definition, a form of child exploitation and abuse.²²² Both Articles 35 and 36 of the CRC obligates States Parties to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form,” as well as “to protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.”²²³

Child marriage offends these two Articles—throughout many communities in Africa, child marriage often involves abduction (e.g., South Africa’s traditional system of *ukuthwala*) of children for the purpose of forcing them into marriage.²²⁴ In addition, child marriage

impacts-costs-and-benefits (noting, *inter alia*, the impact of child marriage on the education of children involved in the practice).

220. Neetu A. John, Jeffrey Edmeades & Lydia Murithi, *Child marriage and psychological well-being in Niger and Ethiopia*, 19 BMC PUB. HEALTH 1029, 1029 (2019).

221. See CRC, *supra* note 197, art. 34.

222. See, e.g., Teri Dobbins Baxter, *Child Marriage as Constitutional Violation*, 19 NEV. L. J. 39 (2019) (arguing, *inter alia*, that child marriage violates children’s constitutional rights). See also Renate van der Zee, ‘It put an end to my childhood’: the hidden scandal of U.S. child marriage, THE GUARDIAN, Feb. 6, 2018 (noting, *inter alia*, that child marriage in the United States robs children of their childhood).

223. See CRC, *supra* note 197, arts. 35 & 36.

224. See Kathleen Rice, *Understanding ukuthwala: Bride abduction in the rural Eastern Cape, South Africa*, 77 AFR. STUD. 394 (2018).

usually involves various forms of exploitation that are prejudicial to various aspects of the child's welfare.²²⁵

The Committee on the Rights of the Child, is the "body of 18 independent experts that monitors implementation of the Convention on the Rights of the Child by its States Parties."²²⁶ All States Parties of the CRC are required to submit reports on a regular basis to the Committee on the Rights of the Child elaborating how the rights contained in the CRC are being implemented. States Parties are obliged to submit an initial report two years after they have acceded to the CRC and thereafter, submit a report every five years. The Committee on the Rights of the Child is then required to examine each report presented by a State Party and address any "concerns and recommendations to the State Party in the form of 'concluding observations.'"²²⁷ For example, in its Concluding Observations of Nigeria's efforts to implement the CRC, the Committee on the Rights of the Child noted that it was "concerned about the persistence of early marriage, child betrothals, discrimination in inheritance, widowhood practices and other harmful traditional practices," which the Committee argued, "are incompatible with the principles and provisions of the Convention."²²⁸

The Committee on the Rights of the Child has linked child marriage to "a whole host of rights violations against the girl child and sees child marriage in the context of gender discrimination and inequality."²²⁹ Child or early marriage, the Committee on the Rights of the Child notes, undermines the following rights, which are guaranteed the girl

225. Susanne Louis B. Mikhail, *Child marriage and child prostitution: two forms of sexual exploitation*, 10 GENDER & DEV. 43 (2002) (noting, *inter alia*, that child marriage is a form of child sexual exploitation).
226. Office of the U.N. High Commissioner for Human Rights, Committee on the Rights of the Child, <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (last visited on December 27, 2019).
227. Office of the UN High Commissioner for Human Rights, Committee on the Rights of the Child: Monitoring Children's Rights, <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (last visited on December 27, 2019).
228. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Nigeria*, UN Doc. CRC/C/15/Ad. 61 (1996), para. 15.
229. *Child Marriage and the Law: Legislative Reform Initiative Paper Series*, *supra* note 198, at 7.

child by the CRC:

- The right to education (Article 28).
- The right to be protected from all forms of physical or mental violence, injury or abuse, including sexual abuse (Article 19) and from all forms of sexual exploitation (Article 34).
- The right to the enjoyment of the highest attainable standard of health (Article 24).
- The right to educational and vocational information and guidance (Article 28).
- The right to seek, receive and impart information and ideas (Article 13).
- The right to rest and leisure, and to participate freely in cultural life (Article 31).
- The right to not be separated from their parents against their will (Article 9).
- The right to protection against all forms of exploitation affecting any aspect of the child's welfare (Article 36).²³⁰

Child marriage offends all the articles of the CRC listed above—it (1) denies the girl-child the right and opportunity to attend school and obtain necessary training and skills development; (2) subjects the girl-child to various forms of physical and/or mental abuse, including sexual abuse; (3) exposes the girl-child to increased risk of contracting various STDs, including HIV/AIDS, as well as, to obstetric fistulas; (4) prevents the girl-child from accessing information to enhance her well-being and through the denial of educational opportunities to her, limits her ability to contribute to the creation of knowledge; (5) cuts short her childhood and hence, prevents her from enjoying a normal childhood, including benefiting from play and leisure—child marriage forces the girl-child into assuming the duties and responsibilities of a wife and mother, even though she is totally immature and does not have the capacity to function as an adult—as noted by the Committee on the Rights of

230. *Child Marriage and the Law: Legislative Reform Initiative Paper Series*, *supra* note 198, at 8.

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the Child, girl children forced into child marriage “may be expected to undertake excessive family responsibilities” and hence, are “deprived of opportunities to participate in early childhood and primary education,”²³¹ and (6) forcefully separates her from her parents against her will and effectively deprives her of the opportunity to grow up in a nurturing environment.

D. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (“Supplementary Convention on the Abolition of Slavery”) provides for the abolition or abandonment of certain institutions and practices that could enhance and perpetuate child marriage. These include:

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.²³²

231. *Report of the Committee on the Rights of the Child, UN General Assembly Official Records, Sixty-first Session, Supplement No. 41 (A/61/41) (2006), at 43.*

232. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, U.N. G.A. Res. 608(XXI) (Apr. 30, 1956), arts. 1(c) & 1(d).

Child marriage offends Arts. 1(c)(i) & 1(c)(ii) of the Supplementary Convention on the Abolition of Slavery—under the circumstances, the girl-child is generally not provided the right to refuse to enter into marriage; she is given in marriage on payment of a consideration, which in many African communities, is referred to as “bride price”; in many African societies, these child-brides often outlive their much older husbands and after the death of the latter, the wife is then transferred, usually without her consent, to another male member of the family.²³³ Article 1(d) speaks specifically to the abolition of the institution of child marriage and in doing so, it implicitly defines the minimum age for marriage as 18 years.²³⁴

The Supplementary Convention on the Abolition of Slavery also provides as follows:

With a view to bringing to an end the institutions and practices mentioned in Article 1(c) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable *minimum ages of marriage*, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.²³⁵

Setting a suitable minimum age for marriage and making certain that all marriages are registered, is critical for any effective measure or effort to eliminate child marriage. Hence, the Supplementary Convention on the Abolition of Slavery’s Art. 2 is very important to the fight against child marriage in Africa.

233. This process is often referred to as “widow inheritance” and is quite common in countries, such as Nigeria. Nwaebuni notes that “[i]t is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband’s property since she herself is, like a chattel, to be inherited by a relative of her husband.” Rose Nwaebuni, *Nigeria: A difficult place to be a widow*, THE AFRICAN REPORT, Nov. 27, 2013, <https://www.theafricareport.com/5025/nigeria-a-difficult-place-to-be-a-widow/> (last visited on December 23, 2019). See also Stella Nyanzi, Margaret Emodu-Walakira & Wilberforce Serwaniko, *The Widow, the Will, and Widow-inheritance in Kampala: Revisiting Victimization Arguments*, 43 CAN. J. AFR. STUD. 12 (2009) (examining, inter alia, the relationship between widow inheritance and HIV/AIDS in Uganda).

234. *Supplementary Convention on the Abolition of Slavery*, *supra* note 232, art. 1(d).

235. *Supplementary Convention on the Abolition of Slavery*, *supra* note 232, art. 2.

E. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

At least three Articles of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages²³⁶ deal with issues that are relevant to child marriage and any efforts to eradicate it. According to Art. 1, “[n]o marriage shall be legally entered into *without the full and free consent of both parties*, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”²³⁷ According to Art. 1, for a marriage to be legally entered into, both parties must grant full and free consent. Where one party to the marriage is a child, as is the case in a *child marriage*, it is impossible for there to be *full and free consent*. As noted by the Committee on the Rights of the Child, children are “relatively powerless” and must “depend on others for the realization of their rights.”²³⁸ Children are often voiceless and invisible within the family and community in which they live. As a consequence, their agency is rarely ever respected, even in decisions, such as child marriage, that directly affect their immediate and future well-being. Hence, decision-making within the family and the community must be child-centered so that the outcomes fully reflect the best interests of the child principle.²³⁹

Article 2 requires States Parties to enact legislation to specify a minimum age for marriage and makes clear that “[n]o marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.”²⁴⁰ The failure of various African countries to specify a minimum age for marriage either through the national constitution or legislation, has allowed marriage

236. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, Nov. 7, 1962, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx> (last visited on December 24, 2019).

237. *Convention on Consent to Marriage*, *supra* note 236, art. 1.

238. *Report of the Committee on the Rights of Child*, General Assembly Official Records, Sixty-first Session, Supplement No. 41 (A/61/41) (2006), at 43.

239. *See CRC*, *supra* note 197, art. 3.

240. *Convention on Consent to Marriage*, *supra* note 236, art. 2.

in many parts of these countries to be governed by traditions and customs that often have no minimum age for marriage. For example, one of the issues that the Constitutional Court of Zimbabwe was called upon to decide in *Mudzuru & Tsopodzi*, was the constitutionality of the *Customary Marriages Act [Chapter 5: 07]*, which did not provide for a minimum age for marriage.²⁴¹

Article 3 of the Convention on Consent to Marriage states that “[a]ll marriages shall be registered in an appropriate official register by the competent authority.”²⁴² A “universal, well-managed registration system that is acceptable to all and free of charge” is critical to any national regime to eliminate child marriage. Most countries in Africa “usually have multiple languages and are compelled, for efficiency and other reasons, to use the language of their former colonizer as a ‘national’ or ‘official’ language.”²⁴³ Unfortunately, most of the people who live in these countries neither speak nor write the official language of their country of residence. Hence, to enhance the birth registration process, it is necessary for governments to provide parents who are not fluent in the official language with translation services so as to improve their ability to register their children.

F. The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁴⁴ imposes an obligation on States Parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to

241. See *Mudzuru & Tsopodzi*, *supra* note 201, at 1.

242. Convention on Consent to Marriage, *supra* note 236, art. 3.

243. JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 65 (2018).

244. *Convention on the Elimination of All Forms of Discrimination against Women*, U.N. G.A. Res. A/RES/34/180 (December 18, 1979), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (last visited on December 27, 2019).

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choose a spouse and to enter into marriage only with their free and full consent.”²⁴⁵ Child marriage, as has been determined by Human Rights Watch, discriminates against the girl child.²⁴⁶ Human Rights Watch notes that “[c]hild marriage—fueled by poverty and deeply rooted norms that undervalue and discriminate against girls—will not disappear if the concerted attention it now enjoys subsides in favor of the next hot-button issue.”²⁴⁷

Article 16(2) of CEDAW states that “[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.”²⁴⁸ According to the U.N. Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”),

A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties’ reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman’s marriage to be arranged for payment or preferment and in others women’s poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on woman’s youth or consanguinity with her partner, a woman’s right to choose when, if, and whom she will marry must be protected and enforced at law.

In addition, notes the CEDAW Committee, “the betrothal of girls or undertakings by family members” violates “a woman’s right freely to choose.”²⁴⁹ In 2014, the Committee on the Elimination of Discrimination

245. CEDAW, *supra* note 244, art. 16(1)(a, b).

246. HUM. RTS WATCH, WORLD REPORT 2016: EVENTS OF 2015 (2016).

247. HUM. RTS WATCH, *supra* note 246, at 33.

248. CEDAW, *supra* note 244, art. 16(2).

249. CEDAW Committee, CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, <https://www.refworld.org/docid/48abd52c0.html> (last visited on December 27, 2019), para. 38.

Against Women and the Committee on the Rights of the Child (“the Committees”) presented a joint general recommendation on the elimination of discrimination against women.²⁵⁰ The Committees noted that the objective of the joint “general recommendation/general comment” was “to clarify the obligations of States Parties to the Conventions by providing authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the Conventions to eliminate harmful practices.”²⁵¹ Given as a “[r]ationale for the joint general recommendation/general comment” is “that harmful practices are deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles.”²⁵²

Noting that child marriage or early marriage “is any marriage where at least one of the parties is under 18 years of age,”²⁵³ the Committees noted that “[t]he overwhelming majority of child marriages, both formal and informal, involve girls,” and that “[a] child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.”²⁵⁴ The Committees also noted that “[c]hild marriage is often accompanied by early and frequent pregnancy and childbirth, resulting in higher than average maternal morbidity and mortality rates” and that “[p]regnancy-related deaths are the leading cause of mortality for girls between 15 and 19 years of age, whether married or unmarried, around the world.”²⁵⁵

The Committees defined “forced marriages” as “marriages in which one and/or both parties have not personally expressed their full and free

250. *Convention on the Elimination of All Forms of Discrimination against Women & the Convention on the Rights of the Child, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, CEDAW/C/GC/31-CRC/C/GC/18 (Nov. 14, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement> (last visited on December 27, 2019).

251. *Id.* at 2 (para. 2).

252. *Id.* at 3 (para. 6).

253. *Id.* at 7 (para. 20).

254. *Id.* at 7 (para. 20).

255. *Id.* at 7 (para. 22).

consent to the union.”²⁵⁶ Child marriage is identified as a form of forced marriage and quite often, they result “in girls lacking personal and economic autonomy and attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.”²⁵⁷ The Committees then noted that allowing marriage to be determined by the expectation of the payment to the family of a bride price (e.g., a cash payment or the offer of animals) “violates the right to freely choose a spouse” and that “such practice should not be required for a marriage to be valid and that such agreements should not be recognized by a State Party as enforceable.”²⁵⁸

The Committees recommended that “the States Parties to the Conventions [should] ensure that any efforts undertaken to tackle harmful practices and to challenge and change underlying social norms are holistic, community based and founded on a rights-based approach that includes the active participation of all relevant stakeholders, especially women and girls.”²⁵⁹ In addition, States Parties are obligated “to challenge and change patriarchal ideologies and structures that constrain women and girls from fully exercising their human rights and freedoms.”²⁶⁰

G. International Covenant on Economic, Social and Cultural Rights

According to Art. 10 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), “[m]arriage must be entered into with the free consent of the intending spouses.”²⁶¹ In child marriage, one spouse is a girl-child and the other is a grown-up, who, in many African cases, is significantly older than the child. For example, in a study conducted in Kenya, Mereso Kilusu found cases in which 13-

256. *Id.* at 7 (para. 23).

257. *Id.* at 7–8 (para. 23).

258. *Id.* at 8 (para. 24).

259. *Id.* at 16 (para. 60).

260. *Id.* at 16 (para. 61).

261. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 10(1).

year old girls were married to men who were as old as 70 years.²⁶² Of course, Africa's girl-child cannot be said to have the capacity to freely and fully consent to marriage since she is still a child and hence, not mature enough to make those types of decisions. Unfortunately for the girl-child in Africa, free and full consent to marriage cannot be said to exist when she, as a partner in child marriage, is still a child, who by definition, is immature and hence, incapable of fully and freely granting consent to the union. In a study of child marriage in Ghana, World Vision noted that "[c]hildren, especially girls, are physically, emotionally and psychologically immature for marriage, pregnancy and parenthood."²⁶³

The Committee on Economic, Social and Cultural Rights ("CESCR")²⁶⁴ has noted that "the difference in the marriageable ages for men and women does not appear to conform with the provisions of articles 2 and 10 of the Covenant, nor does it appear to be compatible with articles 2 and 3 of the Convention on the Rights of the Child."²⁶⁵ In other Concluding Comments, the CESCR also noted that "the practice of early marriage has negative impacts on the right to health, right to education and the right to work, particularly of the girl child."²⁶⁶ The Committee was also concerned about the "disparities between statutory law and customary law"—in some countries, while the age for statutory marriage is 18 years, girls are allowed to marry at much younger ages

262. Mereso Kilusu, *Married at 13 to man in his 70s: Child bride who's changing attitudes*, CNN News, Mar. 8, 2013, <https://www.cnn.com/2013/03/08/opinion/child-marriage-kilusu/index.html> (last visited on December 28, 2019).

263. World Vision, *End Child Marriage Now! It Takes All*, https://www.wvi.org/sites/default/files/policy%20brief%20final%20e%20-%20version%203%20fold_0.pdf (last visited on December 28, 2019).

264. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Suriname*, U.N. Doc. E/C.12/1995/6 (June 7, 1995), file:///Users/jmbaku/Downloads/G9516907%20(1).pdf (last visited on December 28, 2019).

265. Committee on Economic, Social and Cultural Rights, *supra* note 260, at para. 11.

266. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka*, U.N. Doc. E/C.12/1/Add. 24 (June 16, 1998), file:///Users/jmbaku/Downloads/G9816470.pdf (June 16, 1998), at para. 9.

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under customary law.²⁶⁷

Child marriage, as made evident by a discussion of several international human rights instruments, is a violation of human rights. As argued by many human rights advocates, “[c]hild marriages must be viewed within the context of force and coercion, involving pressure and emotional blackmail, and children that lack the choice or capacity to give their full consent.”²⁶⁸ Given the fact that it usually involves the absence of valid consent, *child marriage* must be considered *forced marriage*.²⁶⁹

The girl-children who “get married will most likely be forced into having sexual intercourse with their, usually much older, husbands.”²⁷⁰ Since these girl-children are “often psychologically, physically and sexually” immature, marriage is likely to portend severe health consequences for them.²⁷¹ Research has determined that “[g]irls ages 10–14 are five times more likely to die in pregnancy or childbirth than women aged 20–24 and girls 15–19 are twice as likely to die.”²⁷² It is a well-known fact that the body of a girl-child is “not yet ready for pregnancy and childbirth, which leads to complications such as obstructed labor and obstetric fistula.”²⁷³

The international human rights instruments that were examined above consider valid marriage as that which is contracted between men and women of full age and who enter into such an arrangement only with their free and full consent. In addition, these human rights instruments state that the betrothal and marriage of a child shall have no legal effect and instruct all States Parties to use legislation to specify a minimum age for marriage, make compulsory the registration of marriages in an official registry. These instruments also instruct States

267. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka*, *supra* note 266, at 9.

268. Humanists International, *Child Marriage: A Violation of Human Rights*, Apr. 23, 2007, <https://humanists.international/2007/04/child-marriage-violation-human-rights/> (last visited on December 29, 2019).

269. *Child Marriage*, *supra* note 268.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

Parties to create and maintain an official registry for births.²⁷⁴

In the following section, this article will examine African human rights instruments that address child marriage.

III. AFRICAN HUMAN RIGHTS INSTRUMENTS AND CHILD MARRIAGE

A. Introduction

Three regional human rights instruments deal with child marriage in Africa. These are (1) the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which, at Article 6(b),²⁷⁵ sets the minimum age for marriage at 18 years; (2) the African Charter on the Rights and Welfare of the Child, which, at Article 21(2),²⁷⁶ prohibits child marriage and the betrothal of girls and boys; and (3) the African Charter on Human and Peoples' Rights, which, at Article 18(3), imposes an obligation on all States Parties to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."²⁷⁷ Since the African Charter on the Rights and Welfare of the Child ("African Children's Charter") has more comprehensive provisions dealing with child marriage than the other two instruments, we shall limit our discussion in this section to this instrument—that is, the African Children's Charter, which was adopted by the Heads of State and Government of the Organization of

274. *Id.*

275. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6 (September 13, 2000), art. 6(b).

276. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), art. 21(2).

277. African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 18(3).

African Unity (“OAU”) on July 1, 1990.²⁷⁸ On September 9, 1999, the OAU issued the Sirte (Libya) Declaration and called for the creation of an African Union (“AU”) to take over the functions of the OAU—the AU was subsequently launched in July 2002 in Durban, South Africa and has taken responsibility for the realization of the rights entrenched in the African Children’s Charter.²⁷⁹

In the Preamble to the African Children’s Charter, Member States of the OAU note that the Charter of the OAU “recognizes the paramountcy of Human Rights” and that the African Charter on Human and Peoples’ Rights “proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”²⁸⁰ The OAU noted that “the situation of African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, *and on account of the child’s physical and mental immaturity he/she needs special safeguards and care.*”²⁸¹

The OAU also made mention of the fact that “the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone.”²⁸² The realization of the rights entrenched in the African Children’s Charter requires the participation of parents, community leaders, non-governmental organizations, and state- and other non-state actors. Finally, the OAU reaffirmed its adherence to “the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in

278. African Union/Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), <https://au.int/en/treaties/african-charter-rights-and-welfare-child> (last visited on December 28, 2019).

279. Constitutive Act of the African Union, 2158 U.N.T.S. 3 (Aug. 10, 2001), <https://au.int/en/constitutive-act> (last visited on December 29, 2019).

280. African Children’s Charter, *supra* note 278, at prmb.

281. *Id.* (emphasis added).

282. African Children’s Charter, *supra* note 278, prmb.

particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child."²⁸³

Article 1 of the African Children's Charter defines the obligations of the States Parties and in Art. 1(1), Member States are instructed "to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter."²⁸⁴ Article 1 also states that "[a]ny 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."²⁸⁵

The definition of a child is provided in Art. 2: "a child means every human being below the age of 18 years."²⁸⁶ Discrimination against children is addressed in Article 3. A child, "irrespective of . . . his/her parents' or legal guardians' race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status" shall be "entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter."²⁸⁷ Article 4 elaborates the "best interests of the child principle," which today, is considered the legal foundation or standard for considering any action concerning the child.²⁸⁸ If an African State adheres to this principle when dealing with actions concerning the child, it would not support child marriage.

Article 5 addresses the survival and development of the African child. According to Art. 5(1), "[e]very child has an inherent right to life. This right shall be protected by law" and States Parties are instructed to ensure, "to the maximum extent possible, the survival, protection and development of the child."²⁸⁹ Article 6 addresses "name

283. *Id.*

284. *Id.* art. 1(1).

285. *Id.* art. 1(3). In many African countries, child marriage is often justified on traditional, customary, cultural or religious reasons. Such a practice offends Art. 1 of the African Child Charter and hence, should be abolished.

286. *Id.* art. 2.

287. *Id.* art. 3.

288. *Id.* art. 4.

289. *Id.* art. 5.

and nationality” as they relate to children. In addition to the fact that this article guarantees every African child “the right from his birth to a name,” it also mandates that every child be “registered immediately after birth.”²⁹⁰ Creating an official registry, that is administered by national and sub-national governments, and making the registration of births compulsory, would provide the government with important information to judge if a marriage violates laws against underage/child marriage.

Article 7 guarantees the child the right to freedom of expression. The exercise of this right by a child, however, should not be manipulated by her parents and other adults in her life, to justify child marriage by claiming that a child freely expressed her consent to marriage. A child’s physical and mental immaturity, coupled with pressure from her parents and the community, means that any consent to marriage granted by a child is likely to be coerced and not freely given and hence, not in the best interests of the child.²⁹¹

The African Children’s Charter considers education very important to the “promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential.”²⁹² The African child, according to Art. 11(1), “shall have the right to education.”²⁹³ Child marriage, however, deprives the African girl-child of the opportunity to attend school as it forces or coerces her into the role of wife and mother. Guaranteeing the African child the right to education implies that States Parties should legislate against child marriage as the latter directly interferes with the child’s ability to exercise the right to education.

Child marriage, which forces the girl-child into the responsibilities of a wife and mother—all of which are the purview of adults—deprives her of the right “to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.”²⁹⁴ The most effective way to make certain that

290. *Id.* art. 6.

291. *Id.* art. 7.

292. *Id.* 11(2)(a).

293. *Id.* art. 11(1).

294. *Id.* art. 12(1).

children realize this right is for each State Party to “respect and promote the right of the child to fully participate in cultural and artistic life” and to “encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”²⁹⁵

Child marriage automatically imposes upon the African girl-child conditions (e.g., early pregnancy) that are not amenable to the enjoyment of the “best attainable state of physical, mental and spiritual health,”²⁹⁶ a right that is guaranteed by Art. 14 of the African Children’s Charter. Realizing this right, thus, requires that child marriage be abolished. Child marriage must be recognized as a form of economic exploitation of the child, first, by her parents and, second, by her new husband and his family. Research has determined that in many cases of child marriage in Africa, poor parents literally “sell” their girl-children to an older and richer man for money and goods (e.g., cows) to support the girl-child’s family. In addition, when the girl-child is transferred to the new husband’s house, she is exploited economically and effectively reduced to an indentured servant or slave.²⁹⁷ According to Art. 15, “[e]very child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development.”²⁹⁸ Child marriage subjects the African girl-child to various forms of exploitation that can negatively affect her social development.

The African Children’s Charter also protects children against abuse and torture. Specifically, Art. 16(1) instructs States Parties to take “specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman and degrading treatment and especially physical or mental injury or abuse, neglect or

295. *Id.* art. 12(2).

296. *Id.* art. 5.

297. As argued by the African Union’s goodwill ambassador, Nyaradzayi Gumbonzvanda, “[c]hild marriage should be seen as a form of modern slavery and is tantamount to sanctioning child rape,” and that it inflicts “life-long trauma on many girls and far more must be done to address its psychological impact.” Emma Batha, *Child marriage a form of slavery: African Union goodwill ambassador*, REUTERS, May 20, 2015, <https://af.reuters.com/article/topNews/idAFKBN0O50YI20150520> (accessed on December 29, 2019).

298. African Children’s Charter, *supra* note 278, art. 15(1).

maltreatment including sexual abuse, while in the care of the child.”²⁹⁹ A study conducted by the United Nations Population Fund (“UNFPA”) determined that “[c]hild brides are particularly vulnerable to abuse” because “[t]hey are less able to advocate for themselves and less able to escape abusive relationships.”³⁰⁰ The UNFPA also determined that “[m]ental illness is common among child brides,” which is due to “their experience of violence” and that “[g]irls who marry young are also more likely to think that wife beating is justified.”³⁰¹

Article 19 of the African Children’s Charter deals with parental care and protection of children. According to Art. 19(1), “[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his/her parents against his/her will, except when a judicial authority determines in accordance with appropriate law, that such separation is in the best interest of the child.”³⁰² Child marriage separates the children who are forced into marriage from their families and usually against their will. In addition, child marriage deprives children from “the enjoyment of parental care and protection” since it forces them to leave home and school.³⁰³

In 1954, the U.N. General Assembly made an effort to shine light on what it referred to as “customs, ancient laws and practices relating to marriage and family which,” it argued, were “inconsistent with” the guiding principles provided in the Universal Declaration of Human Rights.³⁰⁴ The resolution asked all U.N. Member States to abolish all customary and traditional practices that are harmful to children. Specifically, the resolution asked Member States to completely eliminate “child marriages and the betrothal of young girls before the age of

299. *Id.* art. 16(1).

300. U.N. Population Fund (UNFPA), Child marriage—Frequently Asked Questions, Feb. 2018, <https://www.unfpa.org/child-marriage-frequently-asked-questions> (last visited on December 30, 2019).

301. *Id.*

302. African Children’s Charter, *supra* note 278, art. 19(1).

303. *Id.*

304. See G.A. Res. 843 (IX), *Status of Women in Private Law: Customs, Ancient Law and Practices Affecting the Human Dignity of Women* (Dec. 17, 1954), at 23.

puberty” and establish “appropriate penalties where necessary.”³⁰⁵

The African Children’s Charter also speaks to harmful social and cultural practices and instructs States Parties to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.”³⁰⁶ Child marriage is a practice that is harmful to children—it negatively affects the “welfare, dignity, normal growth and development of the child.”³⁰⁷

Article 21(2) bans child marriage and the “betrothal of girls and boys.”³⁰⁸ According to this section of Art. 21, “[c]hild 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.”³⁰⁹ In addition to abolishing child marriage and the betrothal of girls and boys, Art. 21(2) also instructs States Parties to specify 18 years as the minimum age for marriage, as well as, establish an official marriage registry and make the registration of marriages in this registry compulsory.³¹⁰

The African Committee of Experts on the Rights and Welfare of the Child (“ACERWC”) is vested with the power to interpret the provisions of the African Charter on the Rights and Welfare of the Child.³¹¹ The ACERWC has the power to issue “authoritative interpretation of the Charter, in order to clarify its meaning and scope.”³¹² The outcome of

305. G.A. Res. 843 (IX), *supra* note 304, at 23. See also John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT’L & COMO. L. REV. 287, 395 (examining, inter alia, customary and traditional practices that are harmful to children).

306. African Children’s Charter, *supra* note 278, art. 21(1)(a, b).

307. *Id.* art. 21(1).

308. *Id.* art. 21(2).

309. *Id.*

310. *Id.*

311. African Children’s Charter, *supra* note 278, arts. 32–41.

312. African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comments*, <https://www.acerwc.africa/general->

the ACERWC's work is usually presented to the public through *General Comments*. Since its establishment, the ACERWC has issued several General Comments, including a *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage*.³¹³ This *General Comment* is discussed below.

B. ACERWC & ACHPR Joint General Comment on Ending Child Marriage in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005 ("Maputo Protocol") and the African Charter on the Rights and Welfare of the Child ("African Children's Charter") both specify 18 years as the minimum age for marriage.³¹⁴ The task of interpreting the scope and meaning of the provisions of the Maputo Protocol is granted to the African Commission on Human and Peoples' Rights ("African Commission")³¹⁵ and that of

comments/ (accessed on December 30, 2019).

313. ACERWC & African Commission on Human and Peoples' Rights (ACHPR), *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage* (2017), <https://www.acerwc.africa/general-comments/> (last visited on December 30, 2019).

314. According to Art. 6(b) of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005, States Parties "shall enact appropriate national legislative measures to guarantee that: b) the minimum age of marriage for women shall 18 years." Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005 (Maputo Protocol), adopted on July 1, 2003 and entered into force on November 25, 2005, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed on December 31, 2019), art. 6(b). Article 21(2) of the African Charter on the Rights and Welfare of the Child specifies "the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory." African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990), [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/2AfricanCharterontheRightsandWelfareoftheChild\(1990\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/2AfricanCharterontheRightsandWelfareoftheChild(1990).aspx) (last visited on December 31, 2019), art. 21(2).

315. The mandate of the African Commission is defined in Art. 45 of the African Charter on Human and Peoples' Rights. See African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 45.

the African Children's Charter to the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC").³¹⁶ The ACERWC and the African Commission, "[a]cting on [their] interpretative mandates, . . . decided to issue [the] interpretative guidance on child marriage as a Joint General Comment."³¹⁷ The joint effort was "premised on Article 42(a)(iii) of the African Children's Charter and Article 45(1)(c) of the [African Charter on Human and Peoples' Rights] ("Banjul Charter") which mandate the two bodies respectively to cooperate with other African, international and regional institutions concerned."³¹⁸

The Joint General Comment was focused on "children in child marriages, children at risk of child marriage and women who were married before the age of 18."³¹⁹ The betrothal and marriage of girls and boys before age 18 years is prohibited by Article 21(2) of the African Children's Charter.³²⁰ Nevertheless, the ACERWC and the African Commission noted that since "girls are disproportionately at risk of and affected by child marriage," the Joint General Comment was aimed at specifically addressing "some of the factors that make girls more susceptible to child marriage and its impacts, including their reproductive capacities and persistent gender inequality and discrimination against women."³²¹

In performing the task of interpreting the African Children's Charter, the ACERWC "applies four general principles as the lens through which interpretation of all African Children's Charter provisions and all issues relating to the protection of the rights and welfare of the child are addressed."³²² These interpretive principles are "the best interest of the child, the child's right to freedom from discrimination, the right to survival, development and protection, and children's right to participate

316. The mandate of the ACERWC is defined in Art. 42 of the African Children's Charter. See African Children's Charter, *supra* note 315, art. 42(a)(i) & (c).

317. Joint General Comment, *supra* note 313, at 2–3 (para. 4).

318. *Id.* at 3 (para. 4).

319. *Id.* at 3 (para. 5). Note that Article 1(k) of the Maputo Protocol states that "[w]omen" means persons of female gender, including girls." See Maputo Protocol, *supra* note 314, art. 1(k).

320. African Children's Charter, *supra* note 315, art. 21(2).

321. Joint General Comment, *supra* note 313, at 3–4 (para. 5).

322. *Id.* at 5 (para. 7).

in matters that affect and concern them.”³²³

The Joint General Comment’s guidance begins with Article 4(1) of the African Children’s Charter, which states that “[i]n all actions concerning the child undertaken by any person or authority *the best interests of the child shall be the primary consideration*.”³²⁴ Since child marriage “gives rise to negative physical, psychological, economical and social consequences and curtails the enjoyment of children’s human rights and fundamental freedoms,” the practice is, therefore, “not in the best interests of the child.”³²⁵ It is noted that Article 4(1) applies “to all actions by States Parties concerning the child as well as all the actions by other stakeholders, such as parents, traditional leaders and community representatives who, in the best interests of the child, must not perpetrate, perpetuate or support child marriage.”³²⁶

The Joint General Comment then notes that if each State Party applies the principle of the best interests of the child, it “must adopt and enforce legislation that sets the minimum age of marriage at 18 for both boys and girls” and adopt “effective prevention and redress measures to address those [children that are] at risk and those already affected by child marriage.”³²⁷ This principle, however, must never be “interpreted or used as a justification to permit child marriage in any circumstance.”³²⁸ Hence, poor parents, for example, must not be allowed to justify forcing their child into early marriage by arguing that they are doing so to save her from pervasive poverty or to restore the child’s or family’s honor.

Both the Maputo Protocol³²⁹ and the African Children’s Charter³³⁰ provide the African child with “the right to freedom from

323. *Id.* at 5 (para. 7). The Joint General Comment notes that the African Commission “supports the application of these four principles in formulating the guidance in [the] Joint General Comment.” *See Id.* at 5–6 (para. 7).

324. African Children’s Charter, *supra* note 315, art. 4(1).

325. Joint General Comment, *supra* note 313, at 6 (para. 8)

326. *Id.* at 6 (para. 7).

327. *Id.* at 6 (para. 9).

328. *Id.* at 6–7 (para. 10).

329. Maputo Protocol, *supra* note 314, art. 2.

330. African Children’s Charter, *supra* note 315 art. 3.

discrimination based on sex or gender.”³³¹ The Joint General Comment defines sex- and gender-based discrimination as “any distinction, exclusion or restriction or any differential treatment which is based on sex or gender and which has the objective or effect of compromising or destroying the recognition, enjoyment or exercise of a human right or a fundamental freedom.”³³² Child marriage, the ACERWC and the African Commission have noted, “is a manifestation of gender inequality and constitutes discrimination based on sex and gender.”³³³ The practice of child marriage in Africa and other parts of the world, imposes an “overwhelmingly disproportionate risk and impact . . . on girls and women” and deprives them of their ability to enjoy their “human rights and fundamental freedoms.”³³⁴

Article 5(2) of the African Children’s Charter and the preamble to the Maputo Protocol deal with the child’s right to survival, development and protection.³³⁵ The Maputo Protocol notes that “any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated.”³³⁶ According to the Joint General Comment, “[c]hild marriage poses a considerable threat to the survival and development of women and children, especially girls, children with disabilities, migrant children, children who are refugees and children in child headed households.”³³⁷ Research has determined that child marriage is associated with outcomes that are harmful to child, particularly girls. These include, but are not limited to, “frequent pregnancy, which in turn is associated with significantly higher rates of maternal morbidity, maternal mortality and infant mortality,” as well as, the contraction of various post-pregnancy ailments, including obstetric fistulas; failure to

331. Joint General Comment, *supra* note 313, at 7 (para. 11).

332. *Id.*

333. *Id.*

334. *Id.*

335. According to Article 5(2) of the African Children’s Charter, “States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.” African Children’s Charter, *supra* note 315, art. 5(2).

336. Maputo Protocol, *supra* note 314, at prmb1.

337. Joint General Comment, *supra* note 313, at 8 (para. 12).

complete school and develop the skills that these girls need to participate gainfully in economic, social and political activities; increased levels of domestic violence, including sexual abuse; and a general deterioration in the overall health of the child forced into early marriage.

The African Children's Charter guarantees the child's right to communicate and express her views and opinions.³³⁸ According to Article 7 of the African Children's Charter, "[e]very child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws."³³⁹ Child marriage offends the provisions of Articles 4(2) and (7). Even where national laws (statutory, customary and religious) "regard the consent of legal guardians" as "determinative," child marriage under these conditions still offends the provisions of Articles 4(2) and (7). In addition, in those situations where men "convicted of rape are given the option to marry the victim in order to avoid criminal sanctions," the child's rights are violated and hence, such marriage offends the provisions of Articles 4(2) and (7). Finally, "in circumstances where a child is not permitted to refuse or leave a union or marriage, his or her rights to participation, freedom of expression and freedom of movement (Article 9 of the African Children's Charter) are rendered nugatory."³⁴⁰

Although every child must be allowed to express their views and opinions as guaranteed by Article 7 of the African Children's Charter, the Joint General Comment makes clear that "the best interests of the child require that no exceptions to the minimum marriageable age of 18 can be tolerated."³⁴¹ The right of a child to freely express his or her views and opinions must not be used to justify child marriage.

The ACERWC and the African Commission note that any interpretation of the provisions of the African Children's Charter "must be one that is consistent with the overall objectives and purposes of the instruments and must prefer an interpretation that results in maximal

338. African Children's Charter, *supra* note 315, art. 4(2).

339. *Id.* art. 7.

340. Joint General Comment, *supra* note 313, at 9 (para. 13).

341. *Id.* at 9–10 (para. 14).

realization and enjoyment of the totality of rights.”³⁴² The Joint General Comment that notes further that “[t]he prohibition against child marriage in Article 6 of the Maputo Protocol and Article 21(2) of the African Children’s Charter is interdependent and interlinked with a number of other rights recognized under the two instruments.”³⁴³

Practices, whether justified by customary, statutory or religious laws, that are harmful to children, infringe on their human rights. These practices, according to the ACERWC and the African Commission, must be condemned and prohibited by States Parties. In the African countries, practices that are harmful to children include, but are not limited to, female genital mutilation (“FGM”), virginity testing, breast ironing, witchcraft, forced servitude in fetish shrines, acid attacks, blood-letting, corporal punishment, cosmetic mutilation, dowry and bride price, initiation rites, child sex tourism, and *child marriage*.³⁴⁴ States Parties, argue the ACERWC and the African Commission, must take measures to condemn and prohibit child marriage.

C. ACERWC & ACHPR Recommendations on Ending Child Marriage in Africa

The *first set of recommendations* made by the ACERWC and the African Commission deal with *legislative measures*. Legislative measure number one requires that States Parties “[e]nsure that the betrothal and marriage of boys and girls under the age of 18 [should be] prohibited without exception.”³⁴⁵

The Maputo Protocol (Article 6(b)) and the African Children’s Charter (Article 21(2)) impose binding obligations on States Parties requiring them to take appropriate legislative measures to (1) condemn and prohibit child marriage; (2) specify that the minimum marriage age shall be 18 years; (3) “enact, amend, repeal or supplement legislation as appropriate to ensure that the betrothal and marriage of children

342. *Id.* at 10 (para. 15).

343. Joint General Comment, *supra* note 313, at 10 (para. 15).

344. See, e.g., John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 287, 398–411.

345. Joint General Comment, *supra* note 313, at 13.

under the age of 18 years is prohibited.”³⁴⁶ The prohibition against child marriage, states the ACERWC and the African Commission, should be “without exception and should apply to all forms of marriage.”³⁴⁷ In addition, practices of abduction and kidnapping of girls for the purposes of marriage must be prohibited. Such practices are common in countries, such as South Africa (*ukuthwala*); among the Sotho people of Bostwana, Eswatini, Lesotho and South Africa (*tshobediso*); Eswatini (*unwendisa*); and Ethiopia (*telefa*).³⁴⁸

The ACERWC and the African Commission note that “[l]egislative measures that prohibit child marriage must take precedence over customary, religious, traditional or sub-national laws and States Parties with plural legal systems must take care to ensure that prohibition is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage.”³⁴⁹

The second legislative measure is one that is designed to “[e]nsure personal, full and free consent to marry.”³⁵⁰ Specifically, the ACERWC and the African Commission recommend that “[l]egislation must require that both parties to a marriage give full and free consent” and that “[p]ersons below the age of 18 are not able to give full and free consent to a marriage or similar union.”³⁵¹ In addition, “the personal, full and free consent of both parties to a marriage cannot be replaced by the consent of a parent, legal guardian or any other person.”³⁵²

The third legislative measure is for States Parties to “[u]ndertake constitutional reforms” and in doing so, consider entrenching “non-derogable clauses that entrench equality within marriage and specify a constitutional minimum age of 18 years for marriage.”³⁵³ The ACERWC and the African Commission then stated that there must not be “[l]imitations, exceptions and derogations from these clauses, whether

346. Joint General Comment, *supra* note 313, at 13 (para. 18).

347. *Id.* at 13 (para. 18).

348. *Id.* at 14 (fn. 18).

349. *Id.* at 14 (para. 19).

350. *Id.* at 14.

351. *Id.* at 14 (para. 21).

352. *Id.* at 15 (para. 22).

353. *Id.* at 15 (para. 24).

based on tradition, religion or any other ground.”³⁵⁴

The *second set of recommendations* were based on *institutional measures*. Implementing legislation to outlaw child marriage, setting the minimum age for marriage for boys and girls at 18 years, and creating an official registry for the registration of marriages and births, however, are a necessary but not sufficient condition for the effective elimination of child marriage in African countries. Sufficiency requires that States Parties make sure that the laws and policies designed to regulate marriage are fully and effectively enforced. With this in mind, the ACERWC and the African Commission made several suggestions about the type of institutional measures that can serve as “mechanisms which will help States Parties to identify and prevent child marriages, protect children from the risk of child marriage and reduce the impacts of child marriage, including for those already married.”³⁵⁵

The *first institutional measure* suggested by the ACERWC and the African Commission is for each State Party to implement verification measures, which include birth registration, age verification, and marriage registration. In order to enforce laws against child marriage, there must be a way to accurately determine a child’s age. Hence, the registration of all births is “an essential component of the effort to end child marriage, as birth certificates produced on marriage are the most effective means to ensure that children under the age of 18 do not enter into marriage.”³⁵⁶ In addition to making sure that the registration of births is “compulsory, accessible and free,” those individuals who preside over marriages must verify that “both parties to a marriage meet the minimum age requirement of 18 years of age and birth certificates should constitute the preferred means for verification.”³⁵⁷ Where official registration records are not available, the ACERWC and the African Commission instruct “[m]arriage officers” to “rely on community knowledge and interviews” and to substantiate that with “objective, documentary evidence” and to make certain that “verification procedures . . . [do not] rely solely on the statements of

354. *Id.*

355. *Id.* at 15 (para. 25).

356. *Id.* at 16 (para. 26).

357. *Id.* at 16 (para. 26).

parents or legal guardians.”³⁵⁸

As part of this institutional measure, States Parties are required to “make the registration of all marriages in an official registry compulsory.”³⁵⁹ In addition, every State Party should make sure that “[c]ompliance with this obligation requires the official registration of all forms of union, whether civil, customary or religious.”³⁶⁰ It is also important that “marriage registration systems are accessible and cost effective for the parties to a marriage.”³⁶¹

The *second institutional measure* is for States Parties to make sure that all laws against child marriage are fully enforced and appropriate sanctions imposed on those convicted of breaching these laws. Specifically, in order “to enforce the prohibitions against child marriage, penalties and sanctions should be imposed where marriages are performed without the necessary checks to ensure that the age and consent requirements are met.”³⁶² Nevertheless, penalties and sanctions should never be imposed on children who are involved in a child marriage—the child must be seen as a victim and treated as such.³⁶³ The overall objective of a penalty or sanction system in the context of child marriage should be to prevent and deter this practice and protect children from harm and exploitation.³⁶⁴

The *third institutional measure* involves designing and implementing an effective system for the retention of children in school. Making sure that children stay in school and complete their education is very critical to effective measures to prevent child marriage. Of particular importance is that care must be taken to make certain that girl-children have the opportunity to complete their education. In addition to encouraging and providing opportunities for pregnant girls to stay in school and complete their studies, States Parties “should pursue policies and plans designed to achieve equal access by girls and boys

358. *Id.* at 16 (para. 26).

359. *Id.* at 16–17 (para. 28).

360. *Id.* at 17 (para. 28).

361. *Id.*

362. *Id.* at 17 (para. 29).

363. *Id.*

364. *Id.* at 18 (para. 30).

to education.”³⁶⁵

At the very minimum, States Parties should make primary education free and compulsory and should also create educational environments within which girl-children can pursue their studies without harassment. The ACERWC and the African Commission note that States Parties must ensure that “sanitary facilities are available to girls at school” and that the exposure of girls to violence should be minimized.³⁶⁶ Proper sanitary facilities for girls must include their own separate bathrooms, which do not expose them to harassment by boys. A study by Marni Sommer, Christina Kwauk and Nora Fyles has determined that the lack of “gender sensitive sanitation . . . may hinder girls’ access to, experience in, and completion of school.”³⁶⁷ Specifically, Sommer, Kwauk and Fyles determined that “[g]ender sensitive sanitation—including clean, safe and separate toilets, with access to water and garbage disposal—is central to ensuring a gender equitable learning environment that addresses the needs of all students, including adolescent girls.”³⁶⁸ They also determined that in countries, such as Tanzania, Kenya, and Ethiopia, there is a general “lack of separate toilets as well as insufficient information and guidance about how to manage menstruation at school.”³⁶⁹ In fact, it was determined that “[l]ack of attention and access to quality menstrual hygiene management (MHM) in schools can negatively affect adolescent girls’ abilities to concentrate, stand up and respond to questions, write on the blackboard, and feel confident and comfortable attending school on days when they are menstruating.”³⁷⁰ Throughout many African countries, these “experiences are often exacerbated by a lack of emotional support; a lack of adequate menstrual materials (pads, cloth, underwear), including emergency menstrual-related supplies in schools; and a lack of private spaces to rest when

365. *Id.* at 18 (para. 31).

366. *Id.* at 19 (para. 32).

367. Marni Sommer, Christina Kwauk & Nora Fyles, *Gender Sensitive Sanitation: Opportunities for Girl’s Education*, MENSTRUAL HYGIENE MANAGEMENT NETWORK, Jan. 28, 2018, <https://womendeliver.org/2018/gender-sensitive-sanitation-opportunities-girls-education/> (last visited on January 1, 2020).

368. *Id.*

369. *Id.*

370. *Id.*

[girls] are experiencing significant menstrual cramping.”³⁷¹

As made clear in the Maputo Protocol and the African Children’s Charter, every girl-child “shall have the right to enjoy the best attainable state of physical, mental and spiritual health.”³⁷² The African Children’s Charter instructs States Parties to “undertake to pursue the full implementation of this right,”³⁷³ through, for example, the provision of “necessary medical assistance and health care to all children with emphasis on the development of primary health care” and “adequate nutrition and safe drinking water.”³⁷⁴ Part of a comprehensive health education program, particularly for girls, must include comprehensive information on sexual and reproductive health, with special emphasis on sexually transmitted infections (e.g., HIV/AIDS).³⁷⁵

The *fourth institutional measure* to enhance the protection of girls against child marriage is to ensure access to justice. The ACERWC and the African Commission note that “[s]ystematic inadequacies in the administration of justice, such as lack of infrastructure, resources, adequate laws, well-trained personnel and corruption violate States Parties[’] obligations to ensure access to justice and impacts on the obligation of States Parties to protect girls from child marriage.”³⁷⁶ First, each State Party must provide itself with a judiciary that is independent enough to serve as a check on the exercise of government power. An independent judiciary is very important to the fight against child marriage in particular and the recognition and protection of children’s rights in general. The independence of the judiciary is “a multifaceted concept” which, at the very minimum, “calls for all judicial officers to be granted ‘security of tenure,’ ‘financial security,’ and ‘institutional

371. *Id.*

372. African Children’s Charter, *supra* note 315, art. 14(1).

373. *Id.* art. 14(2).

374. *Id.* art. 14(2)(b, c).

375. Joint General Comment, *supra* note 313, at 20 (para. 36).

376. *Id.* at 23 (para. 39).

independence.”³⁷⁷ In *De Lange v. Smuts NO and Others*,³⁷⁸ the Constitutional Court of the Republic of South Africa held that “judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.”³⁷⁹

Judge Louraine C. Arkfeld, a former chair of the American Bar Association Judicial Division Rule of Law and International Courts Committee, has argued that there are five critical principles of judicial independence. The first is “[d]ecisional independence [which] allows fair and impartial judges to decide cases pursuant to the rule of law and the governing constitutions unaffected by personal interest or threats or pressure from any source.”³⁸⁰ The second principle of judicial independence is “[i]nstitutional independence [which] recognizes the judiciary as a separate and co-equal branch of government charged with administering justice pursuant to the rule of law and as a constitutional partner with the executive and legislative branches authorized to manage its own internal operations without undue interference from the other branches.”³⁸¹

The third principle is “[f]air and impartial courts [which] require competent judges who have been selected for their merit, who represent the diversity of their community, and who are provided with access to the law and continuing legal education provided by nonpolitical sources.”³⁸² The fourth principle is “[a]n independent judiciary [which] must have adequate resources including a budget that provides for adequate facilities and equipment, security, and just compensation for

377. John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 196–197 (2019). See also Constitution of the United States of America, art. III (showing, *inter alia*, that the framers and Founders of the American Republic considered these elements as very important and critical to the independence of the judiciary).

378. *De Lange v. Smuts NO and Others*, [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (May 28, 1998).

379. *De Lange v. Smuts*, *supra* note 378, para. 59.

380. Louraine C. Arkfeld, *The Rule of Law and an Independent Judiciary*, 46 JUDGES J. 12, 13 (2007).

381. Arkfeld, *supra* note 380, at 13.

382. *Id.*

Mbaku

judges.”³⁸³ Security is very important for judicial officers in the African countries—at a meeting of the Africa group of the International Association of Judges (“IAJ”) in Maputo (Mozambique) in May 2017, participants lamented the “politicization of the judiciary,” the importance of granting the judiciary “financial autonomy,” and the continuing deterioration in “the safety and security of judges.”³⁸⁴ Judges must be able to make their decisions without fear, either from state- or non-state actors.

The fifth principle for the independence of the judiciary is that “[t]here also must be a system of accountability for judges including a judicial code of ethics as well as a process for citizens to file complaints against judges for illegal or unethical conduct and an impartial disciplinary system that allows for a range of sanctions and removal of errant judges.”³⁸⁵

Pervasive corruption in the civil services generally and in the police and the judiciary in particular is a major constraint to the effective enforcement of the law and the administration of justice.³⁸⁶ As part of the effort to prevent child marriage, each State Party should “conduct awareness raising activities about laws on child marriage and how people can enforce them.”³⁸⁷ In addition, citizens should be encouraged to report suspected cases of child marriage to the appropriate authorities and where needed, government (including that at sub-national units) should provide free legal aid to vulnerable groups.³⁸⁸

In countries where harmful practices (e.g., child marriage, FGM) are pervasive, the government should consider establishing

383. Arkfeld, *supra* note 380, at 13.

384. Int’l Ass’n of Judges, *Promoting a culture of lawfulness through strengthening judicial integrity in Africa*, U.N. Office on Drugs and Crime, May 19, 2017, <https://www.unodc.org/dohadeclaration/en/news/2017/05/promoting-a-culture-of-lawfulness-through-strengthening-judicial-integrity-in-africa.html> (last visited on January 2, 2020).

385. Arkfeld, *supra* note 380, at 13.

386. See, e.g., JOHN MUKUM MBAKU, *CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS* (2010) (examining, *inter alia*, the pervasiveness of corruption in Africa’s civil services, including the judiciary).

387. Joint General Comment, *supra* note 313, at 22 (para. 39).

388. *Id.*

“specialized women’s and children’s police units” as well as specialized programs to train “prosecutors, magistrates and judges in gender and age sensitive approaches and interventions for supporting Civil Society Organizations, national human rights institutions and statutory bodies to ensure access to effective assistance in justice processes.”³⁸⁹

The *fifth institutional measure* for ensuring the protection of the girl-child against being forced into child marriage is the provision of redress and support for children who have already been forced into marriage. Specifically, the ACERWC and the African Commission suggest that States Parties should provide children who have already been affected by child marriage with the following: (1) “comprehensive social protection and health services;” (2) a full appraisal to each child affected by child marriage of his or her legal rights and options for redress; (3) full assistance to the child so that he or she can continue their education and training; (4) encouragement for the affected children to seek assistance and advice for the violation of any of their rights; and (5) support for all children born out of the child marriage.³⁹⁰

The *sixth institutional measure* is for each State Party to develop enough government capacity to deal fully and effectively with the issue of child marriage. Capacity building for the purpose of preventing child marriage should include “conducting workshops for relevant government officials, particularly officials dealing with marriage and birth registration, [so as] to raise awareness about the prohibition against child marriage, the legal rights of children and women and the right to be protected from child marriage.”³⁹¹ The capacity building program should also target other stakeholders, including, for example, “teachers, health providers, judicial officers, the police, religious, community and traditional leaders, national human rights institutions, bodies with a human rights mandate and Civil Society Organizations providing legal, health, psychosocial or other services to the victims of child marriage.”³⁹²

The *seventh institutional principle* for the protection of children against being forced into child marriage is for each State Party to “establish

389. *Id.* at 22 (para. 40).

390. *Id.* at 23 (para. 42).

391. *Id.* at 23 (para. 43).

392. *Id.* at 23–24 (para. 43).

credible and effective data collection mechanisms to determine which efforts need to be intensified to combat child marriage and in which areas.”³⁹³ Of critical importance is data on “school enrolment, school attendance, school completion and drop out,” as well as “the uptake of health and other social services.”³⁹⁴ All these data should be linked to the country’s civil registration and vital statistics system (CRVS)—the latter should include registration of births and marriages. All the data collected should be utilized in the reports that each State Party is required to send to the African Commission and the ACERWC.³⁹⁵

The *eighth institutional principle* concerns the need for each State Party to dedicate enough financial and other resources to the effort to abolish and end child marriage. Government agencies working to enforce laws against and stop child marriage must be fully financed and provided the skilled and well-trained human resources that they need to perform their jobs effectively. In addition, enough resources should be allocated for continuing education classes so that police and other law enforcement officials (e.g., judges and magistrates) can upgrade their skills and meet emerging challenges (e.g., the Internet) to the fight against the trafficking of children for child marriage.

Finally, each State Party must take institutional measures to address the root causes of child marriage. These include (1) addressing poverty, especially in the rural areas, which is considered a major cause of child marriage in many African communities; (2) prohibiting and condemning all customary, traditional and religious practices that perpetuate child marriage and negatively affect the child’s human rights; (3) exposing attitudes and beliefs that “perpetuate the subordination of women and girls” and which often contribute to the evolution of a culture that embraces child marriage; (4) the development and implementation of “national strategies and comprehensive action plans to combat child marriage—such plans should make allowance for the participation of not just government functionaries but also members of civil society, with specific emphasis on traditional, community and religious leaders; and (5) specifically targeting vulnerable children—those affected by unrest and armed conflict, children with disabilities,

393. *Id.* at 24 (para. 44).

394. *Id.*

395. *Id.*

children affected by homelessness (e.g., those orphaned by AIDS), children who are asylum seekers, refugees, migrants, returnees or internally-displaced.³⁹⁶

The African Charter on Human and Peoples' Rights, the Maputo Protocol, and the African Children's Charter all mandate that each State Party "submit periodic reports on the implementation of the rights and freedoms guaranteed under each convention."³⁹⁷ The African Commission and the ACERWC note that "the State reporting process is a constructive one and the [African] Commission and the [ACERWC] strongly encourage States Parties to use state reporting as an opportunity and platform to indicate progress and share best practices in the implementation and fulfilment of rights."³⁹⁸ With respect to child marriage, States Parties must report on compliance with Article 6(b) of the Maputo Protocol,³⁹⁹ which sets the minimum age for marriage at 18 years, and Article 21(2) of the African Children's Charter,⁴⁰⁰ which prohibits child marriage and the betrothal of girls and boys. In each report, the State Party should indicate the measures that they have initiated and implemented to realize the rights guaranteed by each convention (e.g., prohibition of child marriage, establishment of 18 years as the minimum age for marriage, etc.), as well as a full assessment of the extent to which the State has failed or succeeded in realizing these rights.

396. *Id.* at 29–30 (paras. 53–58).

397. *Id.* at 34 (para. 64).

398. *Id.*

399. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, OAU Doc. CAB/LEG/66.6 (Sept. 13, 2000), <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (last visited on January 2, 2020).

400. *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990), <https://au.int/en/treaties/african-charter-rights-and-welfare-child> (last visited on January 2, 2020), art. 21(2).

IV. INTERNATIONAL LAW AND THE ADJUDICATION OF CHILDREN'S RIGHTS IN AFRICA

A. Introduction

Children's rights, particularly those guaranteed by international human rights instruments, are considered the purview of international law. For example, Weissbrodt and de la Vega note that "[h]uman rights are a domain of international law, so it is necessary to have a basic understanding of international law and its relationship to national and local laws which may apply in a particular case."⁴⁰¹ Earlier in this article, we examined some of the most important international human rights instruments that deal with child marriage. Unfortunately, the international community does not have a "global government" that can enact laws against child marriage and make sure that they are enforced. Since human rights law is part of international law, legal scholars have argued that "[t]he most effective mechanism for enforcing international law [including international human rights law] is for each ratifying government to incorporate its treaties and customary obligations into national laws"⁴⁰² and hence, create rights that are justiciable in domestic courts. Once that is accomplished, the country can then make certain that the laws are fully enforced and one way to accomplish that is to make sure that the legal and judicial system has the necessary independence and capacity to perform its functions.

For example, the Constitution of the Republic of Kenya, 2010, states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."⁴⁰³ The same constitution also states that "[t]he general rules of international law shall form part of the law of Kenya."⁴⁰⁴ The Constitution of the People's Republic of Benin, 1990, states that "[t]reaties or agreements lawfully ratified shall

401. DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION 4 (2007).

402. *Id.* at 4.

403. Constitution of the Republic of Kenya, 2010, art. 2(6).

404. *Id.* art. 2(5).

have, upon publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party.”⁴⁰⁵

How the provisions of an international treaty that has been signed and ratified by an African country are treated by the country’s national courts is dependent on “how effect is given to international instruments in the particular country.”⁴⁰⁶ How international law affects or impacts domestic constitutional, statutory and customary law is dependent “on how effect is given to international instruments in the particular country.”⁴⁰⁷ There are two well-established approaches to determining how effect is given to the provisions of international law instruments. These are the “dualist”⁴⁰⁸ approach and the “monist”⁴⁰⁹ approach.

In countries in which monism prevails, international law and domestic law “comprise one single legal order within the nation’s legal system.”⁴¹⁰ However, within the domestic legal system in a country which follows the monist approach, international law is superior to national or domestic law—international law supersedes any inconsistent state or domestic law. Thus, in an African country which follows the monist approach to international law, the provisions of international human

405. Constitution of the People’s Republic of Benin, 1990, art. 147.

406. Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 447 (2012).

407. Fombad, *supra* note 406, at 447.

408. The monist approach to the treatment of international law in domestic or municipal courts is prevalent in those countries that follow “the civil law tradition derived from Roman law and include such nations as: Austria, Belgium, Luxembourg, France, and Germany,” as well the former colonies of France and Portugal in Africa. *See, e.g.*, WEISSBRODT & DE LA VEGA, *supra* note 401, at 4. *See also* Graham Hudson, *Neither Here nor There: The (Non-) Impact of International Law on Judicial Reasoning in Canada and South Africa*, 21 CANADIAN J. L. & JURISPRUDENCE 321 (2008) (examining, inter alia, the monist and dualist approaches to the reception of international and foreign law in domestic courts).

409. The dualist approach can be found in countries whose legal systems are based on the Common Law of England and Wales and these include England and Wales, Australia, Canada, India, New Zealand, and several former British colonies in Africa. *See, e.g.*, Fombad, *supra* note 406, at 447.

410. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT’L L. 43, 69 (2018).

rights instruments, override any inconsistent constitutional, statutory and customary law.⁴¹¹ The assumption here, of course, is that the African country with the monist legal system has signed and ratified the international human rights instrument in question.

Given the fact that in countries that follow the monist approach, “international law and municipal law comprise a single legal order within a national legal system, with international law superior to national law,”⁴¹² domestic courts are required to “give effect to principles of international law over superseding or conflicting rules of domestic law.”⁴¹³ In countries whose approach to international law is governed by the dualist approach, international law and municipal law comprise two separate and independent legal orders. David Weissbrodt and Connie de la Vega, both experts in international human rights law, note that although dualist nations “ordinarily consider international law as binding between governments, it may not be asserted by individual residents of the country in national courts unless the legislature or other branch of government makes it national law or regulation.”⁴¹⁴ International law, it is argued, “prevails in regulating the relations between sovereign States in the international system, whereas municipal law takes precedence in governing national legal systems.”⁴¹⁵

In order for the national legal system of a dualist country to give effect to international law, the “national legislatures must incorporate international law into domestic law, thereby creating justiciable rights suitable for enforcement by domestic courts.”⁴¹⁶ International law experts have distinguished between “the types and sources of international law” when they make reference to “international law’s binding status in domestic legal systems.”⁴¹⁷ For example, international norms that have “attained the status of international customary law” are considered

411. See, e.g., *id.* at 69.

412. Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law, Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT’L L. 103, 108–109 (2002).

413. *Id.* at 109.

414. WEISSBRODT & DE LA VEGA, *supra* note 401, at 5.

415. Adjami, *supra* note 412, at 109.

416. *Id.* at 109.

417. *Id.*

“part of municipal law under both the monist and dualist theories, and therefore prevail over national law even in domestic courts.”⁴¹⁸

Some international legal scholars have argued that the “division between monism and dualism encompasses numerous possibilities in theory and in practice.”⁴¹⁹ First, it is argued, “monists and dualists may accept the concept that some international law (peremptory norms/ *jus cogens*) is automatically binding, irrespective of a state’s consent or domestic legal order—creating a sub-category of monist norms even for dualist systems.”⁴²⁰ The second possibility is that “domestic systems may consider themselves monist for one source of international law (e.g., custom) and dualist for another (treaty law).”⁴²¹ A third possibility is that “a court in a dualist state might give direct effect to international law during litigation involving transnational issues, using choice of law principles, because the relevant other legal system is a monist state.”⁴²² Finally, “states taking a dualist approach to treaty incorporation may nonetheless automatically apply adjustments or decisions of treaty bodies that further define the obligations set out in the treaty, as if they were monist.”⁴²³

However, unless a dualist State has duly domesticated international law, through, for example, national legislation, and created rights that are justiciable in municipal courts, any violations of international law, including international human rights law, can only “be asserted at the international level.”⁴²⁴ The protection of human rights in Africa, hence, requires that each African country, particularly those that follow the dualist theory, pass legislation to internationalize their national constitutions and create rights that are justiciable in municipal courts.

The effect of international law, including international human

418. *Id.*

419. See DINAH SHELTON, *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION* 2 (2011).

420. *Id.* at 2.

421. *Id.* at 2.

422. *Id.* at 2.

423. *Id.* at 2. See also Jonathan Turley, *Dualistic Values in the Age of International Jurisprudence*, 44 HASTINGS L. J. 185 (1993) (making a distinction between monist and dualist approaches to international law).

424. WEISSBRODT & DE LA VEGA, *supra* note 401, at 5.

rights law, on a national legal system also depends on the “properties of international instrumental themselves.”⁴²⁵ The Universal Declaration of Human Rights, for example, is generally considered “a hortatory declaration of principles and aspirations” and as a consequence, it “does not have the legal status of a treaty.”⁴²⁶ On the other hand, the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) are international treaties, and hence, are binding on all States Parties.⁴²⁷

In Africa, the African (Banjul) Charter on Human and Peoples’ Rights (“ACHPR” or “Banjul Charter”) is binding on all States Parties. According to Article 1 of the ACHPR, “parties to the present Charter [i.e., the ACHPR or Banjul Charter] shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”⁴²⁸ If a State Party fails to adopt necessary legislation to give effect to the provisions of the Banjul Charter, this is considered a breach of the Charter. According to Article 62 of the Charter, “[e]ach [State Party] shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed

425. Adjami, *supra* note 412, at 110.

426. *Id.* at 110.

427. The binding effect of international treaties can be traced to or stems from the principle in international law generally referred to as *pacta sunt servanda*. This principle is codified in Article 26 of the Vienna Convention on the Law of Treaties. According to Article 26, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” See *Vienna Convention on the Law of Treaties (with annex)*, concluded at Vienna on May 23, 1969, art. 26, 1155 U.N.T.S. 331 (1969).

428. African (Banjul) Charter on Human and Peoples’ Rights, adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, I.L.M. 58 (1982), entered into force on October 21, 1986, art. 1. As of this writing, 54 countries have ratified the African Charter. The latest African country to ratify the treaty was South Sudan, which ratified the treaty on October 23, 2013. See African Commission on Human and Peoples’ Rights, Ratification Table: African Charter on Human and Peoples’ Rights, <https://www.achpr.org/ratificationtable?id=49> (January 29, 20120).

by the present Charter.”⁴²⁹ Scholars of international law have argued that “[t]he combined effect of articles 1 and 62 suggests that in light of resistance to the signing and ratification of the International Covenants, the drafters of the African Charter paid particular attention to ensuring the binding force of the Charter in national legal systems.”⁴³⁰

The African Commission on Human and Peoples’ Rights (“African Commission”) is the continent’s “primary human rights body”⁴³¹ and its “primary mandate” is to “enhance the promotion and protection of human rights in [the continent] and to ensure that member states comply with their obligations undertaken under the Charter.”⁴³² The legal basis for each of the African Commission’s missions to promote and enhance the protection of human rights in the continent is Article 46 of the African Charter, which states as follows: “The [African] Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.”⁴³³

According to the Center for Human Rights at the University of Pretoria, the African Commission’s “progressive interpretation of the Charter” has allowed it to provide “guidance to states about the content of their obligations under the Charter” and the Charter’s “provisions have inspired domestic legislation.”⁴³⁴ The constitutions of some African countries have made the provisions of the African Charter an integral part of national law. For example, the Constitution of the Republic of Benin states as follows:

WE, THE BÉNINESE PEOPLE, [r]eaffirm our attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and

429. Banjul Charter, *supra* note 428, art. 62.

430. Adjami, *supra* note 412, at 111.

431. CTR FOR HUM. RTS, UNIVERSITY OF PRETORIA, A GUIDE TO THE AFRICAN HUMAN RIGHTS SYSTEM: CELEBRATING 30 YEARS SINCE THE ENTRY INTO FORCE OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS, 1986–2016, 8 (2016).

432. *Id.* at 34.

433. Banjul Charter, *supra* note 428, art. 46.

434. CTR FOR HUM. RTS, *supra* note 431, at 8–9.

the Universal Declaration of Human Rights of 1948, by the *African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law.*⁴³⁵

The fact that the Constitution of the Republic of Benin makes the provisions of the African Charter an integral part of Beninese law effectively creates rights that are justiciable in the country's domestic courts. On the other hand, the Federal Republic of Nigeria, which is a dualist country, has enacted legislation to explicitly render provisions of the African Charter an integral part of the country's law.⁴³⁶ The introduction to Nigeria's ratification act states as follows: "An Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and Peoples' Rights made in Banjul on the 19th day of January, 1981 and for purposes connected therewith."⁴³⁷ According to Article 1 of the enabling act, "[a]s from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."⁴³⁸

A regional human rights instrument that is very important for the promotion and protection of human rights in Africa is the *African Charter on the Rights and Welfare of the Child* ("African Children's Charter"). As an international treaty, the African Children's Charter is also binding on States Parties. According to Article 1, States Parties "shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present

435. *Constitution of the Republic of Benin, 1990*, at pmbl (emphasis added).

436. See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9 (Chapter 10 LFN 1990) (No. 2 of 1983): Laws of Nigeria 1990, <http://www.nigeria-law.org/African%20Charter%20on%20Human%20and%20Peoples'%20Rights.htm> (January 29, 2020).

437. *Ratification and Enforcement*, *supra* note 436.

438. *Id.* art. 1.

Charter, to adopt legislative or other measures as may be necessary to give effect to the provisions of this Charter.”⁴³⁹ African Children’s Charter also deals with customary and traditional practices that harm children and states that “[a]ny 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.”⁴⁴⁰

The African Children’s Charter was “inspired by several regional concerns germane to the continent of Africa and which were not covered by the [African Charter on Human and Peoples’ Rights of 1981].”⁴⁴¹ The drafters of the African Children’s Charter were particularly interested in “issues around child trafficking, use of child soldiers in armed conflicts, harmful cultural and traditional practices as well as several other [localized] anti-human rights practices within the domain of many African countries.”⁴⁴² At the time, it was argued that these issues had not been “articulated by the African Charter [on Human and Peoples’ Rights] and existing international and regional bill of rights” and this “highlighted the need for a context-driven and context-specific norm for the promotion and protection of the rights and welfare of the African Child.”⁴⁴³ The African Children’s Rights Charter also established “the African Committee of Experts on the Rights and Welfare of the Child . . . within the OAU to promote and protect the rights stipulated in the African Children’s Charter.”⁴⁴⁴

Every African country can, “through its constitution, put to rest any doubts as to whether international law, including customary international law, is law within its national jurisdiction.”⁴⁴⁵ For example, the Constitution of the Republic of South Africa directly addresses the applicability of both international law and customary international

439. *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), art. 1.

440. African Children’s Charter, *supra* note 439, art. 3.

441. CTR FOR HUM. RTS, *supra* note 431, at 51.

442. *Id.* at 51.

443. *Id.* at 51.

444. *Id.* at 51.

445. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT’L L. 43, 72 (2018).

law in the country's domestic courts.⁴⁴⁶ Article 233 addresses the applicability of international law in South African courts. It states as follows: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."⁴⁴⁷

During the construction of South Africa's post-apartheid constitution, the various peoples of South Africa "voluntarily opted to allow international law to infringe on their sovereign right to determine the content of their constitutional law in an effort to enhance and improve the protection of human and peoples' rights, as well as, create, within the country, a culture that respects and protects human rights."⁴⁴⁸ South Africa's emerging human rights jurisprudence, notably its effective use of international law, has been lauded by many scholars and advocates for the protection of human rights.⁴⁴⁹ Provisions in South Africa's post-apartheid constitution have significantly enhanced the ability of the country's courts, particularly its Constitutional Court, to develop a rich "body of human rights jurisprudence that has gained international prominence."⁴⁵⁰ However, many other African countries are not yet able to provide themselves with "such explicit approval of the use of international sources for domestic jurisprudence."⁴⁵¹

Nevertheless, there are countries in Africa that have successfully overcome the constraints that "nonincorporation would normally impose through their use of international human rights instruments as persuasive authority in national court decisions."⁴⁵² Consider, for example, Ghana, which has not provided through its constitution "explicit approval of the use of international sources for domestic

446. This is South Africa's post-apartheid constitution: *Constitution of the Republic of South Africa (Act No. 108 of 1996)*.

447. Const. Rep. S. Africa, art. 233.

448. Mbaku, *supra* note 445, at 72.

449. See, e.g., Richard Cameron Blake, *The World's Law in One Country: The South African Constitutional Court's Use of Public International Law*, 115 S. AFR. L. J. 668 (1999).

450. Adjami, *supra* note 412, at 112.

451. *Id.*

452. *Id.*

jurisprudence.”⁴⁵³ The country’s courts, however, have been able to overcome the constraints brought about by nonincorporation by adopting a concept referred to as “transjudicialism.”⁴⁵⁴ The concept of transjudicialism or transjudicial communication was pioneered by Anne-Marie Slaughter and deals with the use of international law and comparative case law in municipal courts, regardless of whether these sources of law are binding or nonbinding on the country’s courts.⁴⁵⁵

As argued by Slaughter, “[c]ourts are talking to one another all over the world” as they increasingly “cite one another’s decisions.”⁴⁵⁶ Slaughter notes that in addition to “strengthening international regimes, such as human rights treaties, and the tribunals established to monitor and enforce them,” transjudicial communication also helps disseminate “ideals from one national legal system to another, from one regional legal system to another, or from the international legal system or particular regional legal system to national legal systems.”⁴⁵⁷ This “cross-fertilization,” argues Slaughter, can “provide inspiration for the solution of a particular legal problem, such as the appropriate balance between individual freedom of expression and the needs of the community,” or “more broadly,” can “foster the development of fledgling national legal systems through the reception of entire bodies of foreign law.”⁴⁵⁸ Cross-fertilization, argues Slaughter, can take place even when “[n]either the speaking nor the listening court is bound by a treaty structure or any other direct and formal links.”⁴⁵⁹ Transjudicialism, it is argued, is likely to “lead national and supranational courts to increasingly conceive of themselves as members of a larger judicial community, one that transcends national boundaries and that encompasses a commitment

453. *Id.* at 112.

454. Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 557 (2002).

455. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994)

456. Slaughter, *supra* note 455, at 100.

457. *Id.* at 117.

458. *Id.*

459. Slaughter, *supra* note 455, at 118.

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to human rights.”⁴⁶⁰

Below, we examine selected cases from the *United Republic of Tanzania* and the *Republic of Zimbabwe* to determine the extent to which these African countries have utilized international and comparative case law sources as tools to interpret national constitutional law and legislative enactments. Emphasis is placed on laws (constitutional, customary and legislative) dealing with child marriage.

B. Rebeca Z. Gyumi v. Attorney General (High Court of the United Republic of Tanzania)⁴⁶¹

In *Gyumi v. Attorney General*, the petitioner, Rebeca Z. Gyumi, “filed an application under the provisions of Article[s] 26(1)2⁴⁶² and 30(3)⁴⁶³ of the Constitution of the United Republic of Tanzania, . . . , Sections 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap 3 R. E. 2002 and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules 20143.”⁴⁶⁴ Specifically, the petitioner challenged the “constitutionality of the provisions of section[s] 13 and 17 of the Law

460. Bahdi, *supra* note 454, at 558.

461. This case is officially referred to as *Miscellaneous Civil Cause No. 5 of 2016 in the Matter of the Constitution of the United Republic of Tanzania 1977—as amended from Time to Time [CAP. 2 R.E. 2002] and In The Matter of Basic Rights and Duties Enforcement Act [CAP 3 R.E. 2002] and In The Matter of a Petition to Challenge Constitutionality of Section 13 and 17 of the Law of Marriage Act (CAP 29 R.E. 2002) Between Rebeca Z. Gyumi (Applicant) v. The Attorney General (Respondent) (March 3, 2016)*. For the purpose of this article, the case will be referred to simply as *Gyumi v. Attorney General (Tanzania Civil Cause No. 5 of 2016, Decided July 8, 2016)*.

462. Article 26(1)(2) state as follows: “(1) Every person has the duty to observe and to abide by this Constitution and the laws of the United Republic” and “(2) Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land.” See *Constitution of the United Republic of Tanzania, 1977* (as amended) (Cap. 2), art. 26(1) & 26 (2).

463. Article 30(3) states as follows: “(3) Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.” Const. of U. Rep. Tanz., *supra* note 462, art. 30(3).

464. *Gyumi v. Attorney General*, *supra* note 461, at 2.

of Marriage Act, Cap R.E. 2002.⁴⁶⁵

Specifically, the applicant was seeking a declaration that:

(a) The provisions of section[s] 13 and 17 of The Law of Marriage Act (Cap 29 R.E. 2002), are unconstitutional for offending the provisions of Article[s] 12, 13 and 18 of the Constitution of the United Republic of Tanzania of 1977 as amended.

(b) That the provisions of section[s] 13 and 17 of The Law of Marriage Act (Cap 29 R.E. 2002), be declared null and void, and expunged from statute and 18 years age should remain for both

465. Section 13 of the Law of Marriage Act, Cap R.E. 2002, which defines the minimum age for marriage, states as follows: “(1) No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years. (2) Notwithstanding the provisions of subsection (1), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) if– (a) each party has attained the age of fourteen years; and (b) the court is satisfied that there are special circumstances which make the proposed marriage desirable. (3) A person who has not attained the apparent age of eighteen years or fifteen years, as the case may be, and in respect of whom the leave of the court has not been obtained under subsection (2), shall be said to be below the minimum age for marriage.” *See Law of Marriage Act, Cap R.E. 2002*, art. 13. Article 17 provides the requirement for consent and states as follows: “(1) A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent– (a) of her father; or (b) if her father is dead, of her mother; or (c) if both her father and mother are dead, of the person who is her guardian, but in any other case, or if all those persons are dead, shall no require consent. (2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or that it is impracticable to obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent is required by subsection (1). (3) Where a marriage is contracted in Islamic form or in accordance with the rites of any specified religion or in accordance with the customary law rites, it shall be lawful for the kadhi, minister of religion or the registrar, as the case may be, to refuse to perform the ceremony if any requirement of the relevant religion or person other than a person mentioned in subsection (1) has not been complied with: Provided that nothing in this subsection shall be construed as empowering the kadhi, minister of religion or registrar to dispense with any requirement of subsection (1).” *See Law of Marriage Act, Cap R.E. 2002*, art. 17.

until the government amend the law.⁴⁶⁶

The petitioner, Rebeca Z. Gyumi, argued that the two prayers noted above are “rooted on four main grounds”:⁴⁶⁷

a. The provisions of sections 13 and 17 of The Law of Marriage Act (Cap 29 R.E. 2002) which provide for different age of marriage between boys and girls, and the requirement of parental consent contravening the right to equality, as provided for under the Constitution of the United Republic of Tanzania of 1977 as amended.

b. The provisions of sections 13(1)(2) which allow female person to get married at the age of fourteen years and while the male should get married at the age of 18 years and above is discriminatory provision thus contravening the right against discrimination as provided for under the constitution of the United Republic of Tanzania of 1977 as amended.

c. The provisions of section 17 of The Law of Marriage Act (Cap 29 R.E. 2002) which allow child of 15 years of age to get married by the consent of the father, mother, guardian or court show that all human beings are not equal and someone can decide on behalf of another thus contravening the right against equality and dignity of a person, and right against discrimination as provided for under the [Constitution of] the United Republic of Tanzania of 1977 as amended.

d. The provisions of section 13(2) of The Law of Marriage Act (Cap 29 R.E. 2002) which require leave of the court for the marriage of the person at the age of 14 years but the provision is too vague and can be arbitrary (sic) interpreted and denial (sic) children right to education which is a cornerstone of the freedom of expression as provided for under the [Constitution of] the United Republic of Tanzania of 1977 as amended.⁴⁶⁸

Writing for the High Court of Tanzania sitting at Dar es Salaam, Munisi J noted that the Court was “satisfied the intended litigation

466. *Gyumi v. Attorney General*, *supra* note 461, at 2.

467. *Id.* at 2–3.

468. *Id.*, at 2–4.

is on behalf of children, a category of people which is vulnerable in society” and that “the acts complained about are likely to impact more on children from poor and socially disadvantaged families.”⁴⁶⁹ In addition, argued Munisi J, “the reliefs sought . . . constitute reasonable and effective means for the enforcement of the fundamental rights of the girl children subjected to early marriage.”⁴⁷⁰

In reply to the petition, the Respondent, the Attorney General of the United Republic of Tanzania, argued strongly that the impugned provisions did not infringe on the fundamental rights of Tanzania’s children.⁴⁷¹ In his submission to the Court, Mr. Jebra Kambole, counsel for the petitioner, argued “that despite the well spelt out intentions [of The Law of Marriage Act], the legislation has retained provisions which are incompatible with . . . [and which infringe] the basic constitutional guarantees enshrined in the Constitution [of the United Republic of Tanzania].”⁴⁷²

The learned judge then proceeded to address each of the four issues placed before the Court. The first issue that the Court tackled was “whether the requirement for parental/guardian/court consent for a girl below 18 years provided under section[s] 13 and 17 of [The Law of Marriage] Act before any intended marriage contravenes the right to equality set out in Article 12 of the constitution.”⁴⁷³ Counsel for the petitioner, Kambole, Adv. argued that the two impugned provisions of The Law of Marriage Act infringed the right to equality guaranteed by Article 12(1) of the Constitution⁴⁷⁴ because “they allow a girl of the age of 15 years to enter into marriage at an age when she cannot make decisions for herself.”⁴⁷⁵ Kambole, Adv. relied on several laws of the United Republic of Tanzania to argue that “without exception,” a

469. *Id.* at 4.

470. *Id.*

471. *Id.*

472. *Id.* at 5.

473. *Id.* at 5.

474. Article 12(1) of the Constitution of the United Republic of Tanzania, as amended, states as follows: “All human beings are born free, and are all equal.”

475. *Gyumi v. Attorney General*, *supra* note 461, at 5–6.

child is “a person under the age of 18 years old.”⁴⁷⁶ He then went on to wonder “how such Act would retain provisions that allow persons it had already defined as children to enter into marriage.”⁴⁷⁷

Kambole, Adv., argued further that “due to their age, children are vulnerable” and thus, “deserve protection from enormous commitments and undertakings reserved for adults’ and that child marriage would “attract complex health hazards which are incompatible with the best interest of a girl child.”⁴⁷⁸ Perhaps, more importantly, argued Kambole, Adv., “a person under the age of 18 years is a child, by simple logic, such person has no capacity to enter into a lawful marriage contract on account of want of competence which ironically has turned out to be the justification for the consent requirement.”⁴⁷⁹ Specifically, the learned counsel argued that the impugned provisions “are unconstitutional as they infringe Article 12 of the Constitution which guarantees the right to equality and dignity of human beings.”⁴⁸⁰

The two impugned provisions of The Law of Marriage Act, Kambole, Adv. argued, are discriminatory because they differentiate between boys and girls “with regard to the eligible age for marriage, in that while for boys the eligible age is 18 years, for girls the age is set between 14 and 15 years” and that “a law that treats people differently under similar circumstances has always been held to be discriminatory.”⁴⁸¹ The cure to this anomaly, argued Kambole, Adv., is for the United Republic of Tanzania to “do away with the requirement for consent and declare the eligible age for marry (sic) to be 18 years.”⁴⁸²

With respect to the remaining issues before the Court, the learned

476. *Gyumi v. Attorney General*, *supra* note 461, at 6. See, e.g., The Law of the Child Act, 2009 (United Republic of Tanzania). Section 4 defines a “child”: “A person below the age of eighteen years shall be known as a child.” The word “child” is also defined by The Law of Marriage Act (Tanzania), 1971, as amended by Act 23/73, Act 15/80 and Act 9/96. Section 2 (Interpretation) defines “infant” and “infant child” as “a child who has not attained the age of eighteen years.”

477. *Gyumi v. Attorney General*, *supra* note 461, at 6.

478. *Id.*

479. *Id.*

480. *Id.* at 7.

481. *Id.*

482. *Id.*

counsel “maintained that the right to protection against discrimination as guaranteed under the provisions of Article 13(2)(3)(4) and (5) of the Constitution are infringed by the application of section[s] 13(1) and 13(2).”⁴⁸³ Kambole, Adv. then “invited the court to look at some International and Regional instruments that [support] the fight against discrimination” and which “are all in accord with the constitutional intentions to preserve and uphold human dignity intended to eliminate discrimination.”⁴⁸⁴ He specifically cited to the *Universal Declaration of Human Rights*;⁴⁸⁵ the *International Covenant on Civil and Political Rights* (Article 26);⁴⁸⁶ the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW, Article 2);⁴⁸⁷ *Convention on the Rights of the Child* (Article 1(2));⁴⁸⁸ the *African Charter on the Right and Welfare of the Child* (Article 3);⁴⁸⁹ the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*

483. *Id.* at 8.

484. *Id.* at 8.

485. *Universal Declaration of Human Rights*, U.N. G.A. 217A (III).

486. *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (Dec. 16, 1966). Article 26 states as follows: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *See id.* at art. 26.

487. *Convention on the Elimination of All Forms of Discrimination Against Women*, 1249 U.N.T.S. 13 (Dec. 18, 1979). Article 2 states as follows: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”

488. *Convention on the Rights of the Child*, 1577 U.N.T.S. 3 (November 20, 1989). Article 2(1) states as follows: “2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”

489. *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9 (1990). Article 3 states as follows: “Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

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(Article 2).⁴⁹⁰

As argued by Kambole, Adv., “Tanzania is a signatory to almost all the referred [human rights] instruments” and “they all contain provisions that encourage Member States to adopt legislation that advocates for equality and total elimination of all forms of discrimination.”⁴⁹¹ The learned counsel then invited the Court to seek guidance from a case of the Constitutional Court of Zimbabwe, which was called upon to decide similar issues. In *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*, the petitioners complained that the girl-child’s fundamental rights were infringed by the Marriage Act and the Customary Marriages Act.⁴⁹² Kambole, Adv. prayed the High Court to declare sections 13 and 17 of The Law of Marriage Act “null and void” and expunge them “from the law books and thereafter declare 18 years as the age of competence and [eligibility]” for marriage for both boys and girls in Tanzania.⁴⁹³

In response, the Principal State Attorney (“PSA”), speaking on behalf of the Respondent (the Attorney General), stated that The Law of Marriage Act (“LMA”) “reflected the will of the people at that time as reflected in Lord Justice Spry’s report in respect of matters relating to customary, traditional and religious beliefs.”⁴⁹⁴ In addition, argued the PSA, the LMA “came up as a compromise legislation to address and accommodate the existing disparities in customary, traditional and religious values from divergent communities pertaining to marriage and related issues.”⁴⁹⁵ Relying on various statutes, the PSA “argued that the law allows each ethnic group to follow and make decisions based on its customary norms, traditions and religious values”⁴⁹⁶ and insisted

490. African Union, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, adopted on July 1, 2003 and entered into force on November 25, 2005.

491. *Gyumi v. Attorney General*, *supra* note 461, at 8.

492. *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*, Const. Application No. 79/14 (Judgment No. CCZ 12/2015).

493. *Gyumi v. Attorney General*, *supra* note 461, at 9.

494. *Id.*

495. *Id.* at 9–10.

496. *Id.* at 10.

that “the law provides for sufficient protection of obtaining court’s leave before the said marriages could be contracted.”⁴⁹⁷

In addition, argued the PSA, since subsection 3 of Article 13 “refers to ‘persons’ and not only the girl child, there is no discrimination because boys too could seek [the] court’s leave if they wish to marry at the age below 18 years as long as they are above 14 years and there are special circumstances necessitating the contracting [of] the intended marriage.”⁴⁹⁸ The PSA also “dismissed as baseless the complaint that the provisions of section 13(2) of [The Law of Marriage Act] are too vague and susceptible to being interpreted arbitrarily, thus [denying] the girls under the age of 18 years the right to education which the petitioner has referred to as a cornerstone to freedom of expression guaranteed under Article 18 of the Constitution.”⁴⁹⁹

Section 35(1) of the National Education Act (Cap 353 R.E. 2002), the PSA argued, imposes an obligation on parents to ensure “that children aged 7 years old are enrolled and attend school until the conclusion of the primary level” and that “it is not expected for a parent to give consent for a marriage to the child before such child completes his/her primary education, which by that time they might then be at the age of majority capable of making their own decisions.”⁵⁰⁰ With respect to the argument that “the provisions of section 13(2) [vest] uncontrolled discretion [in] the court in granting leave which powers might be arbitrarily interpreted,” the Respondent argued that “the apprehension is baseless because courts’ powers are defined by statutes thus implying that they will abuse powers without any fact to substantiate the allegation is unjustified.”⁵⁰¹

With respect to the international and regional human rights instruments cited by the petitioner’s counsel, the PSA conceded that while some of these international human rights instruments do “advocate the stances argued by the petitioner,” there are others that

497. *Id.* at 10.

498. *Id.* at 10–11.

499. *Id.* at 11.

500. *Id.*

501. *Id.* at 11.

“provide for exceptions” to the impugned provisions.⁵⁰² In support of the Attorney General’s position, the PSA cited to Article 8(2)(a) of the Southern African Development Community’s (SADC) Protocol on Gender and Development of 2008.⁵⁰³ The PSA relied on Article 13(5) of the Constitution and “argued that age is not one of the consideration set for assessing discrimination hence the contention by the petitioner that Article 13 has been infringed has no merit.”⁵⁰⁴

The PSA asked the Court to take note that The Law of Marriage Act was the subject of debate and that the Government of the United Republic had already instructed “the Law Reform Commission to look into the impugned provisions with a view [to] addressing the apparent and looming concerns.”⁵⁰⁵ She asked the Court to “afford the government time to finalize the work which it has started to rectify the anomalies complained about. She thus prayed for the petition to be dismissed in its entirety with costs.”⁵⁰⁶

In a rejoinder, the counsel for the petitioner, Kambole, Adv., restated his “earlier position that in interpreting the provisions of section[s] 13 and 17 of [The Law of Marriage] Act, what the court need to look at is mainly whether the right to equality, [the] right against discrimination, equality before the law and [the] right to education which are the cornerstones of freedom of expression are realized in the application of these provisions.”⁵⁰⁷ Kambole, Adv. noted further that “the constitutional guarantees continue to be infringed even today” and made reference to an article published in the March 20, 2016 issue of the *Nwananchi Newspaper*, which gave an account of the arrest of “a 70 year old man from Rukwa Region” after he had married a 14 year old girl.⁵⁰⁸

502. *Id.* at 13

503. SADC Protocol on Gender and Development, 2008, art. 8(2)(a): “Legislation on marriage shall ensure that: a. no person under the age of 18 shall marry unless otherwise specified by law which takes into account the best interests and welfare of the child.”

504. *Gyumi v. Attorney General*, *supra* note 461, at 14.

505. *Id.* at 14.

506. *Id.* at 14.

507. *Id.* at 15.

508. *Id.*

Munisi J, writing for the High Court, then proceeded to analyze the issues presented to the Court and “determine the merits of the petition.”⁵⁰⁹ The learned judge stated that “the main issue is *whether the provisions of section[s] 13 and 17 of [T]he [L]aw [M]arriage Act which require consent of parents or court for girls below 18 years before marriage, contravenes the rights to equality, right to expression and receipt of information as provided for under Article 12, 13, 18 and 21 of the Constitution of the United Republic of Tanzania as amended.*”⁵¹⁰

Munisi J began the analysis of the petition by taking a look at the word “apparent” in sections 13 and 17 of The Law of Marriage Act to determine whether it carried “any particular significance” vis-à-vis the noun “age.”⁵¹¹ The learned judge concluded that the Court was “satisfied that the use of the word ‘apparent’ in section[s] 13 and 17 of the Act is redundant and carries no significant meaning to detain us.”⁵¹² The learned judge then stated that after examining the impugned provisions, the Court determined that they give “differential treatment between girls and boys as far as the eligible age for marriage is concerned.”⁵¹³ In addition, the learned judge noted that the provisions also provide that a “court’s leave is required before persons under the age of 14 could enter into marriage.”⁵¹⁴

While under § 17 of The Law of Marriage Act, a girl child is allowed to marry at 15 years of age, she can only do so after she has obtained permission from a parent or guardian. Taking into consideration § 13(1) of the LMA,⁵¹⁵ the Court noted that “even the law itself had reservations on the capacity of the child to make [his or her] own

509. *Gyumi v. Attorney General*, *supra* note 461, at 15.

510. *Id.* at 15–16 (emphasis in original).

511. Article 13(1) states as follows: “No person shall marry who, being male, has not attained the *apparent age* of eighteen years or, being female, has not attained the *apparent age* of fifteen years.” *The Law of Marriage Act Cap 29 R.E. 2002*, art. 13(1) (emphasis added).

512. *Gyumi v. Attorney General*, *supra* note 461, at 17.

513. *Id.* at 17.

514. *Id.* at 17.

515. § 13(1) states that “[n]o person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years.” *The Law of Marriage Act*, §13(1).

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decision to enter into marriage be it girls or boys”⁵¹⁶ and agreed with the petitioner that “the provisions which give differential treatment to persons in a similar situation are discriminatory” and hence offend “the principle of equality contemplated under Article[s] 12(1) and 13(1) & 2 of the Constitution.”⁵¹⁷

Regarding whether the requirement in § 17 (1) of The Law of Marriage Act that a girl who “has not attained the apparent age of eighteen years” of age must obtain the consent of a parent or guardian before she can marry, adversely impacts the girl child, the Court concluded that “having found that a girl under 18 years is a child in all respects we are in agreement that it is undesirous to subject her to complex matrimonial and conjugal obligations.”⁵¹⁸ In addition, noted Munisi J, the Court also took note of “the serious health risks that the girl child is exposed to, once married at such a young age as per the reports attached to the petitioner’s written submission and the in-depth analysis carried out by their Lordships in *Loveness Mudzuru’s* case”⁵¹⁹ which analysis we wish to associate ourselves with.”⁵²⁰

In examining the petitioner’s argument that Tanzanian “girls under 18 years are not free” to “make their own decisions,” Munisi J noted that the Court was in agreement with “the petitioner that indeed the right to equality is negated where there is a differential treatment.”⁵²¹ The learned judge then cited to a regional human rights instrument, the *Maputo Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* [“Maputo Protocol”]⁵²² which states at Article 6 that “States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.”⁵²³ In

516. *Id.* at 18.

517. *Id.* at 19.

518. *Id.* at 19.

519. This is the Constitutional Court of Zimbabwe case: *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*, Judgment No. CCZ 12/2015, Constitutional Application No. 79/14.

520. *Gyumi v. Attorney General*, *supra* note 461, at 19 (emphasis in original).

521. *Id.* at 20.

522. African Union, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (Maputo Protocol), July 11, 2003.

523. Maputo Protocol, *supra* note 522, art. 6.

addition, noted Munisi J, Article 6 of the Maputo Protocol also imposes an obligation on States Parties to “enact appropriate national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties” and that “the minimum age of marriage for women shall be 18 years.”⁵²⁴

The Court agreed with the petitioner that since the United Republic of Tanzania had ratified the Maputo Protocol and was a State Party to this human rights instrument, it is “high time” that the United Republic of Tanzania take “the appropriate legislative measures to ensure that the rights guaranteed under Article 21(2) of the Constitution are realized by all.”⁵²⁵ Munisi J noted that the Court was not in agreement with the respondent—the Attorney General—that the Court was not the appropriate institution to resolve this matter and that it should be left to the legislative branch.⁵²⁶ The Principle State Attorney, speaking on behalf of the respondent, had argued that the impugned provisions “should be spared on account of values embedded in customary law and rules of Islamic law.”⁵²⁷

With respect to the applicability of Islamic law and the rules of customary law to marriage issues covered by The Law of Marriage Act, the Court cited to The Judicature and Application of Laws Act (Cap 358) which, at Article 11(4) states that “[n]otwithstanding the provisions of this Act, the rules of customary law and the rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act.”⁵²⁸ Munisi J then argued that “[w]ith such clear wording of the provision, it is our considered view that the argument that the two [impugned] provisions should be spared on account of values embedded in customary law and rules of Islamic law is invalid and cannot stand.”⁵²⁹ In reaching their decision, the Court “sought

524. Maputo Protocol, *supra* note 522, art. 6.

525. *Gyumi v. Attorney General*, *supra* note 461, at 20. Article 21(2) of the Constitution of the United Republic of Tanzania (Cap 2), states as follows: “Every citizen has the right and freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or nation.”

526. *Id.* at 20.

527. *Id.* at 21.

528. The Judicature and Application of Laws Act (Cap 358) (Tanz.), 1971., art. 11(4).

529. *Gyumi v. Attorney General*, *supra* note 461, at 21.

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inspiration from some of the international and '[r]egional [human rights] instruments which Tanzania has ratified, particularly the African Charter on the [Rights and] Welfare of the Child (1990) which Tanzania signed on 23/10/1992 and ratified on 16/3/2003.'⁵³⁰

Munisi J began the analysis by citing to Article 21 of the African Children's Charter, which protects children against harmful social and cultural practices and states as follows:

States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status. 2. 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.

Taking cognizance of the fact that the United Republic of Tanzania ratified the African Children's Charter thirteen years earlier, the Court stated that it was not persuaded by "the respondent's view that customary practices that have the effect of affecting children adversely will still intend well for those children."⁵³¹ Munisi J noted that the Court had "scrutinized closely the case of Loveness Mudzuru,"⁵³² which had been relied upon by the petitioner. In that case, argued Munisi J, the Constitutional Court of Zimbabwe had made use of several international and regional human rights instruments "advocating for children's rights vis-à-vis health risks portrayed by different reports emanating from researches carried out by some institutions."⁵³³

530. Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990) (hereinafter "African Children's Charter").

531. *Gyumi v. Attorney General*, *supra* note 461, at 22.

532. *Loveness Mudzuru and Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O. and Others*, Judgment No. CCZ 12/2015, Constitutional Application No. 79/14.

533. *Gyumi v. Attorney General*, *supra* note 461, at 22.

The learned judge noted that the honorable justices of the Constitutional Court of Zimbabwe had concluded in *Loveness Mudzuru* that “Zimbabwean provisions which have similar import to the ones impugned had horrific, social and health impacts to children and declare such provisions unconstitutional. We have been persuaded by their observation and we wish to associate ourselves with their conclusion that such provisions should be declared unconstitutional.”⁵³⁴ Munisi J then noted that the United Republic of Tanzania, had, in response to the worldwide effort to ensure the protection of the rights and welfare of the girl-child and the enhancing of her dignity and integrity, enacted several pieces of legislation, including Sexual Offenses Special Provisions Act (Act No. 4 of 1998) (“SOSPA”), “which amended the Penal Code and introduced a variety of sexual offenses with very hefty punishments.”⁵³⁵ Then, the Court noted that if all these provisions are implemented, the petitioner’s counsel would not have to worry about the abuse of the girl child in the United Republic.⁵³⁶

The Court noted that since the coming into effect of SOSPA, if a court granted leave for a girl under the age of 18 years to marry, such a decision would constitute “the newly created offense of statutory rape.”⁵³⁷ Munisi J then went on to argue that since the passage of SOSPA more than 15 years earlier, the Court did not expect to see “valid and competent applications” for leave to marry being filed in any court in the country.⁵³⁸ In addition, argued the learned judge, the courts of Tanzania do not expect “to find criminal cases under section 130(2) (e)” where the accused individual would be granted a defense that the victim was his wife.⁵³⁹ Munisi J also cited to another piece of legislation enacted by the Government of Tanzania and which “is very assertive

534. *Gyumi v. Attorney General*, *supra* note 461, at 22.

535. *Gyumi v. Attorney General*, *supra* note 461, at 23–24. *See also Sexual Offenses Special Provisions Act (Act No. 4 of 1998)*, July 1, 1998, available at <https://www.refworld.org/docid/3ae6b5098.html> (last visited on February 1, 2020) (hereinafter SOSPA).

536. *Gyumi v. Attorney General*, *supra* note 461, at 24.

537. *Id.* at 24.

538. *Id.* at 24.

539. *Gyumi v. Attorney General*, *supra* note 461, at 24. *See also SOSPA*, *supra* note 534.

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on the rights of the child”⁵⁴⁰ and then stated that “with such assertive positive legislative processes, the government [of the United Republic of Tanzania] positively concedes to the gist of the petitioner’s claims in the petition.”⁵⁴¹

After thoroughly examining the petition, the Court indicated that the question that needed to be answered was “whether the provisions of sections 13 and 17 of [The Law of Marriage] Act have any justification to remain in the law books”⁵⁴² and concluded as follows: “[I]t is our considered view and we entertain no flicker of doubt that the two provisions have lost their usefulness” and that “they deserve to be declared null and void.”⁵⁴³ Arguing that the Court has the power “to give directions for correcting the impugned provisions,” Munisi J declared that “[h]aving found as we have found herein above that the impugned provisions have lost their usefulness, we have no option but to find that the two provisions i.e. sections 13 and 17 of the Law of Marriage Act, Cap 29 R.E. 2002 are unconstitutional to the extent explained herein above.”⁵⁴⁴

Finally, the High Court, exercising the powers vested in it by Articles 30(5) and 13(2) of the Constitution [of the United Republic of Tanzania] and the Basic Rights and Duties Enforcement Act respectively,” directed “the Government through the Attorney General within a period of one (1) year from the date of this order to correct the complained anomalies within the provisions of section 13 and 17 of the Law of Marriage Act and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls.”⁵⁴⁵

540. This is the Law of the Child Act (2009). See Parliament of Tanzania, *The Law of the Child Act, 2009*.

541. *Gyumi v. Attorney General*, *supra* note 461, at 24.

542. *Id.* at 25.

543. *Id.* at 25.

544. *Id.* at 26–27.

545. *Id.* at 27.

C. Attorney General v. Rebeca Z. Gyumi (Court of Appeal of the United Republic of Tanzania)

After the High Court of Tanzania (at Dar es Salaam, Main Registry) rendered its decision in the case *Gyumi v. Attorney General*, the Attorney General, the respondent in the case, appealed the ruling to the Court of Appeal at Dar es Salaam.⁵⁴⁶ Levira JA wrote for the Court of Appeal (“CA”) and started the analysis of the appeal by noting that at the High Court, “[t]he petition was disposed by way of written submissions” and that after thoroughly examining the submissions made by both parties, the High Court “was satisfied that the provisions of sections 13 and 17 of the LMA⁵⁴⁷ are discriminatory as they uphold different treatment to persons of similar situations hence offending the principle of equality enunciated by Articles 12(1) and 13(1) of the Constitution.”⁵⁴⁸ Levira JA then noted that “the High Court did not declare the said provisions of the LMA null and void; instead, it found them to be unconstitutional.”⁵⁴⁹ Then, exercising the powers vested in it under Articles 13(2) and 30(5) of the Constitution and the Basic Rights and Duties Enforcement Act,” the High Court directed the Government of the United Republic of Tanzania, “through the Attorney General within a period of one year from the date of the decision to correct the complained anomalies within the provisions of section[s] 13 and 17 of the LMA in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls.”⁵⁵⁰ The Attorney General (“AG”), however, was “aggrieved” and subsequently appealed against the “whole Judgment of the High Court.”⁵⁵¹

Levira JA then proceeded to state the grounds for the AG’s appeal to the Court of Appeal and noted that the appellant had prayed the CA “to quash the decision of the High Court and declare that sections 1 and 17

546. *Attorney General v. Rebeca Z. Gyumi*, Civil Appeal No. 204 of 2017 (Tanzania).

547. “LMA” refers to The Law of Marriage Act.

548. *Attorney General v. Rebeca Z. Gyumi*, *supra* note 546, at 3.

549. *Id.* at 3.

550. *Id.* at 3–4.

551. *Id.* at 4.

of the LMA are constitutional.”⁵⁵² Then, Alesia Mbuya, Principal State Attorney (PSA), speaking on behalf of the appellant (the AG), “argued the grounds of appeal *seriatim*.”⁵⁵³ After Mbuya, PSA had argued all the five grounds of appeal, the learned advocates for the respondent, Rebeca Z. Gyumi, addressed all the grounds of appeal and showed why they believed the appeal should be dismissed.⁵⁵⁴

For example, Mr. Mpoki, one of the advocates for the respondent, addressed the position of international and regional human rights instruments with respect to the minimum age for marriage and “faulted the observation made by the learned Principal State Attorney by stating that [the international human rights instruments in question] recognize the age of marriage to be 18 years for both men and women.”⁵⁵⁵ The learned advocate noted that all these international and regional human rights instruments have been signed and ratified by the Government of the United Republic of Tanzania and hence, are applicable in the country. In addition, argued the advocate for the respondent, “the spirit of the Convention on the Rights of the Child (CRC), CEDAW and the African Charter on the Rights and Welfare of the Child have been translated into the Law of the Child Act, 2009 [LCA]” and that “section 13(1) of the LCA can be construed to prohibit child marriage.”⁵⁵⁶

Mr. Mpoki concluded his presentation to the CA by stating that “[o]n the strength of the above submissions,” the High Court had “correctly held that sections 13 and 17 of the LMA are discriminatory for giving preferential treatment regarding the eligible ages of marriage between girls and boys and hence, the first ground of appeal should be

552. *Id.* at 5.

553. *Id.* at 6.

554. *Id.* at 12–25.

555. *Id.* at 17. The respondent’s advocates made specific reference to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women (Maputo Protocol); the Convention on the Elimination of All Forms of Discrimination Against Women; and the African Charter on the Rights and Welfare of the Child. For example, Article 21(2) of the Maputo Protocol states that “[c]hild 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.”

556. *Id.* at 17–18.

dismissed.”⁵⁵⁷

As part of the substantive examination of the submissions made by both the appellant and the respondent, Levira JA noted that:

it is our respectful view that, Tanzania is not an isolated island. It has from time to time been indebted to legal jurisprudence from other jurisdictions by ratifying and domesticating international, regional and sub-regional instruments or enacting laws as a means of acknowledging the outcry of the international community and taking action against the violation of human rights which includes the right of a girl child. By ratifying and domesticating these instruments, the Government of Tanzania has demonstrated commitment to enforce them and assure smooth realization of human and peoples’ rights. Thus, the impugned provisions cannot be interpreted in isolation rather in comparison to the said instruments which have laid profounding principles on rights to marry and finding (sic) a family.⁵⁵⁸

Speaking for the Court of Appeal, Levira JA made it clear that Tanzania’s courts cannot ignore “the outcry of the international community” and that its government must provide national courts in particular and the legal system in general with the tools to realize the rights guaranteed by the various international human rights instruments to which the country is a State Party. Levira JA then proceeded to deliberately revisit “some of the provisions envisaged in selected [international human rights] instruments under which Tanzania is a member.”⁵⁵⁹

First, Levira JA makes reference to Article 16 of the Universal Declaration of Human Rights (1948) (“UDHR”):

(1) *Men and women of full age*, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

557. *Id.* at 18.

558. *Id.* at 29.

559. *Id.* at 29.

(2) Marriage shall be entered into only with *the free and full consent* of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.⁵⁶⁰

The learned Court of Appeal judge notes that under the UDHR, marriage is reserved for “men and women of full age” and that this institution can only be entered into with “the free and full consent” of both parties. Next, Levira JA considered Article 1 of the Convention on the Rights of the Child, 1989 and Article 2 of the African Charter on the Rights and Welfare of the Child, 1990, which provide a definition for “child”—“a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁵⁶¹

With respect to equality in marriage, Levira JA made reference to Article 6 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”).⁵⁶² Article 6 of the Maputo Protocol deals with marriage and imposes an obligation on States Parties to “ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.”⁵⁶³ In addition, States Parties are required to “enact appropriate national legislative measures to guarantee that: *a) no marriage shall take place without the free and full consent of both parties; b) the minimum age of marriage for women shall be 18 years.*”⁵⁶⁴ Levira JA then noted that once the above provisions are examined thoroughly, one can see that the right to marry is based on two important foundations. First, “only men and women of full age have the right to marry” and thus, by implication, “a person who has not attained the age of 18 years and above lacks the capacity

560. *Universal Declaration of Human Rights*, 1948, U.N. G.A. Res. 217(III)A (Paris, December 10, 1948) (emphasis added).

561. *Convention on the Rights of the Child*, UGA Res. 44/25 (November 20, 1989). See also *African Charter on the Rights and Welfare of the Child*, OAU Res. CAB/LEG/24.9 (July 11, 1990), art. 2.

562. *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)*, July 11, 2003.

563. Maputo Protocol, *supra* note 562, art. 6.

564. *Id.* art. 6(a, b).

to enjoy the right to marry.”⁵⁶⁵ Second, marriage cannot be entered into without the free and full consent of the parties involved.

Turning to the impugned provisions of The Law of Marriage Act, Levira JA noted that, “on one hand,” they allow “men with full age to marry” but, on the other hand, women are only allowed to marry under “relaxed and compromised conditions,” which allow girl-children to marry.⁵⁶⁶ Agreeing with counsel for the respondent that the law as exemplified by sections 13 and 17 of The Law of Marriage Act, undermines the rights of the girl child in Tanzania, Levira JA then examined the reasons why the Court of Appeal had concurred with counsel for the respondent.

First, argued Levira JA, “the impugned provisions [of The Law of Marriage Act] have failed to uphold and appreciate the true intentions of the respective international, regional and sub-regional instruments. The bottom line of all the Conventions on the rights of a child is that no marriage can be contracted with person or persons who have not attained the age of majority. This principle is envisaged under the Law of Child Act, 2009 (the LCA).”⁵⁶⁷ Thus, concluded Levira JA, “the existence of sections 13 and 17 of [The Law of Marriage Act] do not only violate the international law with which Tanzania is a member and has signed and ratified, but also it offends the salutary principles of law of contract which call for competency of the parties who enter into the contract, particularly, in a marriage as a contract.”⁵⁶⁸

The learned judge noted that the Convention on the Rights of the Child came into being in 1989 after Tanzania had already enacted The Law of Marriage Act (“LMA”).⁵⁶⁹ However, in 2009, Tanzania passed the Law of the Child Act (“LCA”) in order to “reflect the rights protected by the CRC without amending the impugned provisions of the LMA to reflect the age and rights protected by the LCA.”⁵⁷⁰ The Court of

565. *Attorney General v. Rebeca Z. Gyumi*, *supra* note 546, at 31.

566. *Id.* at 31.

567. *Id.* at 32.

568. *Id.* at 32.

569. The Law of Marriage Act was enacted in 1971. *See The Law of Marriage Act, 1971, as amended by Act 23/73, Act 15/80 and Act 9/96.*

570. *Attorney General v. Rebeca Z. Gyumi*, *supra* note 546, at 32.

Appeals then went on to state that it believed that the “amendment of the said provisions was necessary.”⁵⁷¹

Second, Levira JA argued that “[t]here is no scientific proof which substantiate[s] the narration that, due to biological reasons, girls should be subjected to early marriages. We subscribe to the findings of the High Court that, the operation of sections 13 and 17 of LMA expose girls to serious matrimonial obligations and health risks like domestic and gender based violence, psychological distress, miscarriage and teenage pregnancies. As rightly found by the High Court it is our settled view, that marriage of a child under 18 years subjects a child into complex matrimonial and conjugal obligations.”⁵⁷²

Third, the Court of Appeal agreed with the counsel for the respondent that “the dictates of section 34(2) of Persons with Disabilities Act, 2010 and section 33(1) of the Employment and Labor Relations Act, 2004 are serving distinguishable purposes” and these “provisions cannot be equated with the impugned provisions of the LMA.”⁵⁷³ Levira JA noted that the Court of Appeal was satisfied that “the impugned provisions under the LMA do not give equal treatment between a boy and girl child” and as a consequence, they “contravene Articles 12 and 13 of the Constitution [of the United Republic of Tanzania].”⁵⁷⁴ In addition, noted Levira JA, it was the Court of Appeal’s conclusion that the impugned provisions “curtail the rights and freedoms of a girl child” which are guaranteed and protected by “Article 30(1) of the Constitution.”⁵⁷⁵ As such, argued the Court of Appeal, “we do not see any cogent reason to disturb the findings of the High Court. Having so stated, the first ground of appeals fails.”⁵⁷⁶

In the second ground for appeal, the appellant had argued “that it was wrong for the High Court to equate the age of the child with the age of marriage.”⁵⁷⁷ The Court of Appeal disagreed with the appellant’s

571. *Id.* at 32.

572. *Id.* at 33–34.

573. *Id.* at 34.

574. *Id.* at 34.

575. *Id.* at 35.

576. *Id.* at 35.

577. *Id.* at 35.

assertions and noted that the “Marriage relationship stands as a social contract therefore the age of [a] child and [the] age of marriage are inseparable factors to be taken into account.”⁵⁷⁸ Girls, Levira JA argued, “cannot be protected from sexual activities by allowing them to get married at younger age as correctly argued by the respondent.”⁵⁷⁹ The learned judge also noted that legislative developments in Tanzania show that “children of whatever age regardless of the kind of objective they want to achieve are incompetent to consent [to] any contractual arrangement.”⁵⁸⁰ Therefore, noted the Court of Appeal, “a girl child does not acquire adult status and/or capacity to contract because of marriage.”⁵⁸¹

The Court of Appeal noted that “[t]he international legal instruments which Tanzania has ratified and domesticated, expressly provide that men and women should be equal partners in marriage; neither of them should be treated as having overriding right than the other when entering the union.”⁵⁸² Perhaps, more importantly, argued the Court of Appeal, “a child is a child whether married or not. So, age has to be considered first before one enters in a marriage contract otherwise there was no need even for the LMA to set age and conditions for one to marry.”⁵⁸³ The Court concluded that “the second ground for appeal is without merit.”⁵⁸⁴

The Court of Appeal then considered the third ground for appeal, which was “whether customary and Islamic law apply in matters of marriage stated in the LMA.”⁵⁸⁵ After making reference to the High Court’s ruling on this matter⁵⁸⁶ the Court of Appeal then cited to the U.S. Supreme Court case, *Caminetti v. U.S.*⁵⁸⁷ where the Court held that:

578. *Id.* at 35.

579. *Id.* at 36.

580. *Id.*

581. *Id.* at 36–37.

582. *Id.* at 37.

583. *Id.*

584. *Id.*

585. *Id.*

586. *See id.* at 39.

587. *Caminetti v. U.S.*, 242 U.S. 470 (2017).

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.⁵⁸⁸

Guided by this principle of interpretation and noting that the language of the Judicature and Application of Laws Act (“JALA”) is plain, the Court of Appeal declared that the High Court’s interpretation of § 11(4) of that statute was “in line with the above elaborated principle.”⁵⁸⁹ The CA then declared the third ground of appeal “unmerited.”⁵⁹⁰

The Court then moved on to deal with the fourth ground of appeal, which was that the High Court had erred “by basing its decision on speculations on the future validity and competency of ‘applications’ intended to be made under sections 13(2) and 17(2) of the LMA.”⁵⁹¹ Noting that the “appellant missed a proper interpretation of what was said by the High Court,”⁵⁹² the CA indicated that it agreed with the respondent’s argument that what the High Court stated “was an orbiter dictum as its decision did not determine the fate or future of the validity and competency of the intended applications under the said provisions subject to this appeal.”⁵⁹³ The CA then ruled that this ground of appeal was “non-meritorous.”⁵⁹⁴ The CA then briefly examined the fifth ground of appeal and ruled it unmerited. In its final ruling, the Court of Appeal held that the entire appeal had no merit and dismissed it in its entirety.

588. *Caminetti v. U.S.*, *supra* note 587, at 485.

589. *Attorney General v. Rebeca Z. Gyumi*, *supra* note 546, at 41.

590. *Id.* at 41.

591. *Id.* at 46.

592. *Id.* at 47.

593. *Id.* at 48.

594. *Id.* at 50.

D. Loveness Mudzuru & Ruvimbo Tsopodzi v. Minister of Justice, Legal and Parliamentary Affairs N.O. & Others (Constitutional Court of Zimbabwe)

In this case, the applicants, two young women, Loveness Mudzuru (aged 19) and Ruvimbo Tsopodzi (aged 18), petitioned the Constitutional Court of Zimbabwe (“CCZ”) “in terms of s 85(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (‘the Constitution’), which came into force on 22 May 2013).”⁵⁹⁵ The applicants complained to the CCZ about “the infringement of the fundamental rights of girl children subjected to early marriages” and sought an interpretation of “s 78(1) as read with s 81(1) of the Constitution.”⁵⁹⁶ Section 78(1) of the Constitution enshrines fundamental human rights and freedoms and provides as follows:

78 Marriage Rights

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same age are prohibited from marrying each other.⁵⁹⁷

Section 81(1) of the Constitution enshrines the fundamental rights of the child:

81 Rights of Children

- (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—
 - (a) to equal treatment before the law, including the right to be heard;
 - (b) to be given a name and family name;

595. *Loveness Mudzuru & Ruvimbo Tsopodzi v. Minister of Justice, Legal and Parliamentary Affairs N.O. & Others* (Constitutional Court of Zimbabwe), *Const. Application No. 79/14* (Judgment No. CCZ 12/2015, at 1.

596. *Mudzuru & Tsopodzi*, *supra* note 595 at 2.

597. *Constitution of Zimbabwe Amendment (No. 20) Act, 2013*, art. 78.

(c) in the case of a child who is—

(i) born in Zimbabwe; or

(ii) born outside Zimbabwe and is a Zimbabwean citizen by descent;

(iii) to the prompt provision of a birth certificate;

(d) to family or parental care, or to appropriate care when removed from the family environment;

(e) to be protected from economic and sexual exploitation, from child labor, and from maltreatment, neglect or any form of abuse;

(f) to education, health care services, nutrition and shelter;

(g) not to be recruited into a militia force or take part in armed conflict or hostilities;

(h) not to be compelled to take part in any political activity; and

(i) not to be detained except as a measure of last resort and, if detained—

(i) to be detained for the shortest appropriate period;

(ii) to be kept separately from detained persons over the age of eighteen years; and

(iii) to be treated in a manner, and kept in conditions, that take account of the child's age.

(2) A child's best interests are paramount in every matter concerning the child.

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.⁵⁹⁸

Malaba DCJ, writing for the CCZ, began the analysis of the case by noting that “[t]he protection of the fundamental rights of the child is guaranteed under s 44 of the Constitution” and that “[t]he provision imposes an obligation on the State and every person, including juristic persons, and every institution and agency of the government at every

598. Const. of Zimb., art. 81.

level to respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4.”⁵⁹⁹ In their presentation to the CCZ, the applicants argued that “on a broad, generous and purposive interpretation of s 78(1) as read with s 81(1) of the Constitution, the age of eighteen years has become the minimum age for marriage in Zimbabwe” and that “s 78(1) of the Constitution cannot be subjected to a strict, narrow and literal interpretation to determine its meaning *if regard is had to the contents of similar provisions on marriage and family rights found in international human rights instruments* from which s 78(1) derives inspiration.”⁶⁰⁰

Malaba DCJ noted that the applicants had “claimed the right to approach the court seeking relief they seek under s 85(1)(a) and (d) of the Constitution.”⁶⁰¹ According to the first applicant, “[t]he issues I raise below are in the public interest and therefore I bring this application in terms of s 85(1)(a) and (d) of the Constitution of Zimbabwe.”⁶⁰² The second applicant also stated her own reasons for bringing the application before the CCZ: “The instant application is an important public interest application that seeks to challenge the law in so far as it relates to child marriages in Zimbabwe. It is motivated by my desire to protect the interests of children in Zimbabwe.”⁶⁰³

The learned justice noted that when “ss 78(1) and 81(1) of the Constitution came into force, s 22(1) of the Marriage Act [*Chapter 5: 11*] provided that a girl who had attained the age of sixteen years was capable of contracting a valid marriage.”⁶⁰⁴ However, such a girl had to secure the written consent of “her legal guardians or, where she had only one legal guardian, the consent in writing of such legal guardian.”⁶⁰⁵ In addition, “[a] boy under the age of eighteen years and a girl under the age of sixteen years had no capacity to contract a valid marriage except

599. *Mudzuru & Tsopodzi*, *supra* note 595 at 2–4. Chapter 4 of the Constitution of Zimbabwe is titled “Declaration of Rights” and deals with fundamental rights and freedoms.

600. *Id.* at 3 (emphasis added).

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

605. *Id.*

with the written permission of the Minister of Justice.”⁶⁰⁶ Two pieces of legislation provided a definition for a child—s 2 of the Child Abduction Act [Chapter 5: 05] and s 2 of the Children’s Protection and Adoption Act [Chapter 5: 06].⁶⁰⁷ A child was defined as “a person under the age of sixteen years.”⁶⁰⁸

As argued by the applicants, since s 81(1) of the Constitution now defines a child to mean “every boy and girl under the age of eighteen years,”⁶⁰⁹ a child does not have the capacity “to enter into a valid marriage in Zimbabwe since the coming into force of ss 78(1) and 81 (1) of the Constitution on 22 May 2013.”⁶¹⁰ The applicants argued further that any law, including s 22(1) of the Marriage Act, which “authorizes a girl under the age of eighteen years to marry, infringes the fundamental right of the girl child to equal treatment before the law enshrined in s 81(1)(a) of the Constitution.”⁶¹¹ More specifically, the applicants argued that s 22(1) of the Marriage Act “exposes the girl child to the horrific consequences of early marriage which are the very injuries against which the fundamental rights are intended to protect every child.”⁶¹²

The respondents challenged the application on the ground that the applicants did not have the right to “approach the court claiming the relief sought” because “they did not allege that any of their own interests was adversely affected by the alleged infringement of the fundamental rights of the girl child.”⁶¹³ Specifically, the respondents alleged that “the applicants had not produced facts to support their claims to *locus standi* under s 85(1)(d) of the Constitution.”⁶¹⁴ With respect to the merits of the application, the respondents “denied that s 78(1) of the Constitution has the effect of setting the age of eighteen years as the minimum age

606. *Id.* at 4.

607. *Id.* at 4.

608. *Children’s Protection and Adoption Act (No. 22 of 1971) [Chapter 5: 06], s 2.*

609. *Const. of Zimb., s 81(1).*

610. *Mudzuru & Tsopodzi, supra* note 595, at 4.

611. *Id.* at 4.

612. *Id.*

613. *Id.*

614. *Id.* at 5.

for marriage in Zimbabwe.”⁶¹⁵

Additionally, the respondents denied that “s 22(1) of the Marriage Act or any other law which authorizes a girl child who has attained the age of sixteen years to marry contravenes s 78(1) of the Constitution.”⁶¹⁶ In support of their argument, the respondents invoked “the old notion that a girl matures physiologically and psychologically earlier than a boy.”⁶¹⁷ In essence, the respondents “put forward the alleged difference in the rates of maturity in the growth and development of girls and boys, as justification for legislation which condemns a girl child, under the pretext of marriage, to a life of sexual exploitation and physical abuse.”⁶¹⁸ In the view of the respondents, then, “there was nothing unconstitutional about legislation which authorized child marriage.”⁶¹⁹

From the positions taken by the applicants and the respondents, the CCZ identified four questions, which the CCZ had to address:

- (1) Whether or not the applicants have, on the facts, locus standi under s 85(1)(a) or s 85(1)(d) of the Constitution to institute the proceedings claiming the relief they seek.
- (2) If they are found to have standing before the Court, does s 78(1) of the Constitution set the age of eighteen years as the minimum age for marriage in Zimbabwe.
- (3) If the answer to issue No. 2 is in the affirmative; did the coming into force of ss 78(1) and 81(1) of the Constitution on 22 May 2013 render invalid s 22(1) of the Marriage Act [Chapter 5:05] and any other law authorizing a girl who has attained the age of sixteen to marry.
- (4) If the answer to issue No. 3 is in the affirmative; what is the appropriate relief to be granted by the Court in the exercise of the wide discretion conferred on it under s 85(1) of the Constitution.⁶²⁰

615. *Id.*

616. *Id.* at 6.

617. *Id.*

618. *Id.*

619. *Id.*

620. *Id.* at 7.

The CCZ considered and ruled on each of these questions. With respect to *locus standi*, Malaba DCJ noted that “[t]he right to approach a court directly seeking appropriate relief in cases arising from alleged infringement of a fundamental human right or freedom enshrined in Chapter 4 of the Constitution is given to the persons specified in s 85(1) of the Constitution.”⁶²¹ The learned justice cited to Supreme Court of Canada cases dealing, inter alia, with *locus standi*⁶²² and concluded that “[t]he rule of standing under s 85(1)(d) of the Constitution must be understood in the context of its purpose and the objectives it is intended to achieve.”⁶²³

Malaba DCJ noted that “[t]he form and structure of s 85(1) shows that it is a product of the liberalization of the narrow traditional conception of *locus standi*”⁶²⁴ and that “[t]he liberalization of the narrow traditional conception of standing and the provision of the fundamental right of access to justice compel a court exercising jurisdiction under s 85(1) of the Constitution to adopt a broad and generous approach to standing.”⁶²⁵ The learned justice then cited to *Ferreira v. Levin N.O. & Others*,⁶²⁶ a case of the Constitutional Court of South Africa (“CCSA”) in which Chaskalson P, writing for the CCSA, spoke of the need to adopt a broad approach to standing in constitutional cases:

Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that

621. *Id.* at 8.

622. For example, the CCZ referred to *The Queen v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 (1985).

623. *Mudzuru & Tsopodzi*, *supra* note 595, at 12.

624. *Id.* at 13.

625. *Id.* at 14.

626. *Ferreira v. Levin N.O. and Others*, [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (December 6, 1995).

constitutional rights enjoy the full measure of the protection to which they are entitled.⁶²⁷

With respect to *locus standi* under s 85(1)(d) of the Constitution, Malaba DCJ noted that “acting in the public interest is the imperative for standing under s 85(1)(d) of the Constitution.”⁶²⁸ Nevertheless, the learned justice emphasized that “the meaning or content of public interest will vary from case to case depending on the facts and circumstances”⁶²⁹ and that “[s]ection 85(1)(d) of the Constitution guarantees standing to a person who institutes judicial proceedings seeking to achieve the objectives for which the remedy of acting in the public interest was designed.”⁶³⁰ Malabar DCJ then cited to *Ferreira v. Levin*,⁶³¹ a case of the Constitutional Court of South Africa (“CCSA”) in which the CCSA elaborates the factors that are critical to determining “whether a person is genuinely acting in the public interest.”⁶³² These factors include:

whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.⁶³³

Malaba DCJ went on to cite to the Indian Supreme Court case, *SP Gupta v. The Union of India & Others*,⁶³⁴ in which Bhagwati J highlighted the “importance of affording locus standi to a person acting in the public interest for the vindication of the rule of law.” The learned justice declared that

627. *Ferreira v. Levin*, *supra* note 626, para. 165.

628. *Mudzuru & Tsopodzi*, *supra* note 595, at 18.

629. *Id.*

630. *Id.* at 19.

631. *Ferreira v. Levin*, *supra* note 626.

632. *Id.* para. 234.

633. *Ferreira v. Levin*, *supra* note 626, para. 234.

634. *SP Gupta v. The Union of India & Others*, (1982) 2 S.C.R. 365.

[t]he view has therefore been taken by the Courts in many decisions that whatever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceedings.⁶³⁵

The applicants, argued Malaba DCJ, “acted altruistically to protect public interest in the enforcement of the constitutional obligation on the State to protect the fundamental rights of girl children enshrined in s 81(1) as read with s 78(1) of the Constitution.”⁶³⁶ The learned justice then went on to argue that

[c]hildren fall into the category of weak and vulnerable persons in society. They are persons who have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty, and socially and economically disadvantaged positions. The law recognizes the interests of such vulnerable persons in society as constituting the public interest.⁶³⁷

In addition, argued Malaba DCJ, “[t]he proceedings instituted by the applicants and the relief sought were the only reasonable and effective means for enforcement of the fundamental rights of the girl children subjected to early marriages. The remedy they sought was the only means for an effective protection of the public interest adversely affected by the alleged infringement of the girl children’s fundamental

635. *Mudzuru & Tsopodzi*, *supra* note 595 at 21. See also *SP Gupta*, *supra* note 633, para. 18.

636. *Mudzuru & Tsopodzi*, *supra* note 595, at 24.

637. *Id.* at 24.

rights.”⁶³⁸ In the opinion of the CCZ, “[t]he interests of the girl children subjected to early marriages were properly identified as a public interest to be protected by the relief sought in the proceedings.”⁶³⁹

Malaba DCJ then reiterated the issue before the CCZ by noting that “[t]he court is faced with the question of interpretation of s 78(1) as read with s 81(1) of the Constitution. It is also faced with the question of interpretation of s 22(1) of the Marriage Act and the effect of the application of s 78(1) of the Constitution on its meaning.”⁶⁴⁰ The learned justice then sought interpretive assistance from international conventions and treaties. First, he noted that according to s 46(1)(c) of the Constitution of Zimbabwe, “[w]hen interpreting this Chapter,⁶⁴¹ a court, tribunal, forum or body—(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party.”⁶⁴² He then proceeded to state that “[b]oth s 22(1) of the Marriage Act and s 78(1) of the Constitution were born out of provisions of international human rights law prevailing at the time of their respective enactment.”⁶⁴³ In addition, argued the learned justice, “[t]he meaning of s 78(1) of the Constitution is not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions on matters of marriage and family relations at the time it was enacted on 22 May 2013.”⁶⁴⁴ In order to decide “whether s 22(1) of the Marriage Act or any other law which authorizes child marriage infringes the fundamental rights of girl children enshrined, guaranteed and protected under s 81(1) as read with s 78(1) of the Constitution,” noted Malaba DCJ, “regard must be had to the contemporary norms and aspirations of the people of Zimbabwe as expressed in the Constitution,” as well as to “the emerging consensus of values in the international community of which Zimbabwe is a party, on

638. *Id.*

639. *Id.*

640. *Id.* at 25.

641. The Chapter in question is Chapter 4, which deals with fundamental rights and freedoms. See Constitution of Zimbabwe Amendment (No. 20) Act, 2013, ch. 4.

642. Const. Zimb., § 46(1)(c).

643. *Mudzuru & Tsopodzi*, *supra* note 595, at 26.

644. *Id.* at 26.

how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood.”⁶⁴⁵

Malaba DCJ argued further that “[t]he object of the interpretation of s 78(1) as read with s 81(1) of the Constitution and of s 22(1) of the Marriage Act should be to ensure that the interpretation resonates with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in s 3 of the Constitution, and regional and international human rights law.”⁶⁴⁶ Thus, argued the learned justice, when considering the meaning of “s 22(1) of the Marriage Act as a norm of behavior towards children, the court has to take into consideration the current attitude of the international community of which Zimbabwe is a party, on the position of the child in society and his or her rights.”⁶⁴⁷

Zimbabwe is a signatory to the Convention on the Rights of the Child (“CRC”) and the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”). Malaba DCJ noted that “[b]y signing these documents Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice.”⁶⁴⁸

Malaba DCJ then visited the definition of child marriage provided by UNICEF, which is that child marriage is “a formal marriage or informal union between a child under the age of 18 and an adult or another child.”⁶⁴⁹ The learned justice then noted that the minimum age for marriage has been defined by the CEDAW Committee as 18 years after the CEDAW took into consideration the definition of a child provided in Article 1 of the Convention on the Rights of the Child.⁶⁵⁰

645. *Id.*

646. *Id.*

647. *Id.*

648. *Id.* at 27.

649. UNICEF, *Child Marriage*, available at <https://www.unicef.org/protection/child-marriage> (last visited on February 4, 2020).

650. According to Article 1 of the Convention on the Rights of the Child, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Convention on the Rights of the Child, UNGA Res. 44/25 (Nov. 20, 1989), 1577 U.N.T.S. 3 (November 20,

Malaba DCJ then went on to note that s 22(1) of the Marriage Act “was enacted in 1965 as a response to omissions and exceptions that existed in the international human rights provisions on the protection of children that existed at the time.”⁶⁵¹ These provisions, argued Malaba DCJ, “were found in Article 16 of the Universal Declaration of Human Rights (UDHR) and the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962.”⁶⁵²

The learned justice then went on to mention that a common feature of many international conventions “was the failure [of them] to specify for States Parties the minimum age of marriage as a means of protecting children. They left the matter exclusively to domestic law.”⁶⁵³ Although many conventions required that marriage had to be “freely consented to by the bride and groom,”⁶⁵⁴ argued Malaba DCJ, “there was no recognition of the special vulnerabilities of children where ‘consent’ could be easily coerced or unduly influenced by adults.”⁶⁵⁵ With respect to Articles 16(1) and 16(2) of the UDHR, Malaba DCJ noted that while it was not binding on U.N. Member States, it also did not specify a minimum age for marriage.⁶⁵⁶ When the UN General Assembly adopted the Convention on Consent to Marriage, Minimum Age for Marriage

1989).

651. *Mudzuru & Tsopodzi*, *supra* note 595 at 27.

652. Article 16 of the UDHR states as follows: “(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” *Universal Declaration of Human Rights*, UNGA Doc. 217A (III) (December 10, 1948), art. 16. *See also* Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UNGA Res. 1763 A(XVII) (November 7, 1962) (hereinafter, “Marriage Convention”, pmb).

653. *Mudzuru & Tsopodzi*, *supra* note 595 at 28.

654. *Id.* *See also* UDHR, *supra* note 652, art. 16.

655. *Mudzuru & Tsopodzi*, *supra* note 595 at 28. *See also* Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER, SOC. POL’Y & L. 233, 347 (2011) (examining, *inter alia*, the treatment of child marriage by international human rights instruments).

656. *Mudzuru & Tsopodzi*, *supra* note 595 at 29.

and Registration of Marriage (“Marriage Convention”) in 1962, it was expected to “resolve the issue of the standard age of majority for the purposes of marriage.”⁶⁵⁷ In addition to imposing an obligation on States Parties to “specify a minimum age for marriage,” the Marriage Convention also mandated that “[n]o marriage shall be legally entered into by any person under [the specified minimum age], except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.”⁶⁵⁸

Malaba DCJ noted that a major problem with the Marriage Convention is that it did not specify a minimum age for marriage.⁶⁵⁹ By granting States Parties the discretion to set their own minimum ages for marriage, many of these States were able to set their minimum ages for marriage as low as “sixteen years for girls whilst setting different and usual higher ages for boys.”⁶⁶⁰ In addition, argued Malaba DCJ, “the Marriage Convention created exceptions permitting marriages of girls below the minimum age where government officials approved of the marriages” and that “[t]he effect of these provisions was that once a girl was married, however young she was, she was treated under domestic law as an adult”⁶⁶¹ and, as a consequence, was no longer protected by laws designed to protect the rights of children.

It was in this context—“of the omissions and exceptions in the provisions of international human rights law”—that Zimbabwe enacted its Marriage Act (*Chapter 5: 11*), which “prohibited marriage of a boy under the age of eighteen and of a girl under the age of sixteen except with the written permission of the Minister when he or she considered such marriage desirable.”⁶⁶² The learned justice argued that it is “clear from the interpretation of relevant provisions of the Marriage Act . . . that once a child got married with the written permission of the Minister and a girl who had attained the age of sixteen got married, they were treated as persons of full age to whom protection of the rights

657. *Id.* at 29.

658. *Id.*

659. *Id.* at 29.

660. Marriage Convention, *supra* note 652, art. 2.

661. *Mudzuru & Tsopodzi*, *supra* note 595, at 29.

662. *Id.* at 30.

of the child was lost.”

Malaba DCJ then cited to the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), which came into force on September 3, 1981.⁶⁶³ and noted that although CEDAW’s Article 16(2) prohibited child marriage,⁶⁶⁴ s 22(1) of the Marriage Act could not, at the time, be condemned for permitting child marriage in the absence of a specific provision in the international human rights law setting a minimum legal age for marriage.”⁶⁶⁵ Article 16(2) of CEDAW, however, did not define what it meant by “child.” This problem was resolved when the Convention on the Rights of the Child (“CRC”) came into force on September 2, 1990.⁶⁶⁶ Article 1 of the CRC defines “child” as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁶⁶⁷

The CRC, Malaba DCJ noted, provides various protections for the rights of the child. For example, Article 2 prohibits all forms of discrimination against children, including that which is based on sex. Article 3 introduces one of the most important standards for the treatment of children—the “best interests of the child principle or standard.”⁶⁶⁸ Other protections granted children by the CRC include protection from “all forms of physical or mental violence, injury, abuse, maltreatment or exploitation.”⁶⁶⁹ In addition, the CRC requires that children should be protected from being sold or trafficked (e.g., for use in prostitution and other sexual activities). The CRC also imposes

663. *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), 1249 U.N.T.S. 13 (Dec. 18, 1979), entered into force on September 3, 1981.

664. Article 16(2) of CEDAW states as follows: “The 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.” CEDAW, *supra* note 663, art. 16(2).

665. *Mudzuru & Tsopodzi*, *supra* note 595, at 31.

666. *Convention on the Rights of the Child*, 1577 U.N.T.S. 3 (Nov. 20, 1989), entered into force on September 2, 1990.

667. *Id.* art. 1.

668. *Id.* art. 3.

669. *Mudzuru & Tsopodzi*, *supra* note 594, at 32.

an obligation on States Parties to “take all effective and appropriate measures with a view to abolishing *traditional practices* prejudicial to the health of children.”⁶⁷⁰

While the CRC did not specify a minimum age for marriage, nevertheless, by expressly declaring that the “marriage of a child shall have no legal effect,”⁶⁷¹ argued Malaba DCJ, it effectively provided the Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”)⁶⁷² and the Committee on the Rights of the Child (“Children’s Rights Committee”) with the basis to set 18 years as the minimum age for marriage.⁶⁷³ The learned justice then made reference to legal literature that has criticized the CRC for not providing an “explicit provision on marriage”⁶⁷⁴ and for not dealing with those harmful practices that affect girls in child marriage.⁶⁷⁵

Malaba DCJ notes that the CRC’s use of “gender-neutral language throughout” the treaty may have been designed to promote equality, which at the time was lacking in most international human rights instruments.⁶⁷⁶ Nevertheless, argued Malaba DCJ, not fully acknowledging a child’s gender “can detrimentally affect the realization

670. CRC, *supra* note 666, art. 24(3).

671. CRC, *supra* note 666, art. 16(2).

672. The Committee on the Elimination of Discrimination Against Women is the body of independent experts charged with monitoring the “implementation of the Convention on the Elimination of All Forms of Discrimination against Women.” See Office of the UN Commissioner for Human Rights, Committee on the Elimination of Discrimination Against Women, *available at* <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> (last visited on February 7, 2020).

673. See Committee on the Elimination of All Forms of Discrimination against Women & Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/ General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, CEDAW/C/GC/13-CRC/C/GC/18 (Nov. 14, 2014), paras. 20, 55(f), 65.

674. *Mudzuru & Tsopodzi*, *supra* note 595 at 33. See also Warner, *supra* note 655, at 251.

675. Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT’L & COMP. L. 123, 125 (1998).

676. *Mudzuru & Tsopodzi*, *supra* note 595 at 34.

of his or her right.”⁶⁷⁷ The learned justice then cited to work by Jewel Amoah, who argues that “[t]he failure to make specific reference to the girl-child and conditions that exacerbate her vulnerability is itself a form of discrimination against her. . . . It is not enough that the language simply be gender-neutral, but where there are specific gendered human rights abuses, then these, must be directly addressed.”⁶⁷⁸

Next, Malaba DCJ turned to the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), which entered into force on November 29, 1999.⁶⁷⁹ The learned justice noted that Article 21 of the African Children’s Charter is important to the case at bar and proceeded to examine it.

Article 21: Protection against Harmful Social and Cultural Practices

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. 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.⁶⁸⁰

Article 21 of the African Children’s Charter, noted Malaba DCJ, uses “clear and unambiguous language” to impose an obligation on

677. *Id.* at 34.

678. Jewel Amoah, *The World on Her Shoulders: The Rights of the Girl-child in the Context of Culture & Identity*, 4 ESSEX HUM. RTS. REV. 1, 15 (2007).

679. *African Charter on the Rights and Welfare of the Child* (African Children’s Charter), OAU Doc. CAB/LEG/24.9/49 (1990).

680. African Children’s Charter, *supra* note 679, art. 21(1, 2).

States Parties, including Zimbabwe.⁶⁸¹ The obligation, which Malaba DCJ noted was voluntarily entered into by the States Parties, required them to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child,” particularly the girl-child.⁶⁸² In addition, Article 21 also placed the States Parties under a positive obligation to “take effective measures, including legislation, to specify the age of eighteen years as the minimum age for marriage,” as well as “abolish child marriage.”⁶⁸³

The African Children’s Charter, argued Malaba DCJ, “avoided the omissions and exceptions that the other conventions on human rights relating to marriage had permitted States Parties to exploit through local laws that authorized child marriage.”⁶⁸⁴ The learned justice noted that legal scholars have commented on the provisions of Article 21(2) of the African Children’s Charter. For example, Elizabeth Warner, an expert on international human rights law, makes the following comment about Article 21(2):

This is the most explicit provision of any of the international treaties discussed herein. It unequivocally sets the minimum age of marriage at eighteen and brooks no exceptions for local religious or other cultural practices, nor does it allow for exceptions based upon the consent of a local authority or the parents or guardians of the children concerned. An Oxfam report optimistically states that this law is a reflection of changes in attitudes toward child marriages in recent years. The only drawback to this convention is that there are not more States that are parties to it. Again, one longs for the ability to insert this provision into the CRC and the Marriage Convention, where it so clearly belongs.⁶⁸⁵

Malaba DCJ states that the provisions of Article 21(2) of the African

681. *Mudzuru & Tsopodzi*, *supra* note 595 at 35–36.

682. African Children’s Charter, *supra* note 679, art. 21(1).

683. *Mudzuru & Tsopodzi*, *supra* note 595 at 36. *See also* African Children’s Charter, *supra* note 679, art 21(2).

684. *Mudzuru & Tsopodzi*, *supra* note 595 at 36.

685. *See* Warner, *supra* note 655, at 257.

Children's Charter "had a direct effect on the views on the validity of ss 20 and 22 of the Marriage Act" and that "[a] review of States [Parties]' reports presented to the CRC Committee from 1997 to 2004 reveals that forty-four States [Parties] specified a lower age for girls to marry than boys."⁶⁸⁶ The learned justice noted further that the Committee on Civil and Political Rights, in its "concluding statement on Zimbabwe, . . . , expressed the view based on the interpretation of s 22(1) of the Marriage Act that early marriage, and the statutory difference in the minimum age of girls and boys for marriage, should be prohibited by law. The Government of Zimbabwe was asked to adopt measures to prevent and eliminate prevailing social and cultural practices harmful to the welfare of children."⁶⁸⁷ Specifically, the Committee on Civil and Political Rights recommended that all "practices which are incompatible with the Covenant (articles 3, 7, 23, 24 and others) be prohibited by legislation" and that the Government of Zimbabwe should "adopt adequate measures to prevent and eliminate prevailing social attitudes and cultural and religious practices hampering the realization of human rights by women."⁶⁸⁸

Next, Malaba DCJ cited to paragraph 38 of the CEDAW Committee's General Recommendation No. 21, which deals with equality in marriage and family relations.⁶⁸⁹ The CEDAW Committee, which is directed at s 22(1) of the Marriage Act,⁶⁹⁰ states as follows:

Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly

686. *Mudzuru & Tsopodzi*, *supra* note 595, at 37.

687. *Id.* at 37.

688. U.N. Hum. Rts Comm., *Report of the UN Human Rights Committee, Vol. 1, 1998, A/53/40* (U.N. General Assembly Official Records Fifty-third Session Supplement No. 40(A/53/40), para. 214.

689. U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW Committee), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994 (contained in Doc. A/49/38), available at <https://www.refworld.org/docid/48abd52c0.html> (last visited on February 7, 2020).

690. Zimbabwe's Marriage Act states at Article 22(1) that "(1) *No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable.*" (emphasis added.)

that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, *these provisions should be abolished*. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman's right freely to choose her partner.⁶⁹¹

The learned justice noted the Committee's recommendation that the Government of Zimbabwe should abolish the offending provisions. Malaba DCJ argued that in rendering its General Recommendation No. 21, the CEDAW Committee "proceeded on the basis that it was common cause that the coming into effect of Article 1 of the CRC and Article 21(2) of the [African Children's Charter] rendered provisions such as those contained in s 22(1) of [Zimbabwe's] Marriage Act, and any other law authorizing marriage of a person aged below eighteen years, inconsistent with the obligations of Zimbabwe under international human rights law to protect children against child marriage. The view held was that the abolition of the impugned statutory provisions would be consistent with the fulfilment by Zimbabwe of the obligations it undertook in terms of the relevant conventions and the Charter."⁶⁹²

In Zimbabwe, noted Malaba DCJ, it became an imperative and "compelling social need" that the government undertake legislative measures to abolish the offending "statutory provisions" such as ss 22(1) of the country's Marriage Act.⁶⁹³ The learned justice noted that there is "overwhelming empirical evidence of the horrific consequences of child marriage" and that many studies had "exposed child marriage as an embodiment of all the evils against which the fundamental rights are intended to protect the child."⁶⁹⁴ Where child marriage was practiced, argued the learned justice, this was "evidence of failure by the State to discharge its obligations under international human rights law to protect the girl child from the social evils of sexual exploitation, physical abuse and deprivation of education, all of which infringed her

691. CEDAW Committee, *supra* note 689, para. 38 (emphasis added).

692. *Mudzuru & Tsopodzi*, *supra* note 595 at 38.

693. *Id.* at 38.

694. *Id.*

dignity as a human being.”⁶⁹⁵

Malaba DCJ then turned to the facts in the case at bar and noted that these facts on “the horrific consequences of child marriage, as part of the context for the determination of the question of the constitutional validity of s 22(1) of the Marriage Act, could not fail to have an impact on the conscience of any society that cares about the fundamental values of human dignity, freedom and equality.”⁶⁹⁶ The learned justice then examined the legal literature on the impact of child marriage, especially on the girl child. One study that Malaba DCJ cited to was one carried out by UNICEF in 2007.⁶⁹⁷ The UNICEF study determined that poverty was a major cause of child marriage.⁶⁹⁸ The study also noted that “[c]hild marriage is both a cause and a consequence of the most severe form of gender discrimination.”⁶⁹⁹ In addition, child marriage is most likely to be pervasive in countries that are burdened with “[w]eak laws and inadequate implementation of the laws.”⁷⁰⁰

The impact of child marriage on the girl child was examined earlier in this article. Nevertheless, it is important to note that Malaba, DCJ, writing for the Constitutional Court of Zimbabwe in *Mudzuru & Tsopodzi*, has reviewed some of these consequences and these include, but are not limited to, domestic violence; trafficking in girl children, and its consequences; health issues, such as HIV/AIDS and other STDs, as well as fistula; and failure of these girls to acquire the education and training that they need to evolve into productive adults.⁷⁰¹ After reviewing the impact of child marriage on the girl child, Malaba DCJ then turned to s 78(1)⁷⁰² of the Constitution of the Republic of Zimbabwe

695. *Id.*

696. *Id.*

697. UNICEF, Division of Policy and Practice & Rangita de Silva de Alwis, *Child Marriage and the Law: Legislative Reform Initiative Paper Series*, (Apr. 2007).

698. *Mudzuru & Tsopodzi*, *supra* note 595 at 39 & UNICEF, *supra* note 697, at 31, para. 4.1.

699. UNICEF, *supra* note 697, at 32, para. 4.3.

700. *Id.* at 33, para. 4.4.

701. *Mudzuru & Tsopodzi*, *supra* note 595 at 39–41; *see also* UNICEF, *supra* note 697, at 33–36.

702. Section 78(1) states as follows: “Every person who has attained the age of eighteen years has the right to found a family.” Constitution of the Republic of

and noted that this provision of the constitution “was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under Article 21(2)⁷⁰³ of the [African Children’s Charter] to specify by legislation eighteen years as the minimum age for marriage and abolish child marriage.”⁷⁰⁴

Malaba DCJ noted further that “[u]nder Article 18 of the Vienna Convention on the Law of Treaties which came into force on [27] January 1980, a State Party is enjoined to hold in good faith and observe the rights and obligations in a treaty to which it is a party.”⁷⁰⁵ As a State Party to various international human rights treaties and conventions, including the African Children’s Charter, argued the learned justice, Zimbabwe was expected to meet its “specific” obligations under these treaties and “specify eighteen years” as “the minimum age of marriage,” as well as “abolish child marriage.”⁷⁰⁶

The learned justice then tackled the issue of constitutional interpretation and noted that “[s]ection 46(1)(a) of the Constitution obliges a court when interpreting a provision contained in Chapter 4⁷⁰⁷ to give full effect to the rights and freedoms enshrined in the Chapter.”⁷⁰⁸ Malaba DCJ notes that “[t]he purpose of interpreting a provision contained in Chapter 4 must be to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the

Zimbabwe, § 78(1).

703. Article 21(2) of the African Children’s Charter prohibits “[c]hild marriage and the betrothal of girls and boys” and also imposes an obligation States Parties to enact legislation to “specify the minimum age of marriage to be 18 years.” See African Children’s Charter, *supra* note 561, art. 21(2).

704. *Mudzuru & Tsopodzi*, *supra* note 595, at 42.

705. *Id.* at 42. See also Vienna Convention on the Law of Treaties (with annex), 1155 U.N.T.S. 331 (May 23, 1969), available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last visited on February 8, 2020).

706. *Mudzuru & Tsopodzi*, *supra* note 595, at 42.

707. Chapter 4 of the Constitution of Zimbabwe deals with fundamental human rights and freedoms.

708. *Mudzuru & Tsopodzi*, *supra* note 595, at 43. See also Const. Zimbabwe, § 46(1) (a).

values and principles set out in s 3 of the Constitution.”⁷⁰⁹ Any proper interpretation of s 78(1), argued Malaba DCJ, “must take into account the provisions of subs(s) (2) and (3).”⁷¹⁰

Thus, for any persons who have reached the age of 18 years “to enjoy the right to enter into marriage freely and with full consent as intending spouses, they must first have the right to enter into marriage.”⁷¹¹ Since s 78(1) of Zimbabwe’s Constitution sets the minimum age of marriage in the country as 18 years, notes Malaba DCJ, “a person who has not attained the age of eighteen [years] has no legal capacity to marry.”⁷¹² That person who has not reached the age of 18 years, whether female or male, “has a fundamental right not to be subjected to any form of marriage regardless of its source” and “a person who has attained the age of eighteen years has no right to marry a person aged below 18 years.”⁷¹³ According to the learned justice then, “[t]he purpose of s 78(1) as read with s 81(1) of the Constitution [of Zimbabwe] is to ensure that social practices such as early marriages that subject children to exploitation and abuse are arrested. As a result, a child has acquired a right to be protected from any form of marriage.”⁷¹⁴

In their application to the CCZ, the applicants, noted Malaba DCJ, argued that “s 78(1) as read with s 81(1) of the Constitution had the effect of rendering s 22(1) of the Marriage Act invalid when it came into force on 22 May 2013.”⁷¹⁵ Mr. T. Bitti, counsel for the applicants, argued that since s 78(1) of the Constitution “contains an absolute prohibition of child marriage, s 22(1) of the Marriage Act cannot be construed to be in conformity with the Constitution.”⁷¹⁶ The applicants argued further “that as a result of the coming into force of s 78(1) as read with s 81(1) of the Constitution, child marriage has been abolished

709. *Mudzuru & Tsopodzi*, *supra* note 595, at 43.

710. *Id.* at 44.

711. *Id.*

712. *Id.* at 46.

713. *Id.*

714. *Id.* at 47.

715. *Id.*

716. *Id.* at 42.

in Zimbabwe.”⁷¹⁷ Malaba DCJ then argued that:

[s]ection 78(1) as read with s 81(1) of the Constitution sets forth the principle of equality in dignity and rights for girls and boys, effectively prohibiting discriminatory and unequal treatment on the ground of sex and gender. Consistent with Article 21(2) of the [African Children’s Charter], section 78(1) of the Constitution abolishes all types of child marriage and brooks no exception or dispensation as to age based on special circumstances of the child.⁷¹⁸

The learned justice argued further that “[s]ection 78(1) of the Constitution permits of no exception for religious, customary or cultural practices that permit child marriage, nor does it allow for exceptions based on the consent of a public official, or of the parent or guardian of the child.”⁷¹⁹ When s 78(1) is read together with s 81(1) of the Constitution, argues Malaba DCJ, there is produced a legal change that is “consistent with the goals of social justice at the center of international human rights standards requiring Zimbabwe to take appropriate legislative measures, including constitutional provisions, to modify or abolish existing laws, regulations, customs and practices inconsistent with the fundamental rights of the child.”⁷²⁰ The learned justice emphasized that s 78(1) of the Constitution “provides, in effect, that a person aged below 18 years has not attained full maturity and lacks capacity to understand the meaning and responsibilities of marriage.”⁷²¹ Malaba DCJ then concluded that “[n]o law can validly give a person in Zimbabwe who is aged below eighteen years the right to exercise the right to marry and found a family without contravening s 78(1) of the Constitution. To the extent that it provides that a girl who has attained the age of sixteen can marry, s 22(1) of the Marriage Act is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid.”⁷²²

717. *Id.* at 47.

718. *Id.* at 49.

719. *Id.*

720. *Id.*

721. *Id.* at 50.

722. *Id.*

Malaba DCJ concluded that child marriage is not in the best interests of the child and that “[r]esistance to the liberation of the girl child from the shackles of child marriage and its horrific consequences based on conceptions of sex discrimination is against the best interests of the girl child served by the enforcement of the fundamental rights enshrined in ss 78(1) and 81(1) of the Constitution.”⁷²³ Malaba DCJ argued further that “[g]irl children are entitled to effective protection by the Court which is the upper guardian of the rights of children and whose duty it is to enforce the fundamental rights designed for [children’s] protection.”⁷²⁴

Concluding that “[t]he applicants [had] succeeded in showing that s 78(1) of the Constitution sets 18 years as the minimum age for marriage in Zimbabwe,” as well as that “s 22(1) of the Marriage Act and any law, custom and practice which authorize child marriage is unconstitutional,”⁷²⁵ and “[n]otwithstanding the spirited opposition [that] the respondents put up to the application for the relief to be granted,” the Court emphasized that “[t]he litigation really concerned the ending of the problem of child marriage.”⁷²⁶ The Court then rendered its decision, as follows:

1. The application succeeds.
2. It is declared that s 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 sets eighteen years as the minimum age of marriage in Zimbabwe.
3. It is further declared that s 22(1) of the Marriage Act [*Chapter 5:11*] or any law, practice or custom authorizing a person under eighteen years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down.
4. With effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered

723. *Id.* at 53.

724. *Id.*

725. The CCZ noted that this included the Customary Marriages Act [*Chapter 5:07*] to the extent that it authorizes child marriage. *See id.* at 54.

726. *Id.* at 54–55.

customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years.

5. Each party shall bear its own costs.⁷²⁷

SUMMARY AND POLICY RECOMMENDATIONS

Since 1948, the international community has adopted several treaties and conventions to protect human and peoples' rights. The founding of the United Nations in 1945 and the subsequent adoption of the Universal Declaration of Human Rights ("UDHR") on December 10, 1948 by the U.N. General Assembly, are considered "the beginning of the modern struggle to [recognize and] protect human rights."⁷²⁸ Human rights are considered the purview of international law and, as a consequence, their protection invariably involves treaties and conventions. One of the most important treaties of the post-World War II period is the United Nations Charter, which established the United Nations and set the stage for international relations in the post-war period.⁷²⁹

Since the U.N. General Assembly adopted the UDHR in 1948, the global community "has codified a series of fundamental precepts that are intended to prevent such grave abuses as arbitrary killing, torture, discrimination, starvation, and forced eviction"⁷³⁰ In addition, "[s]tandards have also been developed for positive rights such that governments can provide means of assuring, for example, fair trials, education, and health care."⁷³¹ Eventually, international and regional organizations began to develop and adopt treaties and conventions to protect human rights.

Today, the most important human rights treaties are the *International*

727. *Id.* at 55.

728. DAVID WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 3 (2007).

729. U.N. Charter, 1 U.N.T.S. XVI (Oct. 24, 1945).

730. WEISSBRODT & DE LA VEGA, *supra* note 728, at 3.

731. *Id.*

Covenant on Civil and Political Rights and the *International Covenant on Economic, Social and Cultural Rights*, both of which were drafted by the United Nations. These two covenants, together with the *Universal Declaration of Human Rights*, *Optional Protocol to the International Covenant on Civil and Political Rights*, and the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, are generally referred to as the *International Bill of Human Rights*.⁷³² Christopher N. J. Roberts, an expert on international human rights law and a law professor at the University of Minnesota Law School, notes that these instruments “are considered to be the foundational human rights texts within the modern system of international human rights” and that “[t]hey have opened the door for the hundreds of human rights treaties, charters, laws, governmental bodies, public and private organizations, groups, and individuals that now comprise this global regime.”⁷³³

Child marriage, which is defined as “any formal marriage or informal union where one or both people are under 18 years old,”⁷³⁴ is a violation of the rights of the children involved. For one thing, child marriage is invariably forced marriage since it involves the situation in which “one or both people [to the marriage] do not consent to the marriage and pressure or abuse is used” to force them into compliance or acquiescence.⁷³⁵ Since a child does not have the capacity to provide informed consent, child marriage is, by definition, a forced activity. It is therefore, a violation of the child’s rights.

Although child marriage in Africa affects both boys and girls, girl-children are more likely, than boy-children, to be forced into child marriage and hence, be subjected to the consequences of this insidious institution. The UN has recognized child marriage as a violation of human rights and “a harmful practice that disproportionately affects women and girls globally, preventing them from living their lives free

732. See generally CHRISTOPHER N. J. ROBERTS, *THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS* (2015).

733. *Id.* at 3.

734. ActionAid (UK), *Child Marriage*, <https://www.actionaid.org.uk/about-us/what-we-do/violence-against-women-and-girls/child-marriage> (last visited on February 9, 2020).

735. *Id.*

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from all forms of violence.”⁷³⁶

In addition to the fact that girls who marry as children are deprived of the opportunity to obtain the education and training that would allow them to evolve into productive adults, they are subjected to a married life filled with violence and exposure to many health problems. International organizations, such as UNICEF, have noted that unless drastic measures are taken to abolish child marriage, “the number of girls and women married as children will reach nearly 1 billion by 2030—1 billion childhoods lost, 1 billion futures blighted.”⁷³⁷

African countries have not escaped the scourge of child marriage. Data from Human Rights Watch show that as much as 40 percent of Africa’s girls marry before they reach the age of 18 years.⁷³⁸ The rate of child marriage in some African countries is extremely high—for example, in Niger, it is 76% and in Central African Republic, it is 68%.⁷³⁹ Human Rights Watch has argued that unless there is effective intervention by various state- and non-state actors to bring to an end this practice, the number of girl-children marrying before they reach the age of 18 years is likely to double by 2050.⁷⁴⁰

Child marriage is a violation of human rights—the latter are generally considered the domain of international law. However, since the global community does not have a government that can make certain that human rights are recognized and protected, legal scholars have argued that “[t]he most effective mechanism for enforcing international law [including international human rights law] is for each ratifying government to incorporate its treaties and customary obligations into national laws.”⁷⁴¹ The hope is that each African country can domesticate the international treaties that it has signed and ratified and create rights that are justiciable in municipal courts.

For example, the Constitution of the Republic of Kenya, 2010, provides a formula for the domestication of international treaties when

736. Office of the U.N. High Commissioner for Human Rights, *supra* note 9.

737. Office of the U.N. Secretary-General’s Envoy on Youth, *supra* note 1.

738. HUM. RTS WATCH, *supra* note 18.

739. *Id.*

740. *Id.*

741. WEISSBRODT & DE LA VEGA, *supra* note 728, at 4.

it mandates that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁷⁴² Kenya ratified the African Charter on the Rights and Welfare of the Child on July 25, 2000 and hence, according to Article 2(6) of the Constitution of Kenya, 2010, all the provisions of the African Children’s Charter now form “part of the law of Kenya” and hence, now constitute rights that are justiciable in Kenyan courts. The next step, of course, is for Kenya and other countries in a similar position, to make certain that there exist a judiciary that is independent enough and has the capacity to enforce these constitutional provisions. In other words, the domestication of international human rights instruments is a necessary but not sufficient condition for the protection of human rights. Sufficiency requires that there be a governing process “undergirded by a separation of powers with effective checks and balances, which include an independent judiciary, a robust and politically active civil society, and independent press.”⁷⁴³

The question of whether international law, including international human rights law, is law within a given jurisdiction, can be put to rest through positive legislation. A country, for example, can, through its national constitution, “put to rest any doubts as to whether international law, including customary law, is law within its jurisdiction.”⁷⁴⁴ Some African countries have been able to overcome the constraints imposed on them by the failure to incorporate the provisions of international treaties into national constitutions “through the use of international human rights instruments as persuasive authority in national court decisions.”⁷⁴⁵

Take, for example, the Republic of Ghana, an African State whose constitution does not explicitly make any allowance for the use of international law as any form of authority or interpretive tool. Ghana’s national courts, however, have been able to overcome this constraint by adopting the transjudicial model, which has allowed judges to

742. Constitution of the Republic of Kenya, 2010, art. 2(6).

743. John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 73, 201 (2019).

744. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA J. INT’L L. 43, 73 (2018).

745. Adjami, *supra* note 412, at 112.

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utilize international law and comparative case law in domestic courts, regardless of their binding or nonbinding status. In recent years, courts in many African countries have increasingly been utilizing international law and comparative law as instruments to help them interpret their national constitutions, including provisions dealing with fundamental rights. As made clear by Archer CJ in *New Patriotic Party v. Inspector-General of Police* (Ghana), “I do not think that the fact that Ghana has not passed specific legislation to give effect to [the African Charter on Human and Peoples’ Rights], [means that] the Charter cannot be relied upon.”⁷⁴⁶

The present article has examined cases from the United Republic of Tanzania and Zimbabwe, in which judges have employed provisions of international human rights law as tools to interpret constitutional, statutory and customary law and in doing so, they have helped to significantly enhance the recognition and protection of human rights and bring domestic law in line with the provisions of various international human rights instruments. In analyzing the case, *Attorney General v. Gyumi*, which had come as an appeal before the Court of Appeal of the United Republic of Tanzania,⁷⁴⁷ Levira JA noted that, “Tanzania is not an isolated island” and that “[b]y ratifying and domesticating [various international and regional and sub-regional human rights instruments], the Government of Tanzania has demonstrated commitment to enforce them and assure smooth realization of human and peoples’ rights.”⁷⁴⁸

In reaching its decision in *Attorney General v. Gyumi*, the Court of Appeal cited to many international human rights instruments, including, for example, the *Universal Declaration of Human Rights*, *Convention on the Rights of the Child*, the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, and the *African Charter on the Rights and Welfare of the Child*. Using the provisions of these international and regional instruments as interpretive tools, the Court of Appeal noted that “the impugned provisions [of Tanzania’s Law of Marriage Act] have failed to uphold and appreciate the true intentions of the respective international,

746. Quoted in Christian N. Okeke, *The Use of International Law in the Domestic Courts of Ghana and Nigeria*, 32 ARIZ. J INT’L & COMP. L. 371, 411–412 (2015).

747. *Attorney General v. Gyumi*, *supra* note 546.

748. *Id.* at 29.

regional and sub-regional instruments.”⁷⁴⁹ It was with the help of these instruments that Tanzania’s Court of Appeal found that the entire appeal had no merit and dismissed it in its entirety. By doing so, the Court of Appeal let stand the judgment of the High Court.⁷⁵⁰

In the Zimbabwean case, *Mudzuru & Tsopodzi v. Minister of Justice, Legal and Parliamentary Affairs N.O. & Others*,⁷⁵¹ the Constitutional Court of Zimbabwe (“CCZ”) utilized international human rights instruments and comparative case law to (1) set 18 years as the minimum age for marriage in Zimbabwe; (2) strike down any law, practice or custom that authorizes a person under the age of 18 years to marry or be married; and (3) prohibit anyone who has not yet attained the age of 18 years to enter into marriage, “including an unregistered customary law union or any other union including one arising out of religion or religious rite.”⁷⁵²

With respect to the way forward, each African country should, first, sign and ratify all the relevant international, regional and sub-regional human rights instruments. Second, the appropriate authorities within the country should enact legislation to domesticate the provisions of these human rights treaties and conventions and create rights that are justiciable in domestic courts. Alternatively, the country can amend its constitution to make the provisions of treaties and conventions that have been signed and ratified by the country to become an integral part of national constitutional law, eliminating the need for national legislation to domesticate these treaties. A clause, such as that found in Article 2(6) of the Constitution of Kenya, can be inserted into each African country’s constitution to resolve the issue of the applicability of international human rights law in national courts.⁷⁵³ A country

749. *Id.* at 32.

750. The High Court of Tanzania, sitting at Dar es Salaam, had held as follows: “Having found as we have found herein above that the impugned provisions have lost their usefulness, we have no option but to find that the two provisions i.e. sections 13 and 17 of the Law of Marriage Act, Cap. 29 RE 2002 are unconstitutional to the extent advanced herein above.” *Gyumi v. Attorney General*, *supra* note 41, at 26–27.

751. *Mudzuru & Tsopodzi*, *supra* note 595.

752. *Id.* at 55.

753. Article 2(6) of the Constitution of Kenya, 2010 states as follows: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this

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could also choose Angola's approach, as illustrated by Article 26 of its constitution:

1. The fundamental rights established in this Constitution shall not exclude others contained in the laws and applicable rules of international law.
2. Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola.
3. In any consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.⁷⁵⁴

Third, each African country must make certain that it provides itself with a governing process undergirded by the separation of powers, with checks and balances. One of those checks and balances must be an independent judiciary—one that is independent enough and has the capacity to adequately constrain the exercise of government power and use its interpretive power to bring national law in conformity with the provisions of international human rights instruments. Finally, as has been demonstrated by the cases from Tanzania and Zimbabwe, courts have a very important part to play in the elimination of child marriage and other practices, whether based on religion or tradition, that are harmful to children in general and the girl child in particular.

Constitution.”

754. Constitution of the Republic of Angola, 2010, art. 26 (emphasis added).