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To cite this article: Elizabeth Nahamya (Hon. Justice) (2017) Child, early, and forced marriages (CEFM) in the Commonwealth: the role of the judiciary, Commonwealth Law Bulletin, 43:1, 111-144, DOI: [10.1080/03050718.2017.1329964](https://doi.org/10.1080/03050718.2017.1329964)

To link to this article: <https://doi.org/10.1080/03050718.2017.1329964>



Published online: 31 May 2017.



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Child, early, and forced marriages (CEFM) in the Commonwealth: the role of the judiciary

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Forced marriage, especially that involving children, is one of the greatest challenges facing individuals around the world and is integral to the full realization of universal human rights, women's rights, and the rights of the child. This paper examines the effects of child, early and forced marriages (CEFM) within the Commonwealth, with a specific focus on East Africa, and highlights how to best address the issue using international, regional, and national legal norms and judicial processes currently in place. The East African countries examined are Kenya, Rwanda, Uganda and Tanzania. The paper begins with a general introduction of why combating CEFM is an important topic for consideration by the Commonwealth Secretariat and the efforts being made to address it. The introduction is then followed by the background section which gives a historical overview of CEFM at the global level. The paper defines 'CEFM', which is crucial since the definitions often vary depending on how CEFM is worded in respective jurisdictions, followed by CEFM's manifestation within East Africa. Discussing the history of CEFM often helps one understand the hidden challenges that hinder effective implementation of efforts to counter it. The discussion on hidden challenges illustrates how culture and customs play an important role in the prevalence and acceptance of CEFM, as well its damaging effects on education and health. The rest of the paper examines the legal frameworks in place to address CEFM within the four jurisdictions. This includes examination of international instruments such as the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* to regional instruments such as the *Protocol on the Rights of Women in Africa* to the *African Charter on Human and Peoples' Rights*, in an attempt to analyze the legal obligations that arise from these conventions. Considering that the main target audience of this paper are those within the judiciary (most specifically East Africa), it is important also to take a closer look at the national legal frameworks in place, comprising of national constitutions and statutory laws. The paper then concludes with a section on recommendations and finally and most importantly relevant case law in Appendix 1.

1. Introduction

This paper was developed following a three-day workshop organized by the Commonwealth Secretariat and held in Nairobi from 24 to 26 February 2016.

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This paper is included in the Judicial Bench Book on Violence against Women in East Africa, launched at the 11th Commonwealth Women's Affairs Ministers Meeting in Samoa, September 2016.

The purpose of the workshop was to review and validate a Commonwealth Judicial Bench-Book (JBB) on Violence against Women and Girls (VAWG) for East African jurisdictions. The participants comprised mainly of judges from the four East African Commonwealth jurisdictions and other experts who deliberated on whether the adequacy of the JBB in addressing judicial intervention in tackling VAWG in East Africa. The workshop focused on critical issues raised, lessons learned and best practices. In addition, the review exposed several gaps, which would necessitate reforming the law. This workshop would in turn lead to the launch of the JBB in Nairobi on 29 June 2016.

The Commonwealth's mandate on child marriage arose from the recognition that 'gender equality and women's empowerment are essential components of human development and basic human rights' and therefore the existence of child, early and forced marriages (CEFM) is not only a violation of basic human rights but also a violation of the rights of young girls and women. Additionally, CEFM was made a key mandate area in the 2015 Commonwealth Heads of Government meeting in Malta. The Commonwealth's commitment to end CEFM resulted in the Kigali Declaration,¹ whereby the Commonwealth national human rights institutions agreed to prevent and end child marriages. They also made commitments towards the monitoring and enforcement of legislation, improving data collection and the promotion of compulsory education for girls.

This paper takes a close look at the efforts being made by Kenya, Rwanda, Uganda and Tanzania to address CEFM in their courts of law, if any, and the efforts being made at the national government level to raise awareness and bring about the elimination of CEFM through the creation of national action plans in order to ensure the efficiency and success of the Kigali Declaration.

2. Background

2.1. Overview

Historically, CEFM is a practice that has been prevalent in various communities around the world as early as the nineteenth century.² Despite the progressiveness and advancement of international human rights law, this issue is one that many States still struggle to eliminate, both in the global north and south. In the United States for example, only nine states and one territory (US Virgin Island) have statutes criminalizing forced marriages,³ which means that within 41 States, young women and girls have no legal recourse against CEFM. The statistics provided indicate that the legal protection needed to prevent child marriages is not merely a problem in the developing world but an issue that transcends borders regardless of a State's standing in terms of economic development.⁴ This

¹Commonwealth Secretariat; Kigali Declaration, <<http://thecommonwealth.org/sites/default/files/press-release/documents/Early%20and%20Forced%20Marriage%20-%20Kigali%20Declaration.pdf>> accessed 21 July 2016.

²Jodi O'Brien, *Encyclopedia of Gender and Society* (Vol. 2, Sage Publications 2009).

³Tahirih Justice Center, 'Criminal Laws Addressing Forced Marriage in the United States' (Tahirih Justice Center, July 2013) <<http://preventforcedmarriage.org/wp-content/uploads/2015/01/Tahirih-MEMO-State-Criminal-Laws-Forced-Marriage.pdf>> accessed 20 June 2016.

⁴See also Jeniffer Birech, 'Child Marriage: A Cultural Phenomenon' (2013) 3(17) IJHSS.

ultimately means that States need to implement far more aggressive and protective laws to effectively tackle and eliminate CEFM. It should be noted however that as recently as July 2016, Tanzania and The Gambia (the latter being a former member of the Commonwealth) have outlawed child marriages, with The Gambia prescribing a jail time of 29 years for anyone found guilty of marrying a child under the age of 18.⁵

A recent report by UNICEF estimates that, worldwide, approximately 700 million women were married before the age of 18 years. Compounding this statistic is the fact that one in three of these women (250 million) were married before the age of 15.⁶ It should be noted, that despite the fact that it is girls who are disproportionately affected by child marriage, boys too in some instances are married as children. Statistically CEFM is most prevalent in South Asia and sub-Saharan Africa; in fact the highest rates of child marriages are found within these two regions.

2.2. Definitions

The definitions of CEFM often vary depending on how the abbreviation is used. For purposes of this paper the definition will focus on ‘forced marriage’ and ‘early marriage’. The reason for this is that by definition, ‘child’ marriages⁷ can be considered ‘forced marriage’, or a form thereof, because children especially those under the age of 15 are not able to make an informed decision as to whether or not they want to be married. Most often this decision is influenced by a parent or family member.

Forced marriage is often defined as, *a marriage conducted without the valid consent of one or both parties and where duress is a factor or as a union of two persons at least one of whom has not given their full and free consent to the marriage*. Furthermore, it is important to differentiate between a forced marriage and an ‘arranged marriage’, as the latter is often described as one where a third party or parties may have proposed the union, but both parties are free to decline it.⁸

Early marriage is defined as *a union where at least one of the parties is a child below 18 years in countries where the age of majority is attained earlier or upon marriage*. Early marriage also refers to *marriages where both spouses are 18 years and over but certain factors make them unready to consent to marriage for example their level of physical, emotional, sexual and psychosocial development, or lack of information regarding the person’s life options*.⁹ Within

⁵BBC, ‘Gambia and Tanzania outlaw child marriage’ (BBC World Africa, 8 July 2016) <<http://www.bbc.com/news/world-africa-36746174>> accessed 21 July 2016.

⁶United Nations International Children’s Emergency Fund (UNICEF), *Ending Child Marriage: Progress and Prospects* (New York 2014).

⁷See also Karen Muller, ‘Early Marriages & The Perpetuation of Gender Inequality’ (PhD, Institute for Child Witness Research & Training, S. Africa, Research Associate University of Zululand), p 202.

⁸Ibid.; On forced marriage see also A Phillips and M Dustin, *UK Initiatives on Forced Marriage: Regulation, Dialogue & Exit* (London: LSE Research online, 2004) <http://eprints.lse.ac.uk/546/1/Forced_marriage.pdf> accessed 2 July 2016.

⁹Sexual Rights Initiative (SRI), ‘Analysis of the Language of Child, Early, and Forced Marriages’ (2013) SRI Working Paper <<http://sexualrightsinitiative.com/wp-content/uploads/SRI-Analysis-of-the-Language-of-Child-Early-and-Forced-Marriages-Sep2013.pdf>> accessed 2 July 2016.

the context of the law in East Africa, CEFM does not have a concrete definition. Therefore it is often presented in terms of rights and prohibitions around the institution of marriage, including marriage involving children.

2.3. *Manifestation of CEFM in East Africa*

The prevalence of CEFM in sub-Saharan Africa is one of increasing concern, as the numbers keep rising. Most information gathered on CEFM places child marriages into two categories: those married before 15 years and those married before 18 years. This categorization is of importance as it enables those researching CEFM to understand the trends in various countries. For example in Niger, one third of all girls are married off before they are 15 years old, whereas in Burkina Faso more than half are married before 18 years, meaning that fewer girls in Burkina Faso marry before the age of 15.¹⁰ Other factors too often change the rate at which children are married, for example rural versus urban dynamics. In Ethiopia, it has been shown that the rate of child marriages is higher in northern region of Ethiopia at 75%, versus those married in Addis Abba which stands at 26%.¹¹

Table 1 shows the statistics of prevalence of child marriage for children aged below 15 and 18 years in East Africa.¹²

Table 1. Statistical Information East Africa 2015.^a

Country	Married by age 15 in %	Married by age 18 in %
Kenya	6	26
Rwanda	1	8
Uganda (Highest Prevalence in East Africa)	10	40
Tanzania	7	37

^aFigures were compiled from, UNICEF State of the World's Children Report 2015 and the Girls not Brides organization.

In East Africa, CEFM is evident in the various forms of marriage it often manifests itself. Some of these manifested forms are: *levirate marriage* whereby marriage is forced upon a widow to the brother of her deceased husband, also known as 'wife inheritance'; and *sororate marriage* whereby the sister of a deceased or infertile wife is forced to marry or have sex with her brother-in-law or widower/husband). The other forms of CEFM in East Africa also include the trafficking of brides, marriage as a dispute settlement mechanism, and forced marriage in the context of armed conflict. The latter form was seen in Northern

¹⁰United Nations International Children's Emergency Fund (UNICEF), *Ending Child Marriage: Progress and Prospects* (New York 2014).

¹¹Caroline Harper and others, 'Unhappily Ever After: Slow and Uneven Progress in the Fights Against Early Marriages (Overseas Development Institute Report, 2014).

¹²Child marriage prevalence is defined as the percentage of women 20–24 years old who were married or in union before age 18.

Uganda during the Lord's Resistance Army (LRA) conflict whereby young girls were taken as 'bush wives' by the LRA.¹³

'Bush Wives' is a term given to the thousands of women who are abducted and forced to become the wives of the soldiers, regardless of age. During the Sierra Leonean civil war many young girls were taken against their will and forced to be the 'domestic and sexual slave of their 'husbands''.¹⁴ It has been reported that around 60,000 women and girls were victims of sexual violence and CEFM in Sierra Leone.¹⁵ Compounding this statistic is the thousands of other women and girls in conflict/post-conflict zones like eastern Congo and northern Uganda who to are forced to endure forced marriage. Encouraging however are the landmark case rulings of the Special Court for Sierra Leone and the International Criminal Court (ICC) that have classified forced marriage as a crime against humanity.¹⁶

3. Hidden challenges

3.1. Cultural norms and customs

In order to truly comprehend the forces that drive child marriages, one needs to understand the social dynamics and cultural customs that bring about and allow this practice to occur in the first place. Within East Africa, the various cultures and customs often define the gender roles played by women and girls, creating an environment whereby the rights of women and girls are undermined in favor of traditional practices that often perpetuate CEFM.

One aspect of the hidden challenges to CEFM can be seen in what is known as widow inheritance. In Western Kenya the practice of widow inheritance is where a girl, usually the younger sister/cousin to the deceased, is 'compelled' to marry her deceased sister's widower. The identified girl hardly has a choice to opt out of being the replacement wife.

In Tanzania, a cultural practice that exacerbates CEFM is known as *Nyumba Ntobu*.¹⁷ This cultural practice involves an older, wealthier woman paying bride price for a young girl to become her 'wife'. A man is then chosen to impregnate the girl and any children who are born belong to the older woman. This practice is perpetrated by wealthy and influential older women to protect themselves from

¹³Ibid.; 'God's commands': the destruction of childhood by the Lord's Resistance Army' – 'I would like to give you a message. Please do your best to tell the world what is happening to us, the children so that other children don't have to pass through this violence'. Amnesty International Report, September 1997.

¹⁴Freetown, Sierra Leone – *Fatmata Jalloh was just a kid selling pancakes on a rural road in Sierra Leone when a rebel soldier snatched her and made her his wife. 'I was a child. I didn't know anything about love at that time ... but he said, 'If you don't take me [as your husband], I'll kill you...'; see below for source of reference.*

¹⁵Jina Moore, 'In Africa, Justice for "Bush Wives"' (Christian Science Monitor, 2010) <<http://www.csmonitor.com/World/Africa/2008/0610/p06s01-woaf.html>> accessed 19 July 2016.

¹⁶Case Law on CEFM can be found in section 'X' of the paper, reference to ICC ruling *The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui & The Prosecutor v Thomas Lubanga*.

¹⁷'Child Marriage around the World: Tanzania', <<http://www.girlsnotbrides.org/child-marriage/tanzania/>> accessed 25 July 2016.

becoming victims of VAW through marriage to men. This act is meant to reduce acts of VAW, as the marriage is between two women and the role of the man is merely to foster the conception of a child and the man does not have a significant role in the domestic set-up. This practice however still does not give the girl a chance to decide on whether or not she wants to join a marriage union or engage in sexual intercourse with a man who often is far older than the girl. In addition, bride price can also be a motivation for parents; a younger bride means a higher bride price for the family.

In Uganda, the Pokot tribe, the majority of whom are of Kenyan origin, have settled at Amudat/Nakapiripit. This tribe is known to marry off girls at the age of 12 years upon the receipt of 12 heads of cattle. The girls are married off as they are viewed as a source of economic wealth and stability. Marriage by capture, abduction or kidnapping is a common phenomenon. In Karamoja, it takes the form of a cultural practice known as 'wrestling' which determines which young girl will be the new bride. Another common practice within this ethnic group is where a victim of defilement is required to get married to the perpetrator. This practice is extended within the Buganda region and in some clans in Acholi region whereby when a girl is defiled the parents will offer the girl to the defiler for marriage,¹⁸ even if the girl does not wish to marry her defiler.

Among the Baganda,¹⁹ prior to the enthronement of the king, it was a customary requirement that he have sexual relations with a virgin girl commonly known as 'Nakku'. The 'Nakku' would henceforth not be permitted to marry any man after she has been defiled by the King in-waiting. It should be noted that the current King of Buganda Ssabassajja Kabaka Ronald M. Mutebi issued a public decree against this specific cultural practice and therefore prior to his coronation it is alleged that he did not defile a 'Nakku'. However, despite this, the 'Nakku', who had been selected, had to undergo other rituals, and will remain unmarried for the rest of her life.

3.2. Education

The right to education is a fundamental human right codified in most national constitutions and in international human rights law conventions such as the *International Convention on Economic, Social and Cultural Rights*. Having a right to access education is not only essential in decision-making but also in economic development whereby an individual can gain the skills needed to rise out of poverty. Despite this being a basic right, within most East African countries, girls bear the brunt of not attaining education especially as a result of CEFM. A Uganda Demographic Health Survey, conducted in 2006 in relation to the correlation between CEFM and education, showed that 67% of women aged 20–24 years had no formal education, while 58% with primary education were married or in a union at age 18 in comparison to 14% of women with secondary

¹⁸In one of the criminal sessions in Gulu in 2005 in the case of *Uganda v Otenya Michael* (High Court Criminal Session Case No. 0209-2012) a girl aged 13 years was defiled by a man aged 18 years old. It has been stated that the girl was taken to the man's house by her mother and grandmother to become Otenya's wife.

¹⁹The Baganda are the largest ethnic group in Uganda. Bantu in origin they comprise approximately 17% of the population in Uganda.

education or higher.²⁰ Although the government of Uganda has established a universal primary school education (UPE) policy nationwide, the realities on the ground, such as underfunding and overcrowding (leading to higher drop-out rates) have resulted in poorer families especially in rural areas, marrying off their daughters when they are unable to afford paying school fees anymore.²¹

3.3. *Health*

It has been well documented that CEFM has a devastating effect on a girl's health which often results in life long complications. These complications can manifest in various forms:

- (i) *Early pregnancy*, where statistics have shown that girls aged 10–14 years are five times more likely to die in pregnancy or childbirth than women aged 20–24 years, and girls aged 15–19 are twice as likely to die. One of the most damaging consequences of early pregnancy and the need to prove fertility after marriage, regardless of age, is obstetric fistula whereby the vagina, bladder and/or rectum tear during child birth, which, if left untreated, causes lifelong leakage of urine and faeces.²²
- (ii) *Exposure to violence*, which takes on the form of physical harm and violence, psychological attacks, and most common of all forced sexual acts including marital rape,²³ which in most East African societies and legal systems is still considered taboo.²⁴
- (iii) *Infant mortality*, a child born to a young teen mother is more likely to die before the age of one.
- (iv) *HIV/AIDS*, girls exposed to CEFM are more likely to contract HIV especially from partners who are much older and whose sexual history might have exposed them to HIV.

Another major health risk that CEFM presents is in relation to a traditional practice known as female genital mutilation (FGM), which is outlawed in most East African countries. Legally, CEDAW and CRC Committees have defined FGM as a harmful practice violating the human rights of girls and women on par with child marriage.²⁵ Despite this, FGM is still widely practiced and seen as

²⁰Joy for Children, 'Child Marriage in Uganda: A Call for Urgent Action' (Publication) <<http://www.joyforchildren.org/?q=content/child-marriage-uganda>> accessed 2 July 2016.

²¹Ibid., but see also Early Marriage: A Harmful Traditional Practice – A Statistical Exploration (UNICEF) 2005, p 6.

²²Joy for Children (Uganda), 'Child, Early, and Forced Marriage in Uganda' (Unpublished).

²³Human Rights Watch (HRW), 'Ending Child Marriage in Africa' (HRW, December 2015).

²⁴In Uganda's Sexual Offences Bill (proposed) of 2015, 'Marital Rape' is termed as Marital Sexual Assault which carries a much lesser sentence than the existing offence of Rape.

²⁵ECPAT International, 'Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage' (Thematic Report, ECPAT October 2015).

a prerequisite after achieving puberty and before marriage.²⁶ In relation to CEFM, FGM can be forced upon a girl who is to be married as young as nine years old. Lastly, FGM can cause ‘severe bleeding and problems urinating and later lead to medical conditions, including infertility, complications in childbirth and increased risk of newborn deaths’.²⁷

4. CEFM and the courts

4.1. *The role of the judiciary*

Judicial intervention, depending on how progressive the judicial officer is, may have both positive and negative impacts on the phenomenon of VAWG. Court records reveal the role played by legal processes in disrupting or reinforcing patterns of domestic violence.²⁸ The role of the judiciary in CEFM cases is to adjudicate CEFM cases brought before the judicial officers under the relevant laws; to create a victim centered courtroom with sufficient safeguards and support for victims and witnesses in these cases; and to engage in efforts outside the courtroom aimed at changing mindsets and influencing positive change. Each of these roles will ensue a further disposition.

4.2. *Adjudication and application of relevant laws*

In most of the EAC countries, judicial officers handle cases of sexual and gender-based violence according to laws relevant to the acts specifically charged. A number of relevant cases have been identified and appear in Appendix 1.

In Uganda and in Tanzania, until recently, the laws did not explicitly provide for forced marriage. Kenya makes mention of ‘forced marriage’ in the definitive part of *Protection against Domestic Violence Act* under s 4 but it does not create an offence of ‘forced marriage’. Incidents are majorly handled as defilement cases, cases of abduction with intent to marry, and not as CEFM in Uganda, Tanzania and Kenya. Rwanda, on the other hand makes ‘forced marriage’ a distinct offence and criminalizes it.²⁹ For Tanzania and Uganda, the laws on age and consent exist for marriages contracted under different legal regimes, notably customary marriages and marriages conducted under the various statutory provisions applicable to marriage such as the *Marriage Act 1904 Uganda* and the *Law of Marriage Act of Tanzania*. However, the ‘disjunctive between customary and formal marriage laws makes it challenging to lay down sanctions for customary marriages’.³⁰ One way of initiating the prosecution of such cases is for the

²⁶FGM is normally performed on young girls sometime between infancy and age 15 that intentionally removes or injures (partially or wholly) the female genital organs for non-medical reasons and with no health benefits; see n 19 for reference.

²⁷ECPAT International, ‘Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage’ (Thematic Report, ECPAT October 2015).

²⁸Emily Burrill, Richard Roberts, and Elizabeth Thornberry, ‘Domestic Violence and the Law in Africa’ <http://www.ohioswallow.com/extras/9780821419281_intro.pdf> accessed 25 July 2016.

²⁹See Section on National Laws in this Paper.

³⁰Commonwealth Roundtable on Early and Forced Marriage, 14–15 October 2013, Marlborough House, London, p 15.

complainants to file cases if disagreements emerge, for instance, after failing to agree on the bride price. When this happens, the matter becomes a criminal matter falling within the ambit of 'Defilement' or rape. In Uganda, the cases will either be prosecuted as 'Simple Defilement' cases for girls between 15 and 18 years of age, or 'Aggravated Defilement' for children below 14 years; or where the accused is found to be HIV positive; or where the victim is a mentally challenged person or where the defiler is a parent, guardian or a person in authority. This scenario can be exemplified by the case of *Uganda v Kintu Yusuf, Mbd CRB 2023/2015 AA 038/2016*. The victim was allegedly 17 years old when she left Mubende and went to live with the accused as husband and wife in Kampala. She left after about two months and when it was discovered that she was pregnant, a case of defilement was reported. The accused was charged but the complainants later lost interest in the case. In a similar case of *Uganda v Mwesigye Abdul Shaban, MBD CRB 794/2016*, the victim aged about 16 years escaped from home and joined the accused with whom she stayed as a wife until when her parents found her already pregnant. The baby died shortly after birth. A case of Aggravated Defilement was reported. The accused was recently committed to the High Court for trial. Meanwhile the victim has refused to leave the 'so-called' 'husband's' home. The accused is HIV positive while the victim is HIV negative.³¹ It may also be due to the fact that the issue of marriage is a civil matter and as such, it is incumbent upon an individual to file or not to file a suit against the person who has wronged her. The process of initiation may not be so different from that in Tanzania. However, in Kenya and Rwanda, which have clear marriage laws, the prosecution process may be commenced upon violation of the law.

Additionally, CEFM cases are matters that involve the parents of the girl, the groom and his parents. As such they are categorized as private matters. The parents of the girl and those of the groom would negotiate the marriage of the girl and agree on a common position. Another contributing factor is that there are societal pressures not to expose private matters, with norms encouraging silence and subordination. Considering that the victims are young persons who depend upon their parents, they may not be capable of suing on their own. They will require the support and cooperation of their parents. Also, the parents might be ignorant about the law and the procedure to be applied in pursuing such cases. The high cost of engaging Counsel to institute a case, even where parents are knowledgeable, is another setback. In addition, many women, particularly those in rural areas find Courts inaccessible due to a number of reasons including financial cost, complexity of procedures. Also, women and girls govern their lives by informal norms, practices and institutions that apply customary norms to issues of VAW and girls. In order to overcome some of the hurdles, in some countries, efforts have been made by the law reform bodies.³²

³¹As per the Resident State Attorney, Mubende, Uganda, Mr. Stanley Moses Baine; See also s 129(3) & (4) of the Uganda Penal Code Act Cap 120.

³²At the launch of the Commonwealth Judicial Bench Book in Nairobi, on 29 June 2016, the chairperson of the Uganda Law Reform Commission (ULRC) through Ms. Vastina Rukimirana Nsanze, informed participants about the efforts of the ULRC to translate some of the laws into several local languages to make them accessible to the users.

4.3. *Creation of a victim-centered court*³³

It is expected that judicial officers, in handling any case relating to CEFM, will apply creativity to promote access to justice by ensuring accessibility, appropriateness, equity, efficiency and effectiveness. In addition, judicial officers are expected to take into account the vulnerability of victims and witnesses. Judicial officers are encouraged to ensure that at all stages of court proceedings, the following rights and guarantees for each victim are applied to the extent provided by law in their jurisdiction. These include the right to:

- (a) be treated with respect and dignity;
- (b) be protected from re-victimization due to further violence;
- (c) receive all information about his or her rights (delivery of the judgment and damage compensation, i.e. filing a property claim);
- (d) have the child's identity protected from the media, in accordance with relevant legislation and practice;
- (e) be protected from prejudices based on gender, race, ethnicity, age, appearance, physical and intellectual abilities or other personal features;
- (f) be asked only those questions relevant for the court proceeding;
- (g) have all required steps taken to eliminate fear of future acts of violence;
- (h) protection and safety;
- (i) be informed, at least in cases when victims and their families may be in danger, about the perpetrator's escape from prison/custody, or temporary or permanent release;
- (j) have special protective measures provided as a vulnerable witness in court proceedings, including video-link hearings so the victim may avoid being questioned in the same room

Also during court proceedings, judicial officers are encouraged to take extra protective measures to make the courtroom environment user friendly and do the following:

- (a) Inform both the victim and the accused of their rights.
- (b) Handle bail applications by balancing the vulnerability of the victim and prosecutor's version of events.
- (c) Set conditions for bail during such as non-molestation orders, contact with children.
- (d) Consider special protection orders such as giving evidence by live TV link from a room outside the courtroom, giving evidence *in camera*; use of video recorded interviews to the extent permitted by due process.
- (e) Where necessary appoint an intermediary in the interests of justice.
- (f) Take cognizance of the fact that corroboration requirements may be dispensed with in such cases in line with the constitution and also in accordance with the best practices internationally.
- (g) Vary protection orders for sound reasons.

³³Prior to the trial, it will be the role of judicial officers to ensure compliance with the due diligence principle to investigate CEFM See CK (A child) & 11 others v COP & 2 ors.

- (h) Permit the use of recorded statements as evidence in chief or part of such evidence.
- (i) Hold special sittings to examine vulnerable witnesses.³⁴
- (j) Allow arrangements for accused persons to hear/observe examination of vulnerable witness and ensure that the accused person can communicate with court during examination.
- (k) Control cross examination by paying attention to the views of witnesses, nature of questions put to them, accused's conduct towards the witness during proceedings and nature of relationship between witness and accused.
- (l) Judges may consider victim and witness vulnerabilities and needs when determining lengths of adjournments.
- (m) Use *in camera* proceedings to minimize to protect the identity of the witness or avoid intimidation.
- (n) Use specialized gender responsive courts – e.g. Mobile Domestic Violence and Family Courts.
- (o) Use of a psychologist or other expert to assist the victim during testimony; and provide adequate support services – depending on the court's organizational capacities so that the victim is afforded both physical and psychological support as well as provision of care and referral as needed afterwards.³⁵

Further during trial, it is incumbent upon judicial officers to exercise procedural fairness. They should be mindful of ensuring fairness to victims of sexual violence whilst at the same time balancing the due process rights of the accused. Judicial supervisory considerations, such as maintaining a record of cases of violence against women, and creating awareness for court personnel, are pertinent. Judicial officers are encouraged to creatively explore ways of dealing with evidence which requires corroboration. At the sentencing stage, procedural considerations on judgment and sentencing will be applicable.

4.4. *Efforts outside the courtroom*

The role of judicial officers to address VAW is not confined to the courtroom. They can take part in creating awareness of the adverse effects of violence and in sensitizing women and the community in general, of women's rights and the consequences of violence on the lives of women and children.

They can also create awareness of the existence of laws to address such violence. Such initiatives are instrumental in enhancing women's awareness of their rights and the available remedies and services.

³⁴Challenge has been how to identify 'vulnerable witnesses'. Kenya has court rules governing the interpretation of the Sexual Offences Act that may be useful as an example.

³⁵Courts may identify relevant partners in civil society who can assist in this function because in the usual set up, Courts in many jurisdictions lack this support facility.

Judicial officers should engage in extrajudicial efforts to address CEFM. Some potential options include:

- (a) Participate in cross-sectoral exchange with relevant actors including GBV/Child protection service providers, social workers, police, and prosecutors to establish clear SOPs and referral pathways regarding law, evidence collection and requirements, psychosocial and physical support/protection in GBV and children's rights cases, including CEFM.
- (b) Improve witness protection/safe shelter options and referral mechanisms.
- (c) Engage in community outreach strategies concerning CEFM with traditional leaders, grassroots groups, schools and other entities.
- (d) Enhance the role of judicial officers as role models and champions for girl-education and safe environments.

5. Legal instruments and laws at international, regional and national levels

5.1. *International and regional laws*

CEFM is directly or indirectly addressed in several international human rights conventions and declarations. These legal instruments include, at international level: the *Universal Declaration of Human Rights*; *International Covenant on Civil and Political Rights* (1966); *International Covenant on Economic, Social and Cultural Rights* (1966); *Convention on the Elimination of Discrimination Against Women (CEDAW)*; *Convention on the Rights of the Child (CRC)* (1989); *Convention to Suppress Slavery and the Slave Trade* (1926) and *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956); and the *Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* (1962). At the regional level the legislative instruments include: *African (Banjul) Charter on Human and People's Rights* (1981); *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2005); *African Charter on the Rights and Welfare of the Child* (1990); *African Youth Charter* (2006); and the *Kigali Declaration* (2013).

For the purposes of this paper, focus is on the following international instruments: *CEDAW*, and the *Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* (1962); and the following regional instruments: *The African Charter on the Rights and Welfare of the Child* (1990), *African Youth Charter* (2006), and *Kigali Declaration* (2015).

The CEDAW, adopted in 1979, was a landmark legal instrument of international human rights law ensuring the added protection of women. Within CEDAW, the following provisions specifically address aspects of CEFM: Article 16 – 'The same right to freely choose a spouse and to enter into marriage only with their free and full consent'³⁶ and 'The betrothal and the marriage of a child

³⁶The Convention on the Elimination of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Art 16(1)(b).

shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage'.³⁷

The *Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* adopted in 1962 plays an extremely important role because it codifies into international law provisions addressing forced marriage (within East Africa, Rwanda is the only State to have ratified the convention). Article 1 of the Convention states: 'No 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'.³⁸

The *African Charter on the Rights and Welfare of the Child* (1990) is considered the regional extension of the CRC and plays an important role within the CEFM discourse as it codifies specific rights of a child. The following provisions have been selected as they relate directly to the issues discussed in the paper in regards to manifestations and hidden challenges. The convention, in Article 2, begins with the definition of a child: 'a child means every human being below the age of 18 years'.³⁹ Article 16 protects the child from all forms of child abuse and torture whereby it calls upon states to 'take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child'.⁴⁰

Seen as one of the most important articles in the convention, in relation to CEFM, is Article 21 which grants protection against harmful social and cultural practices. The article 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: those customs and practices prejudicial to the health or life of the child'⁴¹; and *those customs and practices discriminatory to the child on the grounds of sex or other status*.⁴²

Two major initiatives in the fight to end CEFM were launched in Africa and amongst the Commonwealth member states. The first, known as the African Youth Charter, was adopted in 2006 and provides that – *young men and women of full age who enter into marriage shall do so based on their free consent*.⁴³ The latter, known as the *Kigali Declaration*, was adopted in 2015 and aims to prevent and end child marriage by providing Commonwealth national human

³⁷CEDAW (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Art 16(2).

³⁸The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (adopted 10 December 1962, entered into force 9 December 1964) 521 UNTS 231; Art 1(1).

³⁹The African Charter on the Rights and Welfare of the Child (ACRWC) (11 July 1990); Art 2.

⁴⁰*Ibid.*; Art 16 (1).

⁴¹The African Charter on the Rights and Welfare of the Child (ACRWC) (11 July 1990); Art 21 (1)(a).

⁴²*Ibid.*; Art 21(1)(b).

⁴³African Youth Charter (2 July 2006); Art 8 (2).

rights institutions with a comprehensive framework.⁴⁴ In addition, the *Kigali Declaration* includes a list of seventeen commitments to be pursued by Commonwealth national human rights institutions, some of which include but are not limited to; *advocating for legal reform including bringing the age of marriage in line with international standards and strengthening systems for the registration of marriages and births.*⁴⁵

5.2. National constitutions and protective laws

Considering that the applicable laws for each country differ, a summation of the laws from each jurisdiction will follow, juxtaposed with a summary of the relevant case law on CEFM and if none exists, case law from other jurisdictions will be considered.

5.2.1. Kenya

The *Constitution of Kenya* recognizes that ‘every adult has the right to marry a person of the opposite sex, based on the free consent of the parties’ and also provides for equality for all before the law. Kenya has made significant steps in addressing CEFM by enacting several laws, including the *Marriage Act of 2014*, a uniform law to govern celebration of marriages across all religious and cultural divides. Section 4 of the Act sets 18 years as the minimum age to marry for all women, violation of which carries an imprisonment term not exceeding 5 years or a fine not exceeding 1 million Kenya shillings or both. The Act is progressive, and under s 11, a union is void where at least one of the parties is underage, or where consent was not freely given.

Another Act of significance is the *Protection against Domestic Violence Act No. 2 of 2015* which recognises child marriage, forced marriage, wife inheritance and FGM as forms of domestic violence and provides for protection orders and other measures for victims. Police officers who receive or investigate complaints of domestic violence have various duties which include advising victims on access to shelter, medical examination and right to lodge a criminal complaint.⁴⁶ In *C.K. (A child) & 11 others v COP & 2 others*, the police was condemned for culpable systematic violence and the court held that while the perpetrators of harm on the victims were directly responsible, the respondents could not escape responsibility as their failure to ensure effective investigation and prosecution of the perpetrators had created a climate of impunity in which perpetrators knew that they could defile more children. A person who believes that domestic violence is being committed is required to report the offence to authorities. Court may, upon application, grant a protection order to a person who is facing domestic violence. A person who suffers personal injuries or other loss may apply to court for compensation.

⁴⁴<<http://thecommonwealth.org/sites/default/files/press-release/documents/Kigali%20Declaration.pdf>> accessed 1 March 2017.

⁴⁵Ibid.

⁴⁶Section 7 of the Domestic Violence Act, 2010.

FGM is also prohibited under the *Prohibition of Female Genital Mutilation Act 2011*. Kenya has also enacted laws that incriminate concealment of FGM, this was enforced in *S M G & R A M v Republic (Criminal Appeal No. 66 of 2014) 229*.

Other laws include the *Sexual Offences Act* which punishes sexual acts with children below 18 years of age. Defilement of a child below 11 years attracts a sentence of life imprisonment, while the sentence for conviction of defilement of a child of 12–15 years attracts a sentence of twenty years. In the case of defilement of a child aged 16–18 years, the sentence meted out is 15 years imprisonment. A person who commits attempted defilement is liable to a term of imprisonment of no less than 10 years. Section 8(6) of the *Sexual Offences Act* avails an accused person with a defence. In the aforementioned section, if it is proved that the accused took diligent steps but failed to find out the actual age of a child, then such an accused would not be guilty of defilement. This was illustrated in *Martin Charo v Republic [2016] eKLR*. The trial court convicted the appellant and sentenced him to serve 20 years in prison. The girl's testimony was that she had opted to dodge her brothers after going to the beach and sneaked into the appellant's house with the only motive being to have sex and go back home. On appeal, the conviction was quashed. The Judge also stated that the appellant should not be condemned for the voluntary acts of the complainant as she was enjoying the sex relationship. Consequently, the appellant was set free.

The Children Act 2001 provides a framework for child protection and recognizes the rights and best interests of the child. A child has a right to live and be cared for by its parents, and to be protected from sexual exploitation. Further 'no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development'.

The Counter-Trafficking in Persons Act (2010) defines exploitation to include slavery, forced labor, sexual exploitation, child marriage, and forced marriage. Trafficking in persons is committed when a person aims to exploit by coercion, fraud, deception, abuse of power, bribery.

5.2.2. Rwanda

In Rwanda, the laws on CEFM comprehensively protect the rights of the child. Rwanda ratified almost all international conventions relating to the promotion and protection of child rights including the *UN Convention on the Rights of the Child (CRC)* and its additional protocols, the *Convention on the protection of children and cooperation in respect of inter country adoption*, as well as the *African Charter of the Rights and Welfare of the Child (ACRWC)*. Article 34 of the CRC specifically obligates governments to protect children from sexual abuse while Article 35 of the same speaks against child abduction. Rwanda submitted to the Committee on the Rights of Children overdue reports on the implementation of CRC protocols, and the report on the implementation of ACRWC was submitted to the concerned Committee of Experts.

The *Constitution of the Republic of Rwanda of 2003 revised in 2015*, in Article 17 provides that no one can be married without his or her free and full consent. This provision is in tandem with Article 16(2) of the *Universal Declaration of Human Rights* which strictly states that marriage shall be entered into only with the free and full consent of the intending spouses.

The *Organic Law instituting the Penal Code (OLPC)* in Article 275 prohibits forcing a person to marry or not to marry a person of his or her choice. Article 274 prohibits kidnapping or confinement of a person with intent to live together as husband and wife. Article 194 prohibits living with or attempts to live together with a child as husband and wife, and a person who commits this offence is liable to life imprisonment. This article also makes it an offence to live with or attempt to live with a person, as husband or wife who has attained 18 years of age but is below 20 years of age. In effect, the minimum age of marriage is 21 years. Furthermore, 'any person who plays a role in early or forced marriage of a minor is liable to a term of imprisonment of six months, according to Article 195 of the *Organic Law instituting the Penal Code*.

The 1988 *Civil Code* contains provisions related to marriage. The age of consent to marry for both men and women is 21 years. Where the challenge is based on the fact that either or both spouses was not of age at the time of the marriage, such a challenge can be brought by the spouses, by any interested party, or by the *Ministère Public*. Under Art 165(1) and (2) of the OLPC, a pregnancy resulting from forced marriage or rape can be terminated.

Formerly, Article 47 of the Law 27 of 2001 relating to the *Rights and Protection of the Child against Violence* defined 'forced marriage' as any marriage of a boy or girl of less than 21 years of age, and without his or her consent while 'child marriage' is 'any conjugal living-together of a boy and a girl where one of the two or both of them are below the age provided for [in the Code Civil]'. Articles 48 and 49 of the law of 2001 relating to the rights and protection of the child were repealed by the *law N° 54/2011 of 14/12/2011 on the Rights and Protection of the Child*, which is in force today. Unfortunately, the new law does not define 'forced marriage'. The shortfall of the new law in this regard is not fatal as the gap is covered by similar provisions in Articles 194 and 195 of the OLPC. Under Article 197 concerning the penalty for rape on a person aged 18 years or above, the Penal Code stipulates that any person who rapes a person aged 18 years or above shall be liable to a term of imprisonment of more than 5 years to 7 years. If rape results in the death of the victim, the offender shall be liable to life imprisonment.

In Article 198, the law defines 'marital rape' as any act of sexual intercourse committed by one spouse on the other by violence, threat or trickery. The penalty for 'marital rape' is found in Article 199, where it is provided that such a person shall be liable to a term of imprisonment of at least 2 months but less than 6 months and a fine of 100,000 to 300,000 Rwandan francs or one of these penalties. If 'marital rape' results in an ordinary disease, the offender shall be liable to a term of imprisonment of 6 months to 2 years. On the other hand, should 'marital rape' result in an incurable illness, the offender shall be liable to a term of imprisonment of more than 5 years to 10 years. Where 'marital rape' results in the death of the victim, the offender shall be liable to life imprisonment. Interestingly, under Article 200, prosecution of 'marital rape' is instituted

only upon complaint of the offended spouse but he or she may, at any stage of the procedure, apply for the termination of the prosecution, when he/she withdraws his/her complaint. The offended spouse may also demand that the execution of the judgment be terminated in the best interest of the family.

Rape is a crime under Article 360 of the 1977 *Penal Code*, and is punishable by 5–10 years imprisonment.

5.2.3. Tanzania

According to s 13 of the *Constitution of Tanzania*, all people are equal before the law. However, the Constitution is silent about the age of marriage. Tanzania recognizes three types of laws which govern marriages including customary law, civil law and religious law. Section 13(1) of the *Law of Marriage Act, (LMA) 1971* sets the minimum age for marriage at 18 years for men and 15 years for women. The LMA allows the court to grant permission in special circumstances for a marriage where the parties are below the prescribed ages but have attained at least 14 years of age.⁴⁷ Under s 17, a female who has not attained the apparent age of 18 years must seek consent from her father; if he is dead, then her mother; or if both are dead then from her guardian. No consent is required if all those persons are dead.⁴⁸ Where court is satisfied that consent has been unreasonably withheld, or is impracticable to obtain, it may, on application give such consent.⁴⁹ Recently, the High Court of Tanzania declared ss 13 and 17 of the LMA unconstitutional⁵⁰ on grounds that the sections contravene the right to equality and the right against discrimination provided for under articles 12, 13 and 18 of the *Constitution of the Republic of Tanzania*.⁵¹ The Petitioner, Rebecca Gyumi filed an application under Article 26(1)(2) and 30(3) of the *Constitution of Tanzania* challenging the constitutionality of ss 13 and 17 of the *Law of Marriage Act*. In their finding, their Lordships associated themselves with the *Loveness Mudzuru* decision and noted that the requirement of parental consent impacts negatively on the child and subjects her to complex matrimonial and conjugal obligations. The Court also found that the right to equality was negated because of the differential treatment given to boys and girls on the minimum age of marriage and parental consent. The Court noted that the provisions had ‘horrific, social and health impact to the child’ and declared these provisions unconstitutional. The Court also noted that a defence under s 130(2)(e) of the

⁴⁷Section 13(2) of the Law of Marriage Act, 1971 (LMA).

⁴⁸Section 17(1) LMA.

⁴⁹Section 17(2) LMA.

⁵⁰Human Rights Watch, ‘Dispatches: Tanzania High Court Rules against Child Marriage’ 8 July 2016.

⁵¹I acknowledge Ms. Anna Mavenjina-Nkeme’s input. She informed me about a recent Tanzanian Ruling which held that the minimum age for marriage is 18 years. See *In the Matter of the Constitution of the United Republic of Tanzania 1977-as amended from time to time [Cap. 2 R.E 2002] & In the Matter of Basic Rights and Duties Enforcement Act [Cap 3 R.E 2002] & In the Matter of a Petition to Challenge Constitutionality of Section 13 & 17 of the Law of Marriage Act Rebecca Z. Gyumi v The Attorney General [Cap. 29 R.E 2002] High Court of Tanzania, Miscellaneous Civil Cause No. 5 of 2016.*

Sexual Offences Special Provision Act (SOSPA) that a child was a wife of the accused person could not stand.

Furthermore, under the LMA, marriages are void if either party is below the minimum age and leave has not been granted.⁵² In s 16 of the LMA, provision is made for free and voluntary consent of the parties to a marriage.

It is noteworthy that recognition of the application of customary law under the *Judicature and Application of Laws Act*⁵³ and the *Local Customary Law (Declaration) Order*, GN 279 of 1963 allows communities to apply customs and traditions which may promote practices such as early marriage. In *Leonard Jonathan v Republic*,⁵⁴ the case involved an adult woman but it is cited to underscore traditional customary practices (Chagga customary norms) which perpetuate VAWG, kidnapping, forced marriage, and the role of the judiciary and application of international standards. The appellant and three others were jointly charged with rape contrary to ss 130(2) and 131(3) of the *Penal Code as amended by the SOSPA*. The appellant was alleged to have had carnal knowledge of the victim without her consent. The appellant admitted that he kidnapped the victim, took her to his house and had sexual intercourse with her. He told the court that he loved the victim but since he had no money for a church wedding, he pursued her under Chagga custom which permitted forceful sexual intercourse. The appellant was convicted and sentenced to 30 years in prison. The High Court found that the defence of contracting a Chagga customary law marriage was improbable and fallacious in fact and law. This case also highlighted the right to marry with full consent provided for under article 16 of CEDAW and article 23 of the ICCPR.

The Law of the Child Act, of 2009, while silent on child marriages, recognizes that a child is a human being less than 18 years old.⁵⁵ The Act recognizes the rights and principles relating to the child, including the right to live free from discrimination on the basis of gender, age or custom.⁵⁶ The Act also requires parents to register child births at the office of the Registrar General.⁵⁷ Children may not be denied the right to live with their parents⁵⁸ and are not to be exposed to sexual exploitation. A court may, upon application by a social welfare officer, issue a care order where there is a likelihood that a child is suffering from significant harm.⁵⁹ Members of the community who have evidence that a child's rights are being infringed upon have a duty to report the matter to the local government authority in the area. The social welfare officer will, upon receiving this report,

⁵²Section 38 LMA.

⁵³Section 11 of the Judicature and Application of Laws Act Cap. 358 R.E 2002.

⁵⁴*Leonard Jonathan v Republic, High Court of Tanzania at Moshi Criminal Appeal No. 53 of 2001; Judicial Bench Book*, p 163.

⁵⁵Section 4(1) Law of the Child Act, 2009.

⁵⁶Section 5(2) Law of the Child Act, 2009; See also Part II of the Act, which provides for the rights and welfare of the child in ss 3–14.

⁵⁷Section 6(3) Law of the Child Act, 2009.

⁵⁸Section 7 Law of the Child Act.

⁵⁹Section 18 Law of the Child Act, 2009; Part III of the Act contains provisions meant for the care and protection of the child through issuance of care and supervisory orders; duties of the social welfare officer among others.

summon the person against whom the report was made to discuss the matter, after which a decision in the best interests of the child will be made.⁶⁰

The *Penal Code of Tanzania* prohibits the abduction of a woman with intent to marry, an offense which is punishable with imprisonment of 7 years.⁶¹ Another law, the *Sexual Offences Special Provision Act (SOSPA) of 1998* criminalizes rape, defilement, and sexual exploitation of children.⁶² Rape is punishable by no less than 30 years in prison, with corporal punishment, a fine and restitution⁶³ while attempted rape is punishable by a range of 10 years in prison to life in prison.⁶⁴ Sexual exploitation of children is punishable by 5–20 years in prison.⁶⁵ The Act also prohibits various acts of cruelty against children, including FGM.⁶⁶ However, the SOSPA provides that a man does not commit rape if the woman is his wife, and is below 18 years, but above 15 years, and is not separated from the man.⁶⁷ Recent reforms include the *Education Act*, s 60 which has been amended by the *Written Laws (Miscellaneous Amendment) Act No. 2 of 2016* to the effect that anyone who marries a primary or secondary school girl or school boy is liable to 30 years imprisonment. In addition, the same new provision 60A stipulates that anyone who makes a primary or secondary school girl pregnant is liable to 30 years imprisonment.

There are significant challenges relating to legal pluralism and contradictions in different statutory laws which need to be addressed in order to prevent CEFM. As already mentioned, Tanzania recognizes three types of laws which govern marriages. Applying different types of laws to marriages allows for promotion of certain practices which may drive early and forced marriages. Disharmony in the country's laws has also given rise to various legal contradictions.

5.2.4. Uganda

The Constitution of the Republic of Uganda stipulates the age at which one can enter into marriage, which is at 18 years. Article 31(1) of the *Constitution of Uganda*, 1995 establishes the minimum age required for marriage at 18 years thereby providing a uniform minimum for both men and women. The article further provides for free consent of the man and woman to enter into marriage.⁶⁸ Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.⁶⁹ Just like India, in Uganda a child cannot consent to marriage. This was well explained in *Singh v Singh* 67 Misc.2d 878 (1971). Article 33(6) prohibits laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status. Other protective provisions are contained in Articles 20, 21, 24, 33, 34 and 50 of the Constitution.

⁶⁰Section 95 Law of the Child Act 2009.

⁶¹Section 133 of Penal Code Cap 16.

⁶²Sections 5 & 12 of SOSPA.

⁶³Section 131 SOSPA.

⁶⁴Section 132 SOSPA.

⁶⁵Section 138B SOSPA.

⁶⁶Section 169A(1) of SOSPA.

⁶⁷Section 5 SOSPA/Section 130(2)(e) of the Penal Code Act.

⁶⁸Article 31(3) of the Constitution of Uganda.

⁶⁹Article 31(5) of the Constitution of Uganda.

The Constitution operates alongside marriage laws in Uganda. *The Marriage Act of 1904* sets 21 years as the age of consent for marriage but allows for marriages below that age with the written consent of the father, or if he is dead, absent or of unsound mind, then the mother. Where both are dead, then consent can be sought from guardians. *The Marriage and Divorce of Mohammedans Act of 1906* makes no mention of the age of consent while the *Hindu Marriage and Divorce Act of 1961*⁷⁰ and the *Customary Marriages (Registration) Act 1973*⁷¹ provide for the age of consent at 16 years for girls and 18 years for boys. The latter act voids marriages where parties have not attained the prescribed age of marriage. Still under the *Customary Marriages Registration Act*, if the married party is under 21, consent of the father or the mother is required.⁷² While these provisions have been outlawed by the Constitution, they still exist on Uganda's law books and may cause contradictions or hinder effective implementation of the laws targeting CEFM.

The Penal Code (amendment) Act, 2007, criminalizes sexual acts with another person below the age of 18 years. Unlawful and indecent assaults are punishable by 14 years in prison, with or without corporal punishment. If the victim is a minor, ignorance of age is no defense.⁷³ Sex with a female child is punishable by death while attempted sex with a female child is punishable by 18 years in prison.⁷⁴ Knowledge of the age of the female is immaterial 'except as otherwise expressly stated'.⁷⁵

A sentence of life imprisonment⁷⁶; or a death will be imposed if the offence of defilement is committed with a child below 14 years, or by a person in authority, a parent or guardian, where the victim is disabled, or is infected with HIV/AIDS.⁷⁷ In *Uganda v Ssekatawa Yokana Kazibwe HCCS No. 092 of 2016*, the accused person, being the biological father of the complainant, a girl aged 13 years, was found guilty of aggravated defilement and sentenced to life imprisonment. *The Children (Amendment) Act 2016* provides a framework for protection of children. The Act defines a child as one below 18 years.⁷⁸ It introduces new rights including the right of a child to registration after birth.⁷⁹ Children are also protected against social and customary practices, such as CEFM, that are

⁷⁰Section 2(3) & (4) of the Hindu Marriage and Divorce Act.

⁷¹Section 11(a) & (b) of the Customary Marriages Registration Act.

⁷²Section 32 of the Customary Marriages Registration Act.

⁷³Section 128 of the Penal Code Act.

⁷⁴Section 129 of the Penal Code Act.

⁷⁵Section 144 of the Penal Code Act.

⁷⁶The First Schedule to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 stipulates for 30 years. as being the starting point for sentencing a person convicted of aggravated defilement.

⁷⁷Since the Constitutional Court's decision in Constitutional Petition No. 6 of 2003 *Susan Kigula and 416 v The Attorney General*, the death penalty is no longer mandatory so if a person is sentenced to death but is not executed for three years, his case will be reviewed by the Court and the death sentence is commuted to imprisonment for a specific period or life imprisonment depending on the circumstances of each case.

⁷⁸Section 2 Children Act Cap. 59.

⁷⁹Section 4 Children (Amendment) Act 2016

harmful to their health.⁸⁰ Any person who exposes a child to such practices commits an offence and is liable to imprisonment of seven years or a fine.⁸¹ Section 42A creates a protective framework of children from all forms of violence including child marriage and FGM. It establishes child protection organisations or authorities⁸² which receive complaints of child abuse or imminent danger, or circumstances where the child may be in need of protection or care.⁸³ Protection of children also involves protection of child victims in child marriages. This was manifested in *Madley & Madley and Anor [2011] Fmca Fam 1007*, in which parents made arrangements for the child to marry a person whom, on her evidence, she had met on one occasion. The wedding was planned to take place within two weeks' time and would involve this child flying from Australia to Lebanon for the purpose of that marriage occurring. The court intervened and held that it was required to consider the need to protect the child from physical or psychological harm in circumstances whereby the child is being forced to marry, a principle that would render the marriage void under Australian law, as it is devoid of genuine consent.

The section makes it mandatory for a medical practitioner, social worker or teacher to report any matter which may affect the wellbeing of the child under their charge.⁸⁴ Under s 37, the Probation and Social Welfare Officer or Police or authorized person believing that a child is in a harmful situation may place the child under emergency protection for a maximum period of 48 hours and inform the Secretary of Children's Affairs in writing before doing so. In ss 38 and 39, the child's parent or guardian with parental responsibility may apply to vary or stop the protection order. The community also has a duty to report to the Local Council any abuse of rights or neglect to provide, *inter alia*, education.⁸⁵ Practitioners may also look to the rights of the child and the guiding principles on the welfare of children provided under the Act.

Uganda also enacted other laws which could be useful in preventing CEFM. *The Prohibition of the Female Genital Mutilation Act, 2010* criminalizes FGM⁸⁶ while the *Prevention of Trafficking Act of 2009* notes that the recruitment and transportation of persons for purposes of child marriage or forced marriage constitutes trafficking and is punishable by 15 years in prison.⁸⁷ Trafficking in persons also includes, among other things, abusing power or vulnerability to exercise control over another person, for the purposes of exploitation.⁸⁸

Aggravated trafficking in persons covers exploitation of children by parents and close relatives, including situations where adoption/guardianship is

⁸⁰Section 7 of the Children (Amendment) Act 2016

⁸¹Section 7(3) Children (Amendment) Act 2016.

⁸²See also s 42 Children (Amendment) Act 2016.

⁸³Section 42A(2) Children (Amendment) Act 2016.

⁸⁴Section 42A(3) Children (Amendment) Act 2016

⁸⁵Section 11(1) of the Children Act; under Art 34(2) the right to basic education must be provided by the government of Uganda and parents of the child.

⁸⁶See ss 3, 4, 5 of the PFGMA among others.

⁸⁷Sections 2(e) and 3(3) of the Prevention of Trafficking in Persons Act.

⁸⁸Section 3 Prevention of Trafficking in Persons Act.

undertaken for the purposes of exploitation; and is punishable by life in prison.⁸⁹ Trafficking in children covers acts under s 3 that involve children.⁹⁰

Uganda, like Tanzania, is faced with the challenge of legal pluralism in relation to the laws governing marriage yet the *Marriage and Divorce Bill of 2009*, a law intended to govern all marriages is still pending before the parliament.⁹¹ The danger of such pluralism was manifested in an Indian case, *Court on Its Own Motion (Lajja Devi) v State, Smt. Laxmi Devi and another v State Maha Dev v State, Devender @ Babli v State*. In this case, the Court found that although there were several laws on marriages, the *Prohibition of Child Marriage Act 2006* contained loopholes which made child marriages voidable and not void.

6. Policy interventions

6.1. National action plans

In Tanzania, the National Action Plan for the Prevention and Eradication of Violence against Women and Children ('National Action Plan'), 2001–2015, highlights several problem areas in the eradication of violence against women. Challenges include the existence of discriminatory legislation against women and children, legal illiteracy and poorly disseminated laws including the SOSPA; discrimination against women and children as a result of cultural norms, traditional practices and other factors in the social, economic and political spheres; and inadequacy of existing legal and paralegal systems to help victims and survivors of violence. The National Action Plan calls for the amendment of laws that affect and discriminate women and children's rights, including the Marriage Act of 1971. It calls for the minimum age of marriage to be increased to 18 years for women; the need to introduce a gender function into the existing legal and administrative mechanisms in order to address issues of women and children; and to amend laws and ensure the protection and removal of all forms of discrimination against and empowerment of women; of need to create awareness about the impact of early marriage. It also highlights the need to build capacity of grassroots women and men on eradication of traditional norms, religious beliefs, practices and stereotypes; increasing gender awareness on violence against women. The new Education and Training Policy makes provisions for readmissions of girls to school after they have given birth.

In the case of Uganda, the National Strategy to end Child Marriage and Teenage Pregnancy (NSCM & TP) 2014/2015–2019/2020, a joint effort between the government of Uganda and UNICEF, highlights the need for amendment and consolidation of marriage laws. It also notes that the 'current widespread resistance to reforms in marriage laws proposed by the Marriage and Divorce Bill tabled in the 9th parliament underscores the deeply entrenched social norms and expectations of marriage, as well as male bias'.⁹² It notes that there are poor or no structures to enable victims of early marriage access legal redress or other

⁸⁹Section 4 Prevention of Trafficking in Persons Act.

⁹⁰Section 5 Prevention of Trafficking in Persons Act.

⁹¹The bill does not govern marriages conducted under the Muslim faith.

⁹²National Strategy to end Child Marriage and Teenage Pregnancy (Uganda, 2015) 27.

forms of arbitration.⁹³ The NSCM & TP proposes several strategies including improvement of the legal and policy environment by reviewing, promoting and implementing government policies and laws; and also sensitizing communities about the available laws. Other proposed strategies include increased access to quality education and reproductive health services; empowerment of girls and boys with comprehensive and appropriate information on life skills; and changing communities' mindsets, knowledge aspirations, behaviors and social norms that drive child marriages.⁹⁴

The Gender in Education Policy of the Ministry of Education, Science Technology and Sports (2009), Uganda, commits to ensure that girls who drop out of school due to early marriage and pregnancies are able to attend school again while the National Adolescent Reproductive Health Policy (2004) seeks to review existing legal and social barriers to access to health services; to protect adolescents against harmful practices and to promote the provision of sexual and reproductive health.

7. Conclusion

Many developing countries, including those in East Africa, face significant economic, political and resource constraints which prevent the enforcement of laws prohibiting child marriage. This is especially the case in rural and remote areas where government and justice institutions are often a distant presence. Failure to enforce legislation consistently or to impose penalties, combined with a lack of community awareness of laws which prohibit child marriage, means that many parents who arrange child marriages for their daughters do not realize they are breaking the law.⁹⁵ 'Girls have the right under the human rights system to freely consent to marriage; a right to education and to sexual and reproductive rights. Ultimately, States are accountable for the harms that married girls experience as a result of this denial'.⁹⁶

8. Recommendations

In order for Kenya, Rwanda, Tanzania and Uganda to enhance the capacity of to address CEFM in their respective judiciaries, a number of reforms have to be put in place. Where such measures have already been instituted, there is need to strengthen them.

8.1. *Legislative measures and judicial intervention*

8.1.1. *Legislative measures*

- States which lack such a legislation are encouraged to set the minimum age of marriage to 18 years with no exceptions such as with parental consent or court's authorization.

⁹³National Strategy to end Child Marriage and Teenage Pregnancy (Uganda, 2015) 37.

⁹⁴National Strategy to end Child Marriage and Teenage Pregnancy (Uganda, 2015) 42.

⁹⁵Catherine Turner, *Out of the Shadows: Child Marriage and Slavery* (Anti-Slavery International, 2013) 36.

⁹⁶N Shameem, Amnesty USA, Women's Human Rights Coordination Group.

- States should adopt a model law, as seen with the Model Law on Access to Information in Africa,⁹⁷ which should be developed on a regional level for governments to set standards on how to address CEFM on a legal level.⁹⁸ Although model laws are seen as ‘soft law’ it would still help create a set of standards that states could adopt. It has been stated that even if a model law is not domesticated it can be used for advocacy purposes and or to enable civil society to hold government accountable. In addition, the drafting of a model law addressing child marriage could: ‘provide guidance, promote human rights and bring about commonality of approaches’.⁹⁹
- States to ensure that the legislation criminalizes child marriage and provides for clear sanctions, including the provision of a minimum sentence for those who will be convicted of CEFM offences.¹⁰⁰
- States to harmonize laws and policies including personal laws and laws on domestic and sexual violence including marital rape, reproductive health, marriage and birth registration, education, property and citizenship, and dowry with human rights standards and constitutional guarantees to ensure a minimum legal age of marriage of 18 years and to address gaps and inconsistencies that leave girls vulnerable to child marriage and limit married girls’ access to legal remedies.
- States to urgently enact, condense and enforce laws and policies relating to child marriage to effectively prevent child marriage and ensure women and girls who seek to leave child marriages can benefit from existing policies and programmes that provide legal remedies for survivors of VAWG, including safe housing, legal support, access to sexual and reproductive health counseling and services, vocational training, and readmission to school.
- States to recognize the practice of child marriage as a human rights violation through legislation as other jurisdictions have done, such as the United States Senate which promulgated the ‘International Protecting Girls by Preventing Child Marriage Act’.¹⁰¹

⁹⁷Staff Writer, ‘Lawyer Demystifies Model Law’ (The Sentinel, 2015) 1.

⁹⁸This vision of creating a model law on child marriage was proposed by a lawyer of the SADC Parliamentary Forum (SADC PF); the model law would be known as SADC Model Law on Child Marriage; reference to the work can be found in the footnote below.

⁹⁹Staff Writer, ‘Lawyer Demystifies Model Law’ (The Sentinel, 2015) 1.

¹⁰⁰Other EAC Countries should follow that Kenyan example which has set a minimum sentence for convicts of defiling children below 18 years. The practice can be used in the proposed new law on CEFM.

¹⁰¹Government of the United States of America, ‘International Protecting Girls by Preventing Child Marriage Act of 2011’ <<https://www.govtrack.us/congress/bills/112/s414>> accessed 25 July 2016.

8.1.2. *Judicial intervention*

- Enhance and encourage judicial officers to take leadership roles outside the courts of law through: advocacy, mentorship, participation as good citizens by becoming role models in communities and making an impact in their own community's social organisations/associations, among others.
- Ensure the enforcement and implementation of judicial decisions and remedies obtained by girls harmed by child marriage to enforce their legal rights and due protection.
- Judicial officers are implored and encouraged:
 - (1) To give full effect of the Bangalore Principles by making reference to international conventions and treaties.
 - (2) To embrace the notion of *persuasive authority* and exercise judicial creativity and judicial activism as they adjudicate on CEFM.
 - (3) To enhance their roles in court by embracing 'out of the box' methods outside the courtroom, e.g. through advocacy, mentorship; personal efforts in their immediate communities or social organizations (churches, Rotary, school boards, etc.), which further expose them to the psycho-social aspects of VAWG and equip them to better adjudicate over the cases.

8.2. *Policies, action plans and coordination mechanisms*

- States to establish institutional framework and enforcement mechanisms such as specialized Children's Courts, and Child Protection Police Units. Institutions such as National Human Rights Institutions, the Office of an Ombudsperson for Children, National Commission for Children, responsible for coordinating the implementation of children's rights must also be established and operational. Additionally, conscientious efforts should be made to stop secondary trauma both outside and inside the courtroom.¹⁰²
- States to conduct further research into the prevalence, causes and consequences of child marriage and endeavor to have disaggregated data. This could be further enhanced by establishing, at national level, an EAC Data Collection Centre on CEFM in readiness to compile such disaggregated data.
- Implement the 2015 CHOGM (Commonwealth Heads of Government Meeting) Communiqué, which includes a commitment to tackle early and forced marriage, including a pledge to develop a Plan of Action to end child marriage in the Commonwealth.¹⁰³

¹⁰²Outside the courtroom: e.g. corrupt police officers at police stations sexually harass and force victims to give bribes, e.g. in Kenya. Inside the courtroom: EAC Courts can replicate a Protocol set up by the Bosnian Court with necessary modifications; see Anna Kithaka 'Enforcement of the Sexual offences Act Kenya' *Pambazuka News* <www.pambazuka.org/governance/enforcement> accessed 1 July 2016.

¹⁰³See also *Empowering Girls: 'What the Commonwealth can do to End Early and Forced Marriage'* (discusses 2011 CHOGM).

- Conduct monitoring and evaluation of laws and policies relating to child marriage, including prosecutions where the law is violated, prosecution of offenders; implementation of judicial decisions, and remedies received by women and girls harmed by child marriage to ensure that the legal rights of women and girls are duly protected.
- Adequate training to be given to judicial officers to enhance capacity to ably adjudicate CEFM cases.
- States to ensure cooperation with regional and global efforts, and take concerted actions at the national level in order to develop and implement holistic, comprehensive and coordinated responses to address this issue, including those aimed at the eradication of poverty, and protecting girls' and women's right to education.¹⁰⁴
- Ensure compliance of the laws on CEFM through the establishment of enforcement and monitoring mechanisms which will report to a Central Monitoring and Evaluation Unit, most preferably set up at the relevant Ministry.
- Establish effective birth and marriage registration systems.

8.3. *Engagement of religious and traditional leaders and service providers*

- States to run media campaigns encouraging religious, village and traditional leaders, and parents to devise strategies to prevent child marriages.
- States to employ a participatory approach to the solution of CEFM by involving teachers, health workers, law enforcement and judicial officials and social workers in State programs which provide support to women and girls who are already married.

8.4. *Protection measures*

- States be encouraged to establish a strong holistic child protection system that incorporates interventions with incentives¹⁰⁵ in the education health and social protection sectors to tackle child marriage.¹⁰⁶

¹⁰⁴CHOGM Communiqué (2015) para. 31; See also Meeting summary on the Strategic discussion with key AU mandate-holders working on child marriage, 29 January 2015, Addis Ababa, Ethiopia.

¹⁰⁵Programs such as the Zomba Cash Transfer Programme (Malawi) where parents of girls and girls were given cash incentives; Berhane Hewan (Ethiopian) (light of Eve') targeted both unmarried and married girls and gave them incentives such scholastic materials, goats, etc.

¹⁰⁶Rwanda Children's Rights References in the Universal Periodic Review-23rd Session 2015(4 November 2015) (Compilation of UN Information)-Rwanda compiled what it accepted and supported as recommendations from other countries. Most of the recommendations to enhance children's rights are included in this paper. Rwanda supported the following countries' recommendations para 134.18 (Guatemala); paras 134.33 & 134.41 (Portugal); para 134.33&134.41 (Portugal); paras 134.37&134.50 (Italy); para 134.38 (Sierra Leone); para 134.40 (Ukraine) and para 134.46 (Djibouti).

- States to adhere to their commitment to international standards on the rights of the child through accountability to treaty bodies; submission of reports explaining measures put in place to prevent child marriage and protect children.

8.5. Education and empowerment of girls and women

- Recognizing the risks of early, frequent, and forced pregnancy linked to child marriage, Nations to ensure that married girls have access to reproductive health care services and information tailored to their needs¹⁰⁷ and situation, including comprehensive sexuality education, contraceptive information and services, safe abortion, and maternal health care.
- States to ensure adequate allocation of financial resources to implement laws/policies/programs and ensure girls' access to legal remedies, including any related support needed to help them survive independently and rebuild their lives.

Appendix 1

Case law

African case law

I Loveness Mudzuru (2) Ruvimbo Tsopodzi v (1) Minister of Justice, Legal & Parliamentary Affairs N.O (2) Minister of Women's Affairs, Gender & Community Development, (3) Attorney General of Zimbabwe

Summary

In this case, an application was brought by two former child brides, Loveness Mudzuru and Ruvimbo Tsopodzi who according to their Affidavits were 16 and 15 years, respectively, when they were married. Their affidavits recount their experiences, narratives which depicted all too vividly the cycle of child marriage, poverty and domestic violence.

Issues and resolution

On presentation of this application, the two applicants were young women of 19 and 18 years respectively. They sought a declaratory order;

- (a) That under the Constitution of Zimbabwe, no one whether boy or girl may enter into a marriage, including an unregistered customary law union, before attaining the age of 18 years.
- (b) That s 18 of the *Marriage Act* was unconstitutional to the extent that it allowed for marriages of people below the age of 18 years.

¹⁰⁷See Child Marriage in Eastern & Southern Africa: Determinants, Consequences & the Way forward, pp v–vi; pp 14–17.

- (c) That the *Customary Marriages Act* (ch 5:17) was unconstitutional to the extent that it did not provide for a minimum age of 18 years in respect of any marriage conducted under the same.

After hearing the submission of the parties, the Constitutional Court made the following finding and orders;

- (a) That s 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 sets 18 years as the minimum age of marriage in Zimbabwe.
- (b) That s 22(1) of the *Marriage Act* (ch 5:11) or any other law, or custom authorizing a person under 18 years of age to marry or to be married is inconsistent to the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency.
- (c) That with effect from 20 January 2016, no person male, or female, could enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of 18 years.

The court struck down s 18 of the *Marriage Act* which allowed girls to marry at 16 and boys at 18. The ruling outlined the ‘horrific consequences’ of child marriage and said there had long been a ‘lack of common social consciousness’ on the problems faced by girls who marry early.

Contribution to jurisprudence

The effect of this ruling upon child marriages in Zimbabwe is that child marriages have been abolished in Zimbabwe. The case defines ‘child’ pursuant to Article 81 of the Constitution to mean a girl or a boy under the age of 18 years. Therefore, no child i.e. a boy or a girl under the age of 18 years has the capacity to enter into a valid marriage in Zimbabwe. Another outstanding effect of the Ruling is that s 22(1) of the *Marriage Act* which provided that a girl who attained the age of 16 years could get married and that a boy under 18 years and a girl under the age of 16 years could get married with the consent of the Minister of Justice, Legal and Parliamentary Affairs is no longer part of the law. Whilst in the past there was no age limit in respect of customary law unions and marriages, now there is an age limit in respect of such customary law unions and marriages. The age limit is now definitely 18 years.

Additionally, a girl child who falls pregnant before the age of 18 years remains the responsibility of her parents in that she will still be a child. It is also pertinent to note that pregnancy is no longer a basis for child marriages.

In this regard the Court said, ‘A girl does not become an adult and therefore eligible for marriage because she has become pregnant ... the pregnant girl is entitled to parental care and schooling just as any other child is entitled. This means that the parental obligation to care for and control the girl child does not cease because of her pregnancy’.

Lastly, customary practices or customs as well as religious rites can no longer be used to justify child marriages. There is, however one set back and that is that, whereas child marriages have been outlawed, they are yet to be criminalized. This problem is still persisting in many jurisdictions in Africa and Asia.

II *Rebecca Z. Gyumi v Attorney General*, Miscellaneous Civil Cause No. 5 of 2016

Relevant aspects to CEFM: minimum age of marriage in Tanzania, discrimination in the minimum age for marriage, child marriages.

Summary

The Petitioner, through her Lawyer, filed an Originating Summons under Art 26(1), (2; 30(3)) of the Constitution of the United Republic of Tanzania (‘the Constitution’); ss

4&5 of the *Basic Rights & Duties Enforcement Act, Cap 3 (Revised Edition 2002)*; Rule 4 of the *Basic Rights & Duties Enforcement (Practice & Procedure) Rules 2014*. She was challenging the constitutionality of the provisions of ss 13 and 17 of the *Law of the Marriage Act, Cap 29*. She sought declarations that the provisions of ss 13 and 17 of the *Law of the Marriage Act* ('*Marriage Act*') are unconstitutional as they contravene Articles 12, 13 & 18 of the Constitution 1977 as amended. Further, that the provisions of the *Marriage Act* be declared null and void and be expunged from the Statute. Additionally, that 18 years should remain the minimum age of marriage until the Government of the United Republic of Tanzania amends the law.

Issues and resolution

The Petitioner contended that ss 13 and 17 of the *Marriage Act* provides for different ages of marriage for boys and girls. Moreover, they stipulate the need for the requisite parental consent, both of which contravene the right to equality under the Constitution. Also the provisions of ss 13(1)(2) of the *Marriage Act* allow a female person to get married at the age of 14 years yet the boy can marry at 18 years. This is discriminatory and contravenes the anti-discrimination provisions of the Constitution. She also raised the ground that the provisions of S. 17 of the *Marriage Act* allow a child of 15 years of age to get married, if her father, mother, guardian or court consents, yet all human beings are equal so to let another person decide on behalf of another contravenes the right to equality and dignity of a person and is discriminatory. An additional ground was that s 13(2) of the *Marriage Act*, which requires leave of Court for marriage of one who is aged 14 years, can be too vague and is wanton to arbitrary interpretation. As such, this might result into denial of children of their right to education, which is the cornerstone of the freedom of expression as stipulated in the Constitution. The girl's Advocate, Mr. Jebra Kambole, citing the Zimbabwean case of *Loveness Mudzuru and Another*, argued his case ably. In reply, the Attorney General vehemently denied the fact that there was any infringement on the children's rights. Judge Munisi decided in favor of the Petitioner and declared the said provisions null and void as requested by the Petitioner and declared that the minimum age of marriage in Tanzania is 18 years for children of both sexes.

Contribution to jurisprudence

The necessity for a national jurisdiction to adhere to international standards relating to minimum age of marriage.

III *Martin Charo v Republic* [2016] eKLR (In the High Court of Kenya)

Relevant aspects to CEFM: willful consent of a minor to sexual intercourse as a defense.

Summary

The appellant was charged with the offence of defilement contrary to s 8(1)(3) of the Sexual Offences Act. The particulars were that the appellant on diverse dates between 2 December 2011 and 3 January 2012 had intentionally and unlawfully defiled E N, a girl aged 13 years. The trial court convicted the appellant and sentenced him to serve 20 years in prison. The girl's testimony was that she had opted to dodge her brothers after going to the beach and sneaked into the appellant's house with the only motive being to have sex and go back home. When her brothers interfered, she opted to run away to the appellant's parents' home where they continued to have sex for three days after which she decided to go home.

On appeal, Justice S. Chitembwe based his finding on s 8(6) of the Sexual Offences Act and explained that the Appellant was not expected to inquire from several people about the age of the complainant (PW1). That since PW1 consistently had sexual intercourse with the Appellant, the relationship continued for quite a long time to the extent

that age became a non-issue. The judge faulted the prosecution for not going to length to prove that the Appellant had not taken the necessary due diligences to find out that the complainant was below the age of 18 years. The Judge also stated that the appellant should not be condemned for the voluntary acts of the complainant as she was enjoying the sex relationship. Consequently, the appellant was set free.

Contribution to jurisprudence

To illustrate the need for judges/judicial officers not to take motive into consideration but to try and ascertain the ages of the children involved. Also that the feelings of such children should not be countenanced considering their tender ages.

Commonwealth case law

IV *M & M and Anor. [2011] Fmca fam. 1007* (Family Court of Australia)

Relevant aspects to CEFM: Judicial creativity, forced marriages, role of Legal Aid in stopping CEFM, lack of consent, protection of victims.

Summary

Ms. M. was 16 years old when she asked Legal Aid NSW to help prevent her proposed marriage, which was planned to take place within two weeks in a country outside Australia to a person she had only met once. With the help of Legal Aid, Ms. M. made an application for *ex parte* orders to the Federal Magistrates Court of Australia. In her evidence she was insistent that she did not want to marry or travel overseas. She also gave evidence that she was fearful for her safety when her family became aware of the legal proceeding. The Court commended Legal Aid NSW 'for their prompt action and their efforts in accordance not only with their charter but with the spirit of the legislation [the *Family Law Act 1975*] to protect this young person's rights'. In making his orders, Federal Magistrate Harman observed, 'it is not the right of any parent to cause their child to be married against their will, whether in accordance with Australian law or otherwise'. The Court ordered her parents be restrained from removing, attempting or causing her removal from Australia. Ms. M's passport was surrendered to the court and she was placed on the airport watch list.¹⁰⁸

Contribution to jurisprudence

The promptness of action in accordance with the spirit of the legislation in order to ensure the protection of the rights of a young person.

V *Court On Its Own Motion (Lajja Devi) v State, Smt. Laxmi Devi And Another v State Maha Dev v State, Devender @ Babli v State* (The High Court of Delhi at New Delhi)

Relevant aspects to CEFM: loopholes in the law prohibiting child marriages, need to make child marriages void *ab initio*, validity of child marriages, custody of the minors.

Summary

This was a consolidated petition. In all scenarios, the girls being minors were found to have got married to men above 21 years of age, out of their own free will.

¹⁰⁸Plan International Australia 'Just Married, Just a Child: Child Marriage in the Indo-Pacific Region (Plan Child Marriage Report, July 2014).

Issues and resolution

The questions that arose in each case was that of the validity of the marriage, and who was in the circumstances entitled to the custody of the minor girl. The larger bench went to the minutest detail to conclude that the object behind enacting the *Prohibition of Child Marriage Act* was to curb the menace of the prevalent child marriages. Court noted that indeed such marriages were illegal for several sociological and seemingly moral reasons. However, the Court was dissatisfied that all the relevant laws contradict their illegalizing clause by turning the disputed marriages voidable other than void *ab initio*. Section 3 of the PCM Act which relates to child marriages specifically states that a child marriage shall be voidable at the option of the contracting party to the marriage who was a minor at the time of contracting the marriage.

In conclusion, Court found that the PCM Act contains loopholes which make child marriages voidable and not void (not out rightly banned). As such, simply because the marriage is not void, it would automatically follow that the husband is entitled to the custody of the minor girl. However, the Court was of the view that the welfare principle in each case depending on the circumstances would be the best approach.

Contribution to jurisprudence

The illegality of child marriages due to several sociological and seemingly moral reasons and stipulating the standard that the court will employ the welfare principle in each case depending on the circumstances.

VI *Singh v Singh* 67 Misc.2d 878 (1971)

Relevant aspects to CEFM: custom and child marriages.

Summary

This action was brought by the plaintiff to have his purported marriage to the defendant declared null and void pursuant to s 5 of the *Hindu Marriage Act (Act. No. 25 of the Laws of India, 1955)*. The complaint and the evidence submitted all showed that the marriage was arranged by the respective parents of the plaintiff and the defendant without the consent of either of the parties and that certain ceremonies and rites customary and essential in marriages performed according to the Hindu Marriage Act were not observed. These ceremonies included the invocation before the sacred fire and the ‘saptapadi’ – that is, the taking of seven steps by the bride and bridegroom before the sacred fire. The defendant’s failure to perform the saptapadi and to her present refusal to acknowledge herself as the plaintiff’s wife was because the defendant was in love with someone else and did not want to marry the plaintiff.

Resolution

Court held that this marriage was void *ab initio* due to the defendant’s failure to perform the saptapadi – an essential element in the marriage rites

Contribution to jurisprudence

The yardstick for consent and meaning of duress in arranged marriages is provided. VII V’s story

Summary

In 2010, the Department of Human Services (DHS) in Victoria received a report that ‘V’, then aged nearly 14, had ceased to attend school because she was about to be married. In response to the report, DHS interviewed V and applied to the Family Court for orders to

prevent her from being taken out of Australia. V told the DHS child protection officer she was engaged to be married to her 17-year-old fiancé and she was going to travel overseas to meet him. V had not met her fiancé but had seen his photograph.¹⁰⁹

Contribution to jurisprudence

The timely issuance of protection orders to prevent child marriages is important.

International law cases

VIII *The Prosecutor v Germain Katanga ICC-01/04-01/07-717* (30 September 2008) (International Criminal Court)

Relevant aspects to CEFM: Recognition of abduction of civilian women, rape, sexual slavery, forcing women to become bush wives, cook and clean as amounting to forced marriage; protection of children from actively participating in hostilities; lessons from international criminal tribunals

Summary

Germain Katanga was a commander of the FRPI, an armed group in the Ituri Province of the DRC. Katanga was charged with the crime against humanity of sexual slavery and rape under Article 7(1)(g) of the *Rome Statute* (enslaving civilian female population of Bogoro); and sexual slavery and rape constituting a war crime under article 8(2)(e)(vi) and article 8(2)(b)(xxii) constituting a war crime in non-international and international armed conflicts respectively. Katanga was also charged with using children under the age of fifteen to actively participate in hostilities pursuant to article 8(2)(b)(xxvi). The Prosecution alleged that Katanga was criminally responsible and committed the crimes jointly with other commanders of the FRPI and the FNI by agreeing to a common plan to wipe out Bogoro.

Issues and resolution

In the Decision on the Confirmation of Charges, the Pre-Trial Chamber held that:

The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that civilian women were abducted from the village of Bogoro after the attack, imprisoned, forced into becoming the ‘wives’ of FNI/FRPI combatants, required to cook for and obey the orders of FNI or FRPI combatants.¹¹⁰

The PTC noted that the sexual slavery could be described as a particular of enslavement and referred to the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 which recognizes practices such as forced marriage as a form of slavery. In the view of the Chamber, sexual slavery includes situations where women and girls are forced into marriages to soldiers.¹¹¹ It also noted that there were substantial grounds to believe that a large number of the FNI/ FRPI combatants who participated in hostilities were under the age of fifteen, and were being used as body guards and escorts.¹¹²

¹⁰⁹ *Department of Human Services & Brouker and Anor* [2010] FamCA 742 at [9].

¹¹⁰ ICC, Pre-Trial Chamber I, *The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, para 348.

¹¹¹ *The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, paras 430–1.

¹¹² *The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, paras 250–61.

When the judgment came, the Trial Chamber acquitted Germain Katanga of rape and sexual slavery as a crime against humanity and the war crimes of using children under the age of 15 years to participate actively in hostilities, sexual slavery and rape.

The Chamber noted that although there was evidence beyond reasonable doubt that the crimes of rape, sexual slavery and using children to actively participate in hostilities were committed, the evidence presented did not satisfy it beyond reasonable doubt that the accused was responsible for these crimes. It was noted that, in relation to the crime of using children to participate actively in hostilities, there were children within the militias and combatant who attacked Bogoro.¹¹³

Contribution to jurisprudence

The discussion of what constitutes sex slavery in international law will assist national jurisdictions when adjudicating on similar cases.

IX *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 (14 March 2012) (International Criminal Court)

Relevant aspects to CEFM: protection of children from actively participating in hostilities; lessons from international criminal tribunals

Summary

Thomas Lubanga Dyilo was the President of UPC, a political party which later took control of Bunia. He charged, as co-perpetrator, with the offences of conscripting and enlisting children under the age of 15 years into an armed group (the FPLC, an armed wing of the UPC) and using them to actively participate in hostilities within the meaning of article 8(2)(b)(xxvi) of the Rome Statute. The Prosecution alleged that the FPLC systematically enlisted and conscripted children in large numbers, provided them with military training and later used them to participate actively in hostilities. Girls were also subjected to rape and sexual violence although these acts were not charged.

Issues and resolution

It was noted that the evidence available showed that the children were subjected to severe training regimes and were subjected to harsh punishments. The Trial Chamber found that the evidence available established that children below 15 years were conscripted and enlisted into the UPC/FPLC forces, and were deployed as soldiers in various areas including Bunia, Tchomia and among others and took part in fighting there. They were used as military guards and as body guards.¹¹⁴ It was held that Lubanga was guilty of the crimes of conscripting and enlisting children under the age of 15 years and using them to actively participate in hostilities.¹¹⁵ The Trial Chamber also heard that the children were subjected to rape and sexual violence by commanders. Girls who were conscripted and enlisted were also used by the FPLC commanders to carry out domestic

¹¹³Case Information Sheet, Situation in the Democratic Republic of the Congo: *The Prosecutor v Katanga*, ICC-PIDS-DRC-03-011/15_Eng 25 March 2015.

¹¹⁴ICC, Trial Chamber I, *The Prosecutor v Thomas Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras 1355–57; See also ICC, Trial Chamber I, *The Prosecutor v Thomas Lubanga*, Summary of the Judgment Pursuant to Article 74 of the Statute, ICC.01/04-01/06, 14 March 2012, paras 30–2.

¹¹⁵*The Prosecutor v Thomas Lubanga*, Summary of the Judgment Pursuant to Article 74 of the Statute, para 42.

work, and to work as nurses. However, it declined to make any findings of fact on whether the accused person was responsible for these acts since acts of sexual violence did not form part of the charges against Lubanga.¹¹⁶

Contribution to jurisprudence

The case defines conscription and enlistment children under the age of 15 years and the use of such children to actively participate in hostilities, which definitions can be used when handling cases of exploitation of children.

¹¹⁶ICC, Trial Chamber I, *The Prosecutor v Thomas Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras 629–31. Also see ‘The war crimes charges: on why they were insufficient’ in Sonja C. Grover; *Humanity’s Children: ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children* 2012.