

REPORTS

CHILD MARRIAGE AND GUARDIANSHIP IN TANZANIA: ROBBING GIRLS OF THEIR CHILDHOOD AND INFANTILIZING WOMEN

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I. INTRODUCTION

*The Government of Tanzania recognises that women’s advancement and achievement of gender equality are a matter of human rights and a condition to social justice. The Government of Tanzania reaffirms its commitment to enhancement of women’s rights for national and world progress.*¹
—The United Republic of Tanzania

The practices of child marriage and guardianship in Tanzania perpetuate gender inequality and violate the rights of women and girls.² Child marriage

1. UNITED REPUBLIC OF TANZANIA, Gender: Women Political Empowerment and Decision-Making, <http://www.tanzania.go.tz/issuesf.html> (click on “gender”).

2. This article deals solely with mainland Tanzania and does not discuss the situation in Zanzibar.

removes protection from girls and forces them into early adulthood, while guardianship laws treat adult women as minors subject to a guardian's control. In Tanzania, girls can marry as young as fourteen under the Law of Marriage Act,³ as young as puberty under customary law,⁴ and as young as nine under the Islamic Restatement Act.⁵ Guardianship laws permit men to marry off⁶ and inherit⁷ adult women, assume decision-making power over their children⁸ and property,⁹ and control their movement and activities.¹⁰ Tanzanian laws¹¹ thus rob girls of their childhood, while infantilizing grown women. By trampling over the rights of women and girls, these laws debilitate their families and impoverish Tanzanian society.

In 1971, Tanzania's legislature enacted the Law of Marriage Act¹² to rectify inequalities in marriage. As the government explained in its 1969 White Paper, "At present a wife does not have the same rights and remedies in matrimonial matters as a husband. This, in a country which believes in equality of all human beings, is a serious anomaly."¹³ This inequality further violated women's dignity since "all human beings are equal and . . . every individual has a right to dignity

3. Law of Marriage Act, § 13(2), TANZ. LAWS [CAP 29 R.E. 2002]. Section 13(1) sets the minimum age of marriage for girls at fifteen years, but under section 13(2), a court may give permission for a girl as young as 14 to get married. *Id.* §§ 13(1)-(2).

4. Local Customary Law (Declaration) Order, Government Notice (GN) 279/1963, Schedule 1, Laws of Persons [Sheria Zinazohusu Hali ya Watu], in *Judicature and Application of Laws Act*, TANZ. LAWS SUB. LEGIS. [CAP 358 R.E. 2002], rule 2 [hereinafter GN 279].

5. Every Moslem who has attained puberty may enter into a marriage contract, and under the Shiah Ithna' Asheri school, girls are presumed to reach puberty at age nine. Statements of Islamic Law, Government Notice (GN) 222/1967 in *Islamic Law (Restatement) Act*, TANZ. LAWS SUB. LEGIS. [CAP 375 R.E. 2002], §§ 5(1), 6 *Exception*, TANZ. LAWS [CAP 375 R.E. 2002] [hereinafter *Islamic Restatement Act*]. Marriages, however, can take place even younger, and guardians are empowered to contract marriage on behalf of parties who have not reached puberty. *Id.* § 5(2).

6. *Id.*

7. Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Schedule 1, Laws on Guardianship [Sheria za Ulinzi] in *Judicature and Application of Laws Act*, TANZ. LAWS SUB. LEGIS. [CAP 358 R.E. 2002], Rule 7 [hereinafter GN 436]; *see also* GN 279, *supra* note 4, rules 62, 64.

8. GN 436, *supra* note 7, rules 11, 13, 15.

9. *Id.* rules 12, 14, 19, 43, 44.

10. *Id.* rules 46, 47.

11. Customary law in Tanzania is codified through GN 279 and GN 436. These Government Notices apply to the following districts through subsidiary legislation to the *Judicature and Application of Laws Act*: Handeni, Kahama, Kondoa, Lushoto, Musoma, Ngara, Nzega, and Pangani. *See* Local Customary Law (Declaration) Order ¶2. Dodoma, Iramba, Mpwapwa, Manyoni, Shinyanga, Singida, and Ufipa. *See* Local Customary Law (Declaration) (No. 2) Order ¶2. Kasulu, Kibondo, and Kigoma. *See* Local Customary Law (Declaration) (No. 3) Order ¶2. Kilimanjaro, Maswa, Meru, and Songea. *See* Local Customary Law (Declaration) (No. 5) Order ¶3. Biharamulo, Mpanda, North Mara, Tabora, and Ulanga. *See* Local Customary Law (Declaration) (No. 7) Order ¶2.

12. Law of Marriage Act, TANZ. LAWS [CAP. 29 R.E. 2002].

13. UNITED REPUBLIC OF TANZANIA, GOVERNMENT'S PROPOSALS ON UNIFORM LAW OF MARRIAGE (GOVERNMENT PAPER NO. 1 OF 1969), para. 28 (Dar es Salaam, 1969) [hereinafter *White Paper*]. The *White Paper* recognizes that "[t]here is no valid reason why a woman should not have the same rights as a man." *Id.* para. 20.

and respect.”¹⁴ Besides the importance of equality on an individual level, the government also recognized its social implications: “It is essential that the law should protect the rights of the wife so that she may bring up her children to be good citizens.”¹⁵ To ensure women’s equality, the government aimed to “put a stop to child marriages,”¹⁶ linking their abolition to women’s development and the protection of the family. Prescribing a minimum age of marriage would “prevent the parents from removing their young daughters from schools, because they cannot be married until they reach the proscribed minimum age. Moreover, the girls would be old enough to know how to take care of their children and look after their homes properly.”¹⁷ Yet, the subsequently enacted Law of Marriage Act failed to end the harms of either child marriage or guardianship. Over three decades later, it is time to finally give effect to Parliament’s intentions.

The Law of Marriage Act did not go far enough in addressing child marriage and did not even try to tackle the problem of guardianship. It attempted to stop the practice of child marriage by setting the minimum age of marriage for girls at fifteen, or fourteen with court leave.¹⁸ However, this minimum age assumes that girls do not need to develop into competent adults with equal responsibility in marriage. By contrast, the government selected eighteen as the minimum age of marriage for boys because this is the age at which they are allowed to vote, become members of a political party, and enter into contracts (all rights also accorded to girls at eighteen).¹⁹ Further, it is the age at which boys would have completed their primary school education or “acquired the necessary skill or knowledge to enable them to help themselves.”²⁰ This logic should apply with equal force to girls, who also need to attain the ability to exercise important rights and “help themselves.” Enabling girls to develop into capable women would further obviate the need for guardianship laws, a stark marital inequality currently left in place.

Furthermore, although the Law of Marriage Act is supposed to supersede other laws that overlap with its express provisions,²¹ it does not repeal conflicting customary and Islamic laws and is littered with open-ended standards bringing in “the customs of the community.”²² Thus, customary and Islamic law provisions setting puberty as the minimum age of marriage continue to stand, and

14. *Id.* para. 5.

15. *Id.* para. 28.

16. *Id.* para. 8.

17. *Id.* para. 7.

18. Law of Marriage Act, § 13(1)-(2) TANZ. LAWS [CAP. 29 R.E. 2002]; *see also* White Paper, *supra* note 13, para. 8 (“Since the law will prescribe the minimum age for marriage to apply to all communities, it will put a stop to child marriages.”).

19. White Paper, *supra* note 13, para. 7.

20. *Id.*

21. Judicature and Application of Laws Act, § 11(4), TANZ. LAWS [CAP 358 R.E. 2002].

22. Law of Marriage Act, §§ 107(1)(b), 114(2)(a), 116(b), 125(2)(c), TANZ. LAWS [CAP 29 R.E. 2002]; *see also id.* §§ 107(3)(c), 112(3) (specifically providing for the insertion of Islamic law in divorce proceedings).

discriminatory customs supporting guardianship are given legitimacy. Although “the welfare of the infant” should be “the paramount consideration” in custody determinations, courts “shall have regard . . . to the customs of the community to which the parties belong.”²³ This is highly detrimental to the mother since codified customary law identifies the child as belonging to the father²⁴ or, in the case of illegitimate children, to the maternal grandfather.²⁵ Tanzania’s Law Reform Commission recognized this problem when it stated that in many communities, “custody given to the mother is an exception rather than a rule.”²⁶ Only by closing these gaps can Tanzania provide women with true marital equality and equal authority over their children and property.

The minimum age of marriage for girls must be increased to eighteen, and unless incompetent, an adult over the age of eighteen should not be subject to the control of a guardian. Both Tanzanian and international laws recognize the age of eighteen as the dividing line between children and adults. Tanzania’s Age of Majority Decree and Citizenship Act set the age of majority at eighteen years.²⁷ Additionally, citizens may not vote,²⁸ enter contracts,²⁹ apply for welfare,³⁰ bring an action in court,³¹ or consent to sexual intercourse,³² until they reach the age of eighteen. International law adheres to the same distinction; both the Convention on the Rights of the Child³³ and the African Charter on the Rights and Welfare of the Child³⁴ define a child as a person below the age of eighteen years. In accordance with this definition, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, and both the Committees on the Rights of the Child and on the Elimination of All Forms of Discrimination Against Women recommend that the minimum age of marriage for boys and girls be set at

23. *Id.* § 125(2).

24. GN 279, *supra* note 4, rule 104; *see also id.* rule 175.

25. *Id.* rule 178.

26. LAW REFORM COMMISSION OF TANZANIA, INQUIRY AND REPORT ON THE LAW OF MARRIAGE ACT, 1971 (Jul. 4, 1986), at 12, para. 4.5 (noting that some communities “believe that the father has an exclusive right over the child. The mother has no say whatsoever on the child.”) [hereinafter LAW REFORM COMMISSION, INQUIRY AND REPORT].

27. Age of Majority Ordinance, § 2, TANZ. LAWS [CAP 431 R.E. 2002]; Tanzania Citizenship Act, 1995, § 3(3), Act No. 6/1995.

28. TANZ. CONST. ch. 1, art. 5(1).

29. Law of Contract Ordinance, § 11, TANZ. LAWS [CAP 345 R.E. 2002].

30. Registration and Identification of Persons Act, § 7(1), Act No. 11/1986.

31. Civil Procedure Code, 1966, Government Notice (GN) 410/1966, Order XXXI.

32. Sexual Offences Special Provisions Act, § 130(2)(e), TANZ. LAWS [CAP 4 R.E. 1998] [hereinafter SOSPA].

33. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, art. 1, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, *ratified by Tanzania* July 10, 1991, *available at* <http://www1.umn.edu/humanrts/instree/k2crc.htm> [hereinafter CRC].

34. African Charter on the Rights and Welfare of the Child, art. 2, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, *ratified by Tanzania* Mar. 16, 2003, *available at* <http://www1.umn.edu/humanrts/africa/afchild.htm> [hereinafter African Charter on the Rights and Welfare of the Child].

eighteen.³⁵ The Law of Marriage Act's choice of fifteen as the minimum age of marriage for girls may simply be a product of the time, since in enacting it the government noted that "the U.N. has recommended 15 years as the minimum marriage age for girls so as to protect their health, and the health of their children."³⁶ As Tanzania's Law Reform Commission acknowledged, the international consensus has since progressed, and Tanzania's laws are in urgent need of updating.³⁷ Currently, they subvert the distinction between children and adults, robbing girls of their childhood and infantilizing women.

The anomalous situation created by child marriage and guardianship violates women's fundamental rights, guaranteed by constitutional and international law, to the detriment of Tanzania, as will be discussed in Parts II and III. Additionally, Tanzanian citizens have emphasized the harmfulness of these practices and the need for reform. The only solution, discussed in Part VII, is the legal eradication of the two practices.

A. TANZANIA'S CONSTITUTIONAL AND INTERNATIONAL OBLIGATIONS REQUIRE ABOLITION OF CHILD MARRIAGE AND GUARDIANSHIP

Tanzania is obligated under national and international law to abolish child marriage and guardianship over adult women. Tanzania has commendably agreed to ensure fundamental rights both in its Constitution and in binding international treaties. The Tanzanian Constitution ensures all citizens their "fundamental human rights."³⁸ Fundamental rights are guaranteed in the Universal Declaration

35. *Id.* art. 21(2); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 6(b), adopted by the 2nd Ord. Sess., OAU, Maputa (Aug. 13, 2003), *signed by Tanzania* Nov. 5, 2003, *available at* <http://www1.umn.edu/humanrts/africa/protocol-women2003.html> [hereinafter *Women's Protocol to the African Charter*]; CRC, *General Comment No. 4*, Adolescent Health and Development in the Context of the Convention on the Rights of the Child, Committee on the Rights of the Child (Thirty-third session, 2003), U.N. GAOR, 59th Sess., U.N. Doc. CRC/GC/2003/4, para. 20 (2003), *available at* <http://www1.umn.edu/humanrts/crc/crc-generalcomment4.html> [hereinafter *General Comment No. 4, CRC*]; CEDAW, *General Recommendation No. 21*, Equality in Marriage and Family Relations, Committee on the Elimination of All Forms of Discrimination Against Women, (Thirteenth session, 1992), U.N. GAOR, 49th Sess., Supp. No. 38, at 1, U.N. Doc. A/49/38, para. 36 (1994), *available at* <http://www1.umn.edu/humanrts/gencomm/gencom21.htm> [hereinafter *General Recommendation No. 21, CEDAW*].

36. White Paper, *supra* note 13, para. 7. This reflects the U.N.'s 1965 Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G. A. Res. 2018 (XX), 20 U.N. GAOR Supp. (No. 14) at 36, U.N. Doc. A/60141 (1965), *available at* <http://www1.umn.edu/humanrts/instree/o2rcmar.htm>.

37. In 1986, Tanzania's Law Reform Commission recommended an increase in the minimum age of marriage, pointing to "socio-economic changes" and Tanzania's ratification of international "conventions on [the] rights of women and children," which "affect the thinking and outlook of people." LAW REFORM COMMISSION, INQUIRY AND REPORT, *supra* note 26, at 11, paras. 1.3, 1.4. The Commission, in fact, proposed twenty-one as the minimum age of marriage, with a drop to eighteen only with judicial approval. *Id.* at 20, paras. 2.1.2-3.

38. TANZ. CONST. ch. 1, art. 29(1) ("Every person in the United Republic has the right to . . . enjoy fundamental human rights . . .") (emphasis added).

of Human Rights (UDHR),³⁹ which has also been explicitly incorporated into Tanzanian domestic law.⁴⁰ As a High Court Judge explained in *Eprahim v. Pastory*, the UDHR is “part of [the] Constitution by virtue of art. 9(1)(f).”⁴¹ Additionally, in 1976, Tanzania acceded to the International Covenants on Civil and Political Rights (ICCPR)⁴² and on Economic, Social, and Cultural Rights (ICESCR).⁴³ Tanzania signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women⁴⁴ (CEDAW) in 1985,⁴⁵ the Convention on the Rights of the Child (CRC) in 1991,⁴⁶ the African Charter on Human and People’s Rights⁴⁷ (“African Charter”) in 1984,⁴⁸ and the African Charter on the Rights and Welfare of the Child in 1998.⁴⁹ In addition to these binding documents, Tanzania has consented to abide by the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in

39. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://www1.umn.edu/humanrts/instreet/b1udhr.htm> [hereinafter UDHR].

40. Article 9(f) of the Constitution stipulates that “the state authority and all its agencies are obliged to direct their policies and programs towards ensuring . . . that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.” TANZ. CONST. ch. 1, art. 9(f).

41. *Eprahim v. Pastory & Kaizilege*, [1990] LRC (Const) 757 (Tanz. High Ct. 1990). Tanzania itself reported that “the introduction of a Bill of Rights in the Constitution of the United Republic of Tanzania of 1984” served “to incorporate provisions of various human rights instruments including the Universal Declaration of Human Rights.” *Initial Report of States Parties: United Republic of Tanzania*, Committee on the Rights of the Child, 21st Sess., at para. 61, U.N. Doc. CRC/C/8/Add. 14 (June 1, 1994), available at <http://documents.un.org>. (click “welcome,” then “simple search,” and insert the U.N. Doc. No. at “symbol.”) [hereinafter *Initial Report, CRC*].

42. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, acceded to by Tanzania June 11, 1976, available at <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm> [hereinafter ICCPR]; see also ICCPR, Status of Ratification, <http://www.ohchr.org/english/countries/ratification/4.htm>.

43. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3 1976, acceded to by Tanzania June 11, 1976, available at <http://www1.umn.edu/humanrts/instreet/b2escr.htm> [hereinafter ICESCR]; see also ICESCR, Status of Ratification, <http://www.ohchr.org/english/countries/ratification/3.htm>.

44. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Tanzania Sept. 19, 1985, available at <http://www1.umn.edu/humanrts/instreet/e1cedaw.htm> [hereinafter CEDAW]; see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATION OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11, available at <http://www.unhcr.ch/pdf/report.pdf> [hereinafter UNITED NATIONS, STATUS OF RATIFICATION].

45. UNITED NATIONS, STATUS OF RATIFICATION, *supra* note 44, at 11.

46. *Id.*

47. African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Tanzania Feb. 18, 1984, available at <http://www1.umn.edu/humanrts/instreet/z1afchar.htm> [hereinafter African Charter].

48. Tanzania International Obligations and Access to Remedies: Constitutional Guarantees of the Right to Education, http://www.right-to-education.org/content/rights_and_remedies/tanzania.html.

49. African Charter on the Rights and Welfare of the Child, *supra* note 34.

Africa⁵⁰ (“Women’s Protocol to the African Charter”), a document that is particularly relevant as it was specifically drafted to address the problems of women in Africa.

Tanzania demonstrated its unqualified commitment to fulfilling its binding international obligations by refusing to enter reservations to any of the provisions within these documents.⁵¹ In its 1998 report to the CEDAW Committee, the Tanzanian representative stated that Tanzania is dedicated to ensuring that women’s rights are respected: “[The] Government of Tanzania did not believe that entering reservations to some articles of the Convention would help to solve the problem of discrimination, which required practical solutions.”⁵² In the report, Tanzania articulated its goal to “work systematically to eradicate the remaining practices which discriminated against women.”⁵³ In 2000, Tanzania took an important step towards this end by amending its Constitution to add gender as a basis of non-discrimination. Despite this step forward, the practices of child marriage and guardianship still exist in Tanzania, and are harmful to women and Tanzanian society. To continue working towards its goal of gender equality, Tanzania must take the next step of abolishing child marriage and guardianship over adult women.

B. TANZANIAN CITIZENS DESIRE ABOLITION OF CHILD MARRIAGE AND GUARDIANSHIP

Interviews with the citizens of Tanzania reveal that the country is ready for the proposed changes in the laws of marriage and guardianship. From March 6 through March 11, 2005, the Women’s Legal Aid Centre (WLAC), a legal aid clinic based in Dar es Salaam, in conjunction with Georgetown’s International Women’s Human Rights Clinic, based in Washington, D.C., conducted interviews of 109 individuals in Tanzania. The interviewees ranged from members of parliament, government ministers, and judges to villagers, doctors, and religious leaders. We drew heavily upon these responses in reaching the recommendations of this report.

Several major themes emerged during the fact-finding mission, indicating that the public supports the abolition of child marriage and guardianship. One

50. Women’s Protocol to the African Charter, *supra* note 35.

51. UNITED NATIONS, STATUS OF RATIFICATION, *supra* note 44, at 11.

52. *Second and Third Periodic Reports of States Parties: United Republic of Tanzania*, Committee on the Elimination of Discrimination Against Women, 19th Sess., at 72, para. 146, U.N. Doc. CEDAW/C/TZA/2-3 (September 30, 1996), available at <http://documents.un.org> (click “welcome,” then click “simple search,” and insert the U.N. Doc. No. at “symbol.”) [hereinafter CEDAW, *Second and Third Periodic Reports*].

53. *Id.* This responded to comments by the CEDAW Committee urging this explicit inclusion “as a matter of priority.” *Consideration of Reports Submitted by States Parties: United Republic of Tanzania*, Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 53rd Sess., Supp. No. 38, at 66, U.N. Doc. A/53/38/REV.1 (1998), paras. 226-227, available at <http://documents.un.org>. (click “welcome,” then click “simple search,” and insert the U.N. Doc. No. at “symbol.”)

hundred percent of interviewees believed that child marriage was dangerous for girls and should not be continued as a practice.⁵⁴ Interviewees identified harms such as health problems,⁵⁵ deprivation of education,⁵⁶ and inability to function capably as a wife and mother.⁵⁷ The vast majority of persons asked stated that the legal minimum age of marriage should be eighteen or over for both parties.⁵⁸ Similarly, guardianship was identified as a practice that should be discontinued. One hundred percent of the persons asked saw harms in the practice of guardianship.⁵⁹ Most interviewees observed that women were capable of caring for themselves and did not need a guardian while their husband was away.⁶⁰ In addition, the majority of interviewees believed that upon a man's death, guardianship of the child should immediately go to the surviving wife,⁶¹ arguing that remaining with the mother was in the best interests of the child.⁶²

Tanzanian citizens have thus recognized the need for change. State goals,

54. INT'L WOMEN'S HUMAN RIGHTS CLINIC, INTERVIEW BINDER (on file with International Women's Human Rights Clinic and Women's Legal Aid Centre) [hereinafter CLINIC, INTERVIEW BINDER].

55. Some health problems child brides face include increased risk of physical abuse because of her older husband's dominance, increased likelihood of fistula because of early sexual activity, and physical damage during labor due to early pregnancy. *See, e.g.*, Interview with Doctor, Ministry of Health, in Dar es Salaam, Tanzania (Mar. 9, 2005); Interview with Dr. Elizabeth Hizza, Gynaecologist, in Dar es Salaam, Tanzania (Mar. 9, 2005); Interview with Maggie Bangser, Women's Dignity Project, in Dar es Salaam, Tanzania (Mar. 8, 2005); Interview with Dr. Projestine Muganyizi, in Dar es Salaam, Tanzania (Mar. 9, 2005); Interview with Anna Abdallah, Minister of Health, in Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Fatima Ali Kombe, in Kisarawe, Tanzania (Mar. 10, 2005). *See infra* Part II(C) for a more detailed discussion of these health problems.

56. Many interviewees specifically stated that child brides have difficulty completing their education and noted the adverse impact of not completing an education. *See, e.g.*, Interview with Shani Rais, in Kisarawe, Tanzania (Mar. 10, 2005); Interview with Bailari Athumani, in Dar es Salaam (Mar. 11, 2005); Interview with a Doctor at the Ministry of Health, *supra* note 55; Interview with Robert Makaramba, Commissioner, Human Rights Commission, in Dar es Salaam (Mar. 9, 2005) (The views of Mr. Makaramba do not represent the view of the Commission); Interview with Anna Abdallah, *supra* note 55. *See infra* Part II(F) for a more detailed discussion of child marriage's impact on the right to education.

57. Interviewees noted that the husband will always dominate the wife when the wife is only a child. *See, e.g.*, Interview with Rehema Sameji, Tanzania Social Watch Programme, in Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Evod Mmarda, Legal and Human Rights Centre, in Dar es Salaam (Mar. 7, 2005); Interview with Eugene Mniwasa, in Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Angela Kainiki, Ministry of Justice, in Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Anna Abdallah, *supra* note 55; Interview with Edda Mariki, Women's and Children's Welfare, in Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Honorable Janet Kahama, Member of Parliament, in Dar es Salaam, Tanzania (Mar. 9, 2005). *See infra* Part II(D) for a more detailed discussion of the inequality in marriage caused by child marriage.

58. CLINIC, INTERVIEW BINDER, *supra* note 54. Only those interview responses giving specific ages for both men and women were included in this calculation. Not all respondents gave the same age for men and women.

59. *Id.*

60. *Id.* Of thirty-five persons asked, twenty-nine said that women did not need guardians.

61. *Id.* Of thirty-five persons asked, thirty-one said that guardianship should immediately go to the surviving wife.

62. *See, e.g.*, Interview with Honorable A. Bahati, Chairman, Law Reform Commission, in Dar es Salaam, Tanzania (Mar. 9, 2005); Interview with Tanzanian Woman, in Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Honorable Milton Mahanga, Member of Parliament, in Dar es Salaam, Tanzania (Mar. 8, 2005); Interview with Edda Mariki, *supra* note 57; Interview with Bishop Elinaza Sendoro, in

constitutional and international mandates, and the Tanzanian people all point to the need to abolish child marriage and guardianship over adult women.

II. CHILD MARRIAGE: TANZANIAN LAWS PERMITTING CHILD MARRIAGE VIOLATE WOMEN'S RIGHTS AND INHIBIT TANZANIA'S DEVELOPMENT

A. DOMESTIC LAW AUTHORIZES CHILD MARRIAGE, DEVASTATING GIRLS AND THEIR FAMILIES

*[Then there are] selfish people who marry young girls and put them to bed straight away. The girls lose their youth, they have psychological problems. It is unbecoming.*⁶³

—Grace Makenya, *Advocacy for Women in Africa*

Grace Makenya does not describe the problems of a few girls, but the lives of many. Child marriage is a persistent problem in Tanzania. Approximately twenty-five percent of Tanzanian girls are married.⁶⁴ This means that approximately 471,000 girls between the ages of fifteen and nineteen are already married.⁶⁵ Actual numbers could be higher, but inaccurate birth and marriage records obscure exact figures.⁶⁶ Missing and unrecorded marriages also contribute to the confusion on actual number of child brides.

Tanzania's Law of Marriage Act authorizes child marriage. The law sanctions the marriage of girls as children, while requiring boys to first be adults: "No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years."⁶⁷ In addition, a court may give leave for the marriage of a fourteen-year-old girl, if the court "is satisfied that there are special

Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Alphonse Katemi, Women's Legal Aid Centre, in Dar es Salaam, Tanzania (Mar. 6, 2005).

63. Interview with Grace Makenya, National Coordinator, Advocacy for Women in Africa, in Dar es Salaam, Tanzania (Mar. 9, 2005).

64. NEIL PRICE, KIRSTAN HAWKINS & MANGI EZEKIEL, ADDRESSING THE REPRODUCTIVE AND HEALTH NEEDS OF RIGHTS AND YOUNG PEOPLE SINCE ICPD: THE CONTRIBUTION OF UNFPA AND IPPF: TANZANIA COUNTRY EVALUATION REPORT (2003), available at http://www.unfpa.org/monitoring/country_evals/tanzania/tanzania_countryeval.pdf; UNICEF/Innocenti Research Centre, *Early Marriage: Child Spouses*, INNOCENTI DIGEST, Mar. 2001, at 4, available at <http://www.unicef-icdc.org/publications/pdf/digest7e.pdf> (claiming that twenty-seven percent of girls in East Africa are married) [hereinafter UNICEF/Innocenti Research Centre]; see also CTR. FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, ANGLOPHONE AFRICA PROGRESS REPORT 2001, at 289 (1st ed. 2001), available at http://www.reproductiverights.org/pub_bo_wowaf-rica.html (citing Pathfinder International, Adolescent Reproductive Health in Africa, 22 (1999)) (claiming the number of girls married in Tanzania to be 22.5%) [hereinafter Women of the World: Anglophone Africa Progress Report].

65. U.S. CENSUS BUREAU, IDB SUMMARY DEMOGRAPHIC DATA FOR TANZANIA (2000), <http://www.census.gov/cgi-bin/ipc/idbsum?cty=tz>.

66. UNICEF/Innocenti Research Centre, *supra* note 64, at 4.

67. Law of Marriage Act, § 13(1), TANZ. LAWS [CAP 29 R.E. 2002].

circumstances which make the proposed marriage desirable.”⁶⁸

Even the minimum age set out in the Law of Marriage Act lacks enforcement and is undercut by other Tanzanian laws. Under the Law of Marriage Act, a marriage will be annulled if a party was married below the minimum age,⁶⁹ and participating parties are liable for imprisonment.⁷⁰ Many girls, however, are married below the minimum age as the Act’s enforcement provisions are completely ineffective, and offenders are rarely prosecuted.⁷¹ Moreover, although the Law of Marriage Act supposedly supersedes any law in conflict with its provisions, the existence of laws specifying other acceptable ages of marriage diminishes its effectiveness.⁷² The Sexual Offences Special Provisions Act (SOSPA) permits girls to be married at young ages as long as the husband promises not to consummate the marriage until the girl is over the age of fifteen.⁷³ In addition, both codified customary law and the Islamic Restatement Act permit marriage when a girl reaches puberty,⁷⁴ which can be as low as the age of nine under Islamic law.⁷⁵

As illustrated below, child marriage is detrimental to children and the stability of family and society. Laws sanctioning the marriage of girls at a younger age than boys violate women’s equality by withdrawing protection solely from girls and forcing them into early adulthood. Child marriage breaches a girl’s right to physical integrity by forcing her into teenage pregnancies that jeopardize her life and health and into unequal and often abusive relationships. The right to family is violated because girls married young are deprived of equality in marriage and

68. *Id.* § 13(2).

69. *Id.* § 96.

70. *Id.* §§ 148(1)-(2), 155.

71. As discussed below, girls must challenge their underage marriages before age eighteen, which is difficult since they do not have standing in court as minors. Additionally, the Law of Marriage Act only provides for imprisonment—often an unattractive alternative for all involved—and not for damages, injunctions, or fines. Finally, the Act does not specify who is responsible for monitoring or enforcing the law. According to a police commander, even though child marriage carries criminal penalties, it “is not a criminal activity; it is a social activity. If there is an offense, Social Welfare will take action.” Interview with Commander Simon Mapunda, Department of Police, Dar es Salaam, Tanzania (Mar. 8, 2005). However, the Assistant Commissioner of the Social Welfare Department and the Principal Social Welfare Officer at the local Ilala office did not know of a single case of child marriage where action was taken. Interview with Donald Charwe, Assistant Commissioner, Department of Social Welfare, Dar es Salaam, Tanzania (Mar. 8, 2005); Interview with Bailari Athumani, *supra* note 56.

72. Judicature and Application of Laws Act, § 11(4), TANZ. LAWS [CAP 358 R.E. 2002].

73. SOSPA, *supra* note 32, § 138(1).

74. GN 279, *supra* note 4, rule 2 (“[A] parent may be punished for granting permission for a daughter to be married before she reaches puberty.”); Islamic Restatement Act, *supra* note 5, § 5(1) (“Every Moslem of sound mind who has attained puberty may enter into a contract of marriage.”). Additionally, under Islamic law, girls can marry even before they have attained puberty as long as a guardian consents to the marriage. Islamic Restatement Act, *supra* note 5, § 5(2) (“Persons of unsound mind and minors (that is, persons who have not attained puberty) . . . are incompetent to enter into a contract of marriage but may be validly contracted in marriage by their respective guardians.”).

75. Islamic Restatement Act, *supra* note 5, § 6 *Exception* (“According to the Shiah Ithna’ Asheri school it shall be presumed that males attain puberty at the age of fifteen years and females attain puberty at the age of nine years.”).

their children often suffer. Further, laws permitting child marriage, either explicitly or implicitly, dispense with the wife's consent in violation of her dignity. Child marriage also prevents girls from obtaining an education or skills for employment outside the home, violating their rights to education, employment, and economic development. By inhibiting women's development, child marriage, in turn, hampers Tanzania's growth and contributes to poverty. Resolving these problems requires legislation establishing the minimum age of marriage at eighteen and effectively prohibiting child marriage, explained more fully in Part VII.

B. AGE OF MARRIAGE LAWS DISCRIMINATE AGAINST GIRLS, THEREBY VIOLATING THEIR RIGHT TO EQUALITY

Tanzania's marriage laws deny girls equal protection in violation of both Tanzania's Constitution and international obligations. Not only do Tanzania's marriage laws set a different minimum age of marriage for boys and girls, but they require parental consent only for the marriages of girls, and impose a statute or limitations for challenging underage marriages against girls, but not boys.

1. Age of Marriage Laws Discriminate Between Girls and Boys

The marriage laws provide discriminatory, gender-based minimum ages of marriage. The Law of Marriage Act sets fifteen as the age for girls, and eighteen as the age for boys.⁷⁶ The Islamic Restatement Act permits marriage at puberty,⁷⁷ but stipulates that “[n]o male under the age of twelve years and no female under the age of nine years shall be held to have attained puberty.”⁷⁸

Additionally, Tanzania's laws mandate the consent of parents or guardians to the marriages of girls or women, but not men. Under the Islamic Restatement Act, for the Shafi'i and Shiah Ismaili schools, “women, of all ages, are incompetent to enter into a contract of marriage but may be validly contracted in marriage by their respective guardians.”⁷⁹ By contrast, men over puberty can enter into marriage on their own behalf.⁸⁰ Under the codified customary law, a woman under the age of twenty-one “shall not be married without her father's consent or the consent of her father's representative.”⁸¹ There is no similar provision for men. Further, under the Law of Marriage Act, girls between the ages of fifteen and eighteen “shall be required, before marrying to obtain the consent” of their father, or if he is dead, their mother.

76. Law of Marriage Act, § 13(1), TANZ. LAWS [CAP 29 R.E. 2002].

77. Islamic Restatement Act, *supra* note 5, § 5(1).

78. *Id.* §§ 6(2), 6 *Exception*.

79. *Id.* § 5(2). *See also id.* § 37(2) *Exception* (“According to the Shafi'i school, the father or the paternal grandfather acting as guardian for marriage of a woman . . . [who is a virgin] may contract a valid marriage on behalf of the woman without her consent.”). For the other schools, a marital guardian consents on behalf of the girl if she has not yet reached puberty. *Id.* § 5(2).

80. *Id.* § 5(1).

81. GN 279, *supra* note 4, rule 3.

Again, no parallel provision applies to boys.⁸²

Third, while men may contest the validity of an underage marriage in court at any time or age, girls face a statute of limitations and standing restrictions. The law permits parties to seek an annulment when one was “below the minimum age for marriage.”⁸³ However, the law further requires an underage bride to file a petition for annulment before she has “attained the age of eighteen years,” thus burdening girls with a statute of limitations restriction not placed on boys.⁸⁴ Moreover, because a girl under the age of eighteen is a minor, she has no standing in court.⁸⁵ As a lawyer from the Tanzania Women Lawyer’s Association explained, the girl “cannot make the case move by herself” and requires the aid of a parent or guardian.⁸⁶ The law thus provides for the parents or guardian of the underage bride to bring a case on her behalf.⁸⁷ However, if the parents sanctioned an underage marriage, they have little incentive to annul it on behalf of their daughters and could further be subject to criminal prosecution: “Any person who participates in any such ceremony knowing or having reason to believe that either party is below the minimum age for marriage shall be guilty of an offense and shall be liable on conviction to imprisonment for a term not exceeding two years.”⁸⁸

The statute of limitations and lack of standing rules deny child brides access to court, which is necessary to meaningfully protect their rights, on the basis of their gender. In finding a required court fee an unconstitutional obstacle to court access, the court in *Ndyanabo v. Attorney-General* explained: “Access to courts is, undoubtedly, a cardinal safeguard against violation of one’s rights.”⁸⁹ Similarly, the statute of limitations denies women their “cardinal safeguard” against violations by child marriage. As a High Court Judge recognized, the law provides child brides an illusory remedy: it “gives with this hand, and takes with that hand.”⁹⁰

82. Law of Marriage Act, § 17(1), TANZ. LAWS [CAP 29 R.E. 2002].

83. *Id.* § 38 (“A ceremony purporting to be a marriage shall be a nullity . . . if either party thereto is below the minimum age for marriage.”); *id.* § 39 (Marriage “shall be voidable if . . . the wife had not attained the age of eighteen years and consent to the marriage as required by section 17 had not been given and the court sees good and sufficient reason to set the marriage aside.”).

84. *Id.* § 96(1)(b).

85. Civil Procedure Code, 1966, Government Notice (GN) 410/1966, Order XXXI. (“Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. . . . Where the defendant is a minor, the court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for such minor. . . . Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit.”).

86. Interview with Lawyer, Tanzania Women’s Lawyers Association, in Dar es Salaam, Tanzania (Mar. 9, 2005).

87. Law of Marriage Act, § 97(2), TANZ. LAWS [CAP 29 R.E. 2002].

88. *Id.* § 148(2).

89. *Ndyanabo v. Attorney-General*, [2002] E. Afr. L. Rep. 485 (Tanz. Ct. App. 2001).

90. Interview with Judge, High Court of Tanzania, in Dar es Salaam, Tanzania (Mar. 7, 2005).

2. Discriminatory Treatment in Child Marriage Laws Violate the Constitution and International Law

Tanzania's discriminatory marriage laws violate the constitutional and international guarantee of equality. The Constitution provides, "All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law."⁹¹ Article 13(5) further prohibits any distinction based on gender.⁹² Likewise, international law guarantees equal protection under the law without distinction of any kind, including sex.⁹³ The CEDAW Committee interpreted this mandate to set the minimum age of marriage at eighteen "for both man and woman."⁹⁴

Tanzania has previously recognized its constitutional and international obligations to provide for equal protection in the inheritance context. In *Ephrahim v. Pastory*, a woman challenged the constitutionality of customary law that prohibited women, but permitted men, to inherit and sell clan land.⁹⁵ The court found the discriminatory customary rule invalid in light of Tanzania's adherence to the UDHR, CEDAW, the African Charter, and the ICCPR.⁹⁶ After the adoption of the Bill of Rights, "[t]here can be no doubt that Parliament wanted to do away with all oppressive and unjust laws of the past. It wanted all existing laws (as they existed in 1984) which were inconsistent with the Bill of Rights to be inapplicable in the new era."⁹⁷ Tanzania's discriminatory age of marriage laws are similarly "oppressive and unjust laws of the past" in violation of Tanzania's Bill of Rights and espousal of human rights. Moreover, the case for eliminating these discriminatory provisions is even stronger now than when *Ephrahim* was decided, because the Constitution was amended in 2000 to specifically prohibit discrimination on the basis of gender.

3. Generalized Stereotypes Do Not Justify Equal Protection Violations

A generalized, gender-based stereotype does not justify discrimination in marriage laws. Courts in the United States have found no "compelling State

91. TANZ. CONST. ch. 1, art. 13(1).

92. *Id.* art. 13(5).

93. Equal protection is guaranteed in almost identical language in the following international documents: UDHR, *supra* note 39, art. 7 ("All are equal before the law and are entitled without any discrimination to the equal protection of the law."); ICCPR, *supra* note 42, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); CEDAW, *supra* note 44, art. 15(1) ("States Parties shall accord to women equality with men before the law."); African Charter, *supra* note 47, art. 3 ("Every individual shall be equal before the law," and "[e]very individual shall be entitled to equal protection of the law."); Women's Protocol to the African Charter, *supra* note 35, art. 8 ("Women and men are equal before the law and shall have the right to equal protection and benefit of the law."). The CRC extends this right to "ensure that the child is protected against all forms of discrimination" regardless of sex. CRC, *supra* note 32, art. 2

94. *General Recommendation No. 21*, CEDAW, *supra* note 35, art. 16(2), para. 36.

95. *Ephrahim v. Pastory & Kaizilege*, [1990] LRC (Const) 757 (Tanz. High Ct. 1990).

96. *Id.* at 763.

97. *Id.* at 767.

interest which justifies treating males and females of the same age differently for the purpose of determining their rights to a marriage license.”⁹⁸ The CEDAW Committee has called upon States to abolish these archaic statutes:

Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished.⁹⁹

Tanzania itself recognizes the same age of maturity for men and women in other legal contexts. The Constitution requires that both girls and boys be eighteen before they can “vote in any public election held in Tanzania.”¹⁰⁰ This is also the age at which citizens of either sex are considered mature enough to contract,¹⁰¹ own property,¹⁰² consent to sex,¹⁰³ or reach the age of majority.¹⁰⁴ Tanzania must thus eliminate the discriminatory provisions in the Law of Marriage Act, codified customary law, and the Islamic Restatement Act.

C. CHILD MARRIAGE VIOLATES WOMEN’S AND CHILDREN’S RIGHT TO PHYSICAL INTEGRITY

Discriminatory Tanzanian statutes allowing a girl to marry at the age of fifteen or younger¹⁰⁵ violate women’s and children’s fundamental right to physical integrity under both domestic and international law. Marriage before a girl reaches full mental and physical maturity leads to a greatly increased risk of death and injury for the girl and for any children she may bear. Child marriage also increases a young girl’s susceptibility to domestic violence.

98. *Phelps v. Bing*, 316 N.E.2d 775, 776-77 (Ill. 1974); *see also* *Berger v. Adornato*, 350 N.Y.S.2d 520 (N.Y. Sup. Ct. 1973) (rejecting gender-based assumptions of maturity for purposes of age of marriage).

99. *General Recommendation No. 21*, CEDAW, *supra* note 34, art. 16(2), para. 38.

100. TANZ. CONST. ch.1, art. 5(1).

101. Law of Contract Ordinance, § 11, TANZ. LAWS [CAP 345 R.E. 2002] (requiring a person to have attained the “age of majority” in order to be fully competent to contract).

102. *Id.*

103. SOSPA, *supra* note 32, § 130(2)(e).

104. Age of Majority Ordinance, § 2, TANZ. LAWS [CAP 431 R.E. 2002].

105. Law of Marriage Act, § 13(1), TANZ. LAWS [CAP 29 R.E. 2002] (“No person shall marry who, being male, has not attained the apparent age of 18 years or, being female, has not attained the apparent age of fifteen years.”); *see also* SOSPA, *supra* note 32, § 138(1) (“Any person who, being married to a girl under the age of fifteen years, has or attempts to have carnal knowledge of the girl . . . before she has attained the age of fifteen years, is guilty of a misdemeanor.”).

1. Women and Children Are Dying: Early Childbearing and an Increased Exposure to HIV

*“Early marriage kills children.”*¹⁰⁶

—*Guadensia Mungumi, THE GUARDIAN*

The right to life is a prerequisite to all other human rights and in this sense could be viewed as the most fundamental of all rights. Article 14 of the Tanzanian Constitution explicitly guarantees the right to life: “Every person has the right to live and to the protection of his life by the society in accordance with the law.”¹⁰⁷ The right to life is also prominently recognized and explicitly guaranteed by a number of international treaties that Tanzania has ratified. For example, the African Charter stipulates that “every human being shall be entitled to respect for his life.”¹⁰⁸ Moreover, recognizing the fact that children, such as young girls forced into child marriages, are often particularly vulnerable to harm perpetrated by others,¹⁰⁹ both the CRC and the African Charter on the Rights and Welfare of the Child expressly provide that state parties recognize the “inherent right to life”¹¹⁰ of every child. Yet, despite these guarantees under the Tanzanian Constitution and its binding international commitments, Tanzania has retained its statutory provisions allowing marriage of girls at the age of fifteen or younger. This violates a girl’s right to life.

First, legally sanctioning the practice of marrying girls off at the physically immature age of fifteen or younger greatly increases the chances that the girl will ultimately die during childbirth. Medical evidence shows that girls aged fifteen to nineteen are twice as likely to die during pregnancy and childbirth than women aged twenty to twenty-four, while girls aged ten to fourteen are five times more likely to die in pregnancy and childbirth than women who have at least reached the age of twenty.¹¹¹ While Tanzania does not maintain comprehensive statistics on child marriage and maternal deaths by age, it has nevertheless admitted that its extraordinarily high rate of maternal deaths—approximately 1,500 per 100,000

106. Interview with Guadensia Mungumi, Journalist from THE GUARDIAN, in Dar es Salaam, Tanzania (Mar. 7, 2005).

107. TANZ. CONST. ch. 1, art. 14.

108. African Charter, *supra* note 47, art. 4; *see also* UDHR, *supra* note 39, art. 3; ICCPR, *supra* note 42, art. 6(1); CRC, *supra* note 33, art. 6.

109. *See, e.g.*, African Charter on the Rights and Welfare of the Child, *supra* note 34, *Preamble* (“Recognizing that the child, due to the needs of his physical and mental development requires particular care with regard to health . . .”).

110. CRC, *supra* note 33, art. 6(1) (“States Parties recognize that every child has the inherent right to life . . .”); African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 5(1) (“Every child has an inherent right to life . . .”).

111. UNITED NATIONS POPULATION FUND, ANNUAL REPORT (1997), <http://www.unfpa.org/about/report/report97/1997.htm>.

live births¹¹²—is compounded by child marriage “and the fact that many women bear children when their bodies are not yet physically mature.”¹¹³ Thus, Tanzania has explicitly recognized the connection between child marriage and maternal mortality. In order to fulfil its commitment to ensuring the right to life for all of its citizens, Tanzania must abolish the practice of child marriage that is leading to its high maternal mortality rate.

A second fatal health ramification of child marriage for many girls is infection with HIV and eventual death from AIDS. In Tanzania, well over one million people are infected with HIV; of those, 430,000 have AIDS.¹¹⁴ Studies demonstrate that the HIV prevalence rate among young Tanzanian females aged fifteen to twenty-four stands at approximately 8.1 percent, while the prevalence rate among Tanzanian males in the same age bracket is only four percent.¹¹⁵ This can be traced in part to child marriage because child marriage ensures a girl’s early sexual activity. One recent study by UNICEF conclusively established a link between child marriage and HIV, finding that the younger the age of first intercourse and first pregnancy, the higher the incidence of HIV infection.¹¹⁶ Indeed, Tanzania itself has recognized that the early sexual activity of Tanzanian girls has led to a higher incidence of HIV infection among young females as compared to young males.¹¹⁷ Child marriage exacerbates women’s vulnerability to infections such as HIV because young girls are often unable to insist that their much older male spouses, who have had more sexual experiences and thus increased potential exposure to HIV, practice safe sex.¹¹⁸ An official from the Ministry of Health acknowledged that young girls often cannot assert themselves within their marriages to limit their risk of contracting HIV:

[A young girl] does not have the negotiation, the life skills, and now you just take her into that marriage. Can she negotiate with this person—maybe he is an old one—to use a condom, for example? I don’t know. A few might be able to do so, but we understand that the young people are not so much empowered into their life skills, in negotiations, and so forth. They are submissive in the majority. So

112. THE WORLD BANK GROUP, TANZANIA, (2004), <http://www.worldbank.org/> (click on Countries; Tanzania; Data & Statistics; Gender Statistics; Health & Nutrition) [hereinafter WORLD BANK, TANZANIA].

113. *Initial Report*, CRC, *supra* note 41. As Tanzania’s Law Reform Commission recognized, “There is ample medical evidence that many mothers of tender age give birth by way of operation which is dangerous for the life of the mother.” LAW REFORM COMMISSION, INQUIRY AND REPORT, *supra* note 26, at 19, para. 1.6.1.

114. *Revised Initial Report of States Parties: United Republic of Tanzania*, Committee on the Rights of the Child, 27th Sess., at 17, para. 28, U.N. Doc. CRC/C/8/Add.14/Rev.1 (September 25, 2000), available at <http://documents.un.org>. (After clicking “welcome,” then click “simple search,” and insert the U.N. Doc. No. at “symbol.”) [hereinafter *Revised Initial Report*, CRC].

115. WORLD BANK, TANZANIA, *supra* note 112.

116. UNICEF/Innocenti Research Centre, *supra* note 64, at 10.

117. *Revised Initial Report*, CRC, *supra* note 114, at 17, para. 29.

118. *Id.*

there's no way you put them into marriage and you hope they will be able to protect themselves in the majority.¹¹⁹

Thus, girls are being forced into unprotected sex with potentially infected partners at very young ages. Exposing young girls to a higher risk of HIV is therefore another way in which Tanzania's discriminatory age of marriage statutes have prevented girls from realizing their right to life under the Constitution and international instruments.

Finally, Tanzania's statutes encouraging child marriage violate not only the child bride's right to life, but also the "inherent right to life" of her infant as guaranteed by both Children's Conventions.¹²⁰ Tanzania's infant mortality rate has been as high as 102 deaths per every 1,000 live births.¹²¹ This high mortality rate can be linked to the greater risk that the child will be harmed during gestation and birth due to the mother's physical frailty, as well as to the decreased likelihood that the mother will be capable of providing proper care and nutrition to her child because she is little more than a child herself.¹²² Grace Mesaki, a Kisarawe District Commissioner, described the fatal consequences of early childbearing for both mother and child:

Problems during childbirth—usually it's the child or the girl that gets problems, sometimes they both die. I think they are too young to get married and to give birth . . . our hospitals aren't prepared for such cases. Sometimes they survive if they get to a big hospital but in rural areas, [it is] complicated because there is no equipment.¹²³

Significantly, under Article 14(2)(a) of the African Charter on the Rights and Welfare of the Child, Tanzania has an affirmative obligation to decrease its high infant and child mortality rates.¹²⁴ In fact, Tanzania committed "to reduce the rate to 50 deaths per 1,000 children born by the year 2000."¹²⁵ By increasing the age of marriage to eighteen for both men and women, Tanzania would make significant progress towards achieving this goal of lower infant and child mortality rates.

119. Interview with Doctor at the Ministry of Health, *supra* note 55.

120. CRC, *supra* note 33, art. 6; African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 5.

121. UNICEF, AT A GLANCE: UNITED REPUBLIC OF TANZANIA, http://www.unicef.org/infobycountry/tanzania_statistics.html.

122. UNICEF/Innocenti Research Centre, *supra* note 64, at 5.

123. Interview with Grace Mesaki, District Commissioner, in Kisarawe, Tanzania (Mar. 10, 2005).

124. African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 14(2)(a) ("State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures . . . to reduce infant and child mortality rate.")

125. *Second Periodic Report of States Parties: United Republic of Tanzania*, Human Rights Committee, 46th Sess., at 75, U.N. Doc. CCPR/C/42/Add. 12 (June 4, 1991), available at <http://documents.un.org>. (click "welcome," then click "simple search," and insert the U.N. doc. No. at "symbol.") [hereinafter *Second Periodic Report*, HRC].

2. Even When Death Does Not Result, Early Pregnancy Severely Damages the Health of Women and Their Children

When child marriage does not lead to the death of a child bride, it can nevertheless have serious ramifications for her health and/or that of her child. Child marriages thus violate Tanzania's obligations to protect the health of all its citizens, as recognized by its Constitution and international commitments. As discussed previously, Article 14 of the Constitution acknowledges the closely-related right to life,¹²⁶ while Article 8(1)(b) of the Constitution's *Fundamental Objectives and Directive Principles of State Policy* stipulates that the "primary objective of the Government shall be the welfare of the people."¹²⁷ Read together, these Articles provide that the Tanzanian government has an affirmative obligation under its domestic law to promulgate age of marriage provisions that better protect the health of *all* of its citizens.

Tanzania's international obligations also give rise to this same affirmative duty. The Human Rights Committee entrusted with monitoring compliance with the ICCPR has stated that the right to life guaranteed under international law should not be narrowly interpreted and should include the right to "all possible measures to . . . increase life expectancy."¹²⁸ Indeed, the African Charter specifically requires states to "take all the necessary measures to protect the health of their people."¹²⁹ Further, Tanzania has expressly agreed to eliminate any and all traditional practices that impede the health of a child—such as child marriage—under provisions such as Article 21 of the African Charter on the Rights and Welfare of the Child.¹³⁰ Finally, complementary provisions of other binding treaties such as the CRC and the ICCPR also require States to impose limitations on practices arising out of a person's religion or beliefs that are necessary to protect "public safety, order, *health*, or morals, or the fundamental rights and freedoms of others."¹³¹ Thus, Tanzania is required under both domestic and international law to guarantee the right to health to all of its citizens.

Despite these legal obligations, however, Tanzania is violating women's right to health by allowing the early marriage of girls. The CEDAW and CRC Committees have explicitly linked child marriage to grave problems related to women's sexual and reproductive health.¹³² This is because child marriage

126. TANZ. CONST. ch. 1, art. 14.

127. *Id.* art. 8(1)(b).

128. *General Comment No. 6*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Human Rights Committee (Sixteenth session, 1982), U.N. GAOR, 37th Sess., U.N. Doc. HRI/GEN/1/Rev.1 at para. 5 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom6.htm> [hereinafter *General Comment No. 6*, HRC].

129. African Charter, *supra* note 47, art. 16(2); see also ICESCR, *supra* note 43, art. 12(1); CRC, *supra* note 33, art. 24(1); Women's Protocol to the African Charter, *supra* note 35, art. 14.

130. African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 21(1)(a).

131. CRC, *supra* note 33, art. 14(3) (emphasis added); see also ICCPR, *supra* note 42, art. 18(3).

132. *General Recommendation No. 21*, CEDAW, *supra* note 35, art. 16(2), para. 36; *General Comment No. 3*, HIV/AIDS and the Rights of the Child, Committee on the Rights of the Child (32nd

almost necessarily involves girls becoming sexually active at an early age, which often results in early childbearing. Early childbearing entails significant risks to the health and life of the mother. Underdeveloped girls can have particularly long and painful labors which can lead to severe and permanent physical conditions. For example, early pregnancy can result in the girl's development of hypertension, neurological damage in the lower limbs, chronic pain, asphyxia, malaria, and anemia.¹³³ Moreover, physically immature girls who give birth can develop a debilitating and embarrassing condition known as vesico-vaginal fistula.¹³⁴ Fistula occurs when a girl's uterus is ruptured during labor, accompanied by a tearing of the intestine or bladder.¹³⁵ Girls who suffer from fistula must attempt corrective surgery in order to regain control of their excretory functions.¹³⁶ Dr. Rosemary Kigadye, a UNICEF Health Researcher, has seen Tanzanian women suffer the long-term effects of fistula:

With [fistula] you can imagine it is a problem—urine with no control and no control of feces, and it causes a lot of distress to the poor woman because of the smell. Managing in that situation is difficult . . . The operation [to get it repaired] is tedious because you can repair it and after a few weeks it breaks down again.¹³⁷

Consequently, fistula is a condition that can plague a woman throughout her life, even if she has undergone corrective surgery several times. In addition to the physical pain and discomfort that attend this condition, fistula victims suffer significant psychological and social consequences as well. Girls with fistula are often deemed “unclean,” and are thereafter shunned and marginalized by society.¹³⁸ As a result, these women are “divorced if they're married . . . highly stigmatized, or self-stigmatized because they're so embarrassed . . . [and consequently] live with a lot of social isolation from family, community, [and] social connection.”¹³⁹ Thus, grave physical consequences resulting from early pregnancy are often accompanied by equally grave social and psychological consequences for the girl involved. As a result, the young girl's mental health and well-being is also adversely affected.

Moreover, the health of the infants of young mothers is frequently at risk as well. Such infants are often born with low birth weights and other serious defects

session, 2003), U.N. GAOR, 59th Sess., U.N. Doc. CRC/GC/2003/3, at para. 11 (2003), available at <http://www1.umn.edu/humanrts/crc/comment3.htm> [hereinafter *General Comment No. 3, CRC*]; *General Comment No. 4, CRC*, *supra* note 35, para. 20.

133. Interview with Projestine Muganyizi, *supra* note 55.

134. Interview with Maggie Bangser, *supra* note 55.

135. UNICEF/Innocenti Research Centre, *supra* note 64, at 11.

136. *Id.*

137. Interview with Dr. Rosemary Kigadye, UNICEF Project Officer, in Dar es Salaam, Tanzania (Mar. 9, 2005).

138. Interview with Maggie Bangser, *supra* note 55.

139. *Id.*

which impede their quality of life.¹⁴⁰ Maggie Bangser, the Director of Women's Dignity Project, has found that most children of women with fistula will not survive: "98 or 99% of the women will have a still-born. Or the baby always dies, virtually. As a result of the prolonged labor that also led to the fistula, the fetus invariably dies."¹⁴¹ Consequently, not only is the young mother's health endangered by child marriage, but the health of her offspring as well. Tanzania must therefore abolish the practice of child marriage in order to protect the right to health of both mother and child guaranteed by domestic and international law.

3. Young Wives Are Often Physically Abused By Their Husbands

The rights to life and health guaranteed under domestic and international law also include a girl's or woman's right to be protected from domestic violence. The practice of child marriage impedes this right because girls and women are particularly vulnerable to physical abuse when their husbands are much older than they are. Article 19(1) of the CRC requires a State to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental abuse,"¹⁴² while Article 16(1) of the related African Charter on the Rights and Welfare of the Child similarly requires a State to protect the child from "all forms of . . . inhuman or degrading treatment and especially physical or mental injury or abuse."¹⁴³ Thus, Tanzania has a specific affirmative duty under international law to protect girls against the physical abuse that they will often be subjected to as a result of child marriage.

Child marriage is linked to violence against women because a significant age gap between the girl and her husband will inevitably result in a disparity of power between the two. Edda Mariki, the Executive Director of the Tanzania Women and Children Welfare Center, has seen how a large age difference between a young girl and her husband often results in a violent relationship:

Let's say the man who is going to marry her is a big man, like 28 or 30 years old. And she is 16. Can you think they can even cope or even talk intimately? Even when they are going for sex, it is just like [sic] force. Because she doesn't know anything. She's not exposed to that kind of life. And if this man wants something, he just comes [at her directly]. There is no negotiating. There is no peace in that kind of marriage. So at the end of the day that girl will be tortured.¹⁴⁴

Thus, the inherent inequality of power in this type of marriage often leads to a relationship where the husband continually dominates his young wife. This

140. UNICEF/Innocenti Research Centre, *supra* note 64, at 8.

141. Interview with Maggie Bangser, *supra* note 55.

142. CRC, *supra* note 33, art. 19(1).

143. African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 16(1); *see also* UDHR, *supra* note 39, art. 5; ICCPR, *supra* note 42, art. 7.

144. Interview with Edda Mariki, *supra* note 57.

domination may, and often does, manifest itself in the form of physical violence against the girl. In fact, the CEDAW Committee specifically identified child marriage as a serious concern for women in terms of the immediate health-related consequences of violence, as well as the longer-term implications of family violence:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse [and] forced marriage . . . [and] justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the enjoyment, exercise and knowledge of human rights and fundamental freedoms.¹⁴⁵

Indeed, as the above passage suggests, the right to health and the right to be free from violence are closely linked under international law. Accordingly, CRC General Comment No. 3 notes that in order for the rights of children and adolescents to be fully protected from all types of infringements, girls must not only have their right to health under Article 19 protected, but also their right to be protected from violence guaranteed.¹⁴⁶ After all, gender-based violence not only impedes a woman's health but her enjoyment of *all* of her other fundamental rights under international law.

Moreover, Tanzania's laws permitting child marriage must be viewed in conjunction with codified customary law that permits a husband to punish his wife—even if a child—through “slaps or hitting by hands, beating by sticks (even if they cause bruising or swelling), pushing, kicking, [and] throwing household utensils at his wife.”¹⁴⁷ Young girls are generally less physically and mentally capable of withstanding such treatment from abusive husbands than older women. This was recognized in the 1969 White Paper, which justified the Law of Marriage Act's establishment of a minimum age of marriage for girls as a way to “remove the injustices inflicted upon a wife,” including “corporal punishment.”¹⁴⁸ As discussed above, however, the age fifteen was chosen at that time based on an outdated U.N. Recommendation that does not reflect the current international consensus that defines a child—either girl or boy—as under eighteen. Thus, in order to protect women's and children's right to physical integrity, the minimum age for marriage should be eighteen for both men and women.

145. *General Recommendation No. 19, Violence against Women*, Committee on the Elimination of Discrimination Against Women, (11th session, 1992), U.N. GAOR, 47th Sess., Supp. No. 38, at 1, U.N. Doc. A/47/38 at para. 11 (1993), available at <http://www1.umn.edu/humanrts/gencomm/gener19.htm> [hereinafter *General Recommendation No. 19, CEDAW*].

146. *General Comment No. 3, CRC*, *supra* note 132, para. 6

147. GN 279, *supra* note 4, 1st sched., rule 164.

148. White Paper, *supra* note 13, para. 18.

D. CHILD MARRIAGE IS DETRIMENTAL TO THE WELFARE OF THE ENTIRE FAMILY

By continuing to permit the marriage of children as young as fourteen,¹⁴⁹ Tanzania violates its constitutional and international obligations to protect the family. By its very nature, child marriage not only creates inherent marital inequalities and conflicts, but also almost inevitably deprives the child bride, who is often forced to bear and raise offspring before she is physically and psychologically ready, of her right to childhood.¹⁵⁰ As a result, as one Tanzanian lawyer observed, Tanzania's explicit sanctioning of this practice can destroy the family unit as a whole:

[Section 13 of the Law of Marriage Act] is not a good provision because it is providing for discrimination, it is imposing on the young community, the girl community, to enter into marriage relationships when they are not even mature enough to take on the responsibility of the house. You know, she's going to be now a housewife. She's going to be a mother. Now imagine a girl of fifteen becoming a mother, with all the responsibilities of a mother in the house—it is impossible.¹⁵¹

Thus, child marriage directly harms entire families, whose pivotal role in Tanzanian society is explicitly recognized by the Constitution and international conventions. Article 16 of the Constitution guarantees that “[e]very person is entitled to respect and protection of . . . his family and of his matrimonial life.”¹⁵² The UDHR similarly emphasizes in Article 16(3) that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹⁵³ Signifying the importance of this provision, a number of other international conventions to which Tanzania is a party feature identical or similar provisions stressing the fundamentality of the family to society, including ICCPR Article 23(1),¹⁵⁴ ICESCR Article 10(1),¹⁵⁵ and the preambles to both CEDAW and the CRC.¹⁵⁶ Moreover, the protection of the family, so central to African culture, also constitutes an important regional objective in Africa, as Article 18 of

149. Law of Marriage Act, § 13(2)(a), TANZ. LAWS [CAP 29 R.E. 2002] (granting a court the power to “give leave for a marriage” when “each party has attained the age of fourteen years”).

150. See generally SANYUKTA MATHUR ET. AL., TOO YOUNG TO WED: THE LIVES, RIGHTS, AND HEALTH OF YOUNG MARRIED GIRLS 1 (2003), http://www.icrw.org/docs/tooyoungtowed_1003.pdf.

151. Interview with Rehema Sameji, *supra* note 57.

152. TANZ. CONST. ch. 1, art. 16(1).

153. UDHR, *supra* note 39, art. 16(3).

154. ICCPR, *supra* note 42, art. 23(1)(identical language to UDHR, *supra* note 39, art. 16(3)).

155. ICESCR, *supra* note 43, art. 10(1)(requiring that “the widest possible protection and assistance . . . be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”).

156. See, e.g., CEDAW, *supra* note 44, *Preamble* (noting that CEDAW was promulgated “bearing in mind the great contribution of women to the welfare of the family and to the development of society . . . [and] the social significance of maternity and the role of both parents in the family and in the upbringing of children.”); CRC, *supra* note 33, *Preamble* (stipulating that “the family, as the fundamental group of society and the natural environment for growth and well-being of all its members and

the African Charter emphasizes by requiring that, as “the natural unit and basis of society,” the family “shall be protected by the State which shall take care of its physical health and moral[s]”¹⁵⁷ Thus, domestic and international law explicitly recognize the significance of the family unit, and accord great importance to its protection.

Yet, as will be demonstrated below, child marriage violates these constitutionally and internationally-guaranteed rights to the protection of the family for two primary reasons. First, the marriage of a child to an adult creates inherent inequalities in marriages which impede the optimal functioning of the family as a unit. Second, child marriage violates the right of the child—a fundamental member of the family—to protection and to childhood itself.

1. Child Marriage Creates Marital Conflicts and Inequalities Harmful to Families

*[As a child bride] . . . you become so afraid of your husband. You become afraid of your in-laws. You can't even decide on your own If they tell you no, this is not the right thing, how do you know it's the right thing? You tend to side with them but, possibly, it's not you who are deciding. Because they take you as a child You are immature in the sense that you don't depend on your own, you can't decide anything, whatever you decide to others looks improper.*¹⁵⁸

—Honorable Janet Kahama, Member of Parliament

In order to truly protect the family, both parties must be adults, and there must be equality within the marital relationship. As the CEDAW Committee explained, “A stable family is one which is based on principles of equity, justice and individual fulfilment for each member.”¹⁵⁹ Indeed, Article 18 of the African Charter, by not only mandating state protection of the family¹⁶⁰ but also stipulating that the “State shall ensure the elimination of every discrimination against women,”¹⁶¹ explicitly ties equality for women to the optimal functioning of the entire family unit.

Child marriage is antithetical to the equality necessary for the healthy functioning of the family since partners lack equal rights and even the basic ability to enter into the marriage, essential to prevent harmful conflicts. When girls are married under the age of eighteen, they are particularly likely to not have

particularly children, should be afforded . . . necessary protection and assistance so that it can fully assume its responsibilities within the community”).

157. African Charter, *supra* note 47, art. 18(1).

158. Interview with Honorable Janet Kahama, *supra* note 57.

159. *General Recommendation No. 21*, CEDAW, *supra* note 35, para. 24.

160. African Charter, *supra* note 47, art. 18(1) (“[the family] shall be protected by the State which shall take care of its physical health and moral[s]”).

161. *Id.* art. 18(3). The Women’s Protocol to the African Charter includes similar language, specifically stipulating that “State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.” Women’s Protocol to the African Charter, *supra* note 35, art. 6.

consented to the marriage and thus to play a subordinate role within it,¹⁶² but also to lack the necessary maturity and life skills to deal with marital responsibilities. As one Tanzanian woman, Shani Rais, recalled, “I was married at a very young age. I was crying a lot . . . I was disturbing the man, so he didn’t think it was worth staying with ‘the kid.’”¹⁶³ Thus, when one partner does not consent to the marriage while the other does—a situation which is particularly likely to occur when one party is a child¹⁶⁴—the marriage is especially prone to be miserable for the couple and can, like Ms. Rais’ marriage, ultimately end in divorce,¹⁶⁵ destroying the family unit entirely.

Moreover, even when couples remain together, the imbalance and disparate interests of the young girl and her often much-older husband¹⁶⁶ can further stress the harmony necessary for the proper functioning of the family unit. This age disparity almost inevitably leads to inequalities in decision-making competence and power between the girl and her husband. As one Tanzanian aptly noted, with child marriage “you find that the relationship within the family is not balanced . . . there is a feeling that you’re my wife, but you’re a child. I’m more mature than you, I’ve seen a lot of things . . . so whatever argument you raise, it’s ‘no, no, that’s not the right one.’”¹⁶⁷ This marital imbalance, in turn, facilitates the “victimization”¹⁶⁸ of young girls by subjecting them to forced sexual intercourse since, as SOSPA recognizes,¹⁶⁹ there is often “no negotiating” with a much older and bigger man,¹⁷⁰ as well as other forms of domestic violence.¹⁷¹ Additionally, a girl married before the age of eighteen, due to lack of education and her inherently “childish relationships”¹⁷² with others, will often have disparate interests from her husband that may ultimately lead to extramarital affairs when the young girl seeks companionship from those closer in age to her. Indeed, as Fatma Toufiq, a WLAC paralegal from Dodoma, observed:

162. NICOLE HABERLAND, ERICA CHONG & HILARY BRACKEN, A WORLD APART: THE DISADVANTAGE AND SOCIAL ISOLATION OF MARRIED ADOLESCENT GIRLS 2 (Population Council, 2004), available at www.popcouncil.org/pdfs/socialisolation.pdf (noting that young girls who do not consent to a marriage typically have only a very limited say in family decision-making matters once wed).

163. Interview with Shani Rais, *supra* note 56.

164. See generally HABERLAND, CHONG & BRACKEN, *supra* note 162.

165. Interview with Shani Rais, *supra* note 56.

166. See generally HABERLAND, CHONG & BRACKEN, *supra* note 162, at 3 (noting that studies document that “in general, the younger a girl’s age at marriage, the greater the age difference between her and her husband”).

167. Interview with Judica Tarimo, in Dar es Salaam, Tanzania (Mar. 7, 2005).

168. As one Tanzanian judge simply stated, child marriages allow girls to become “victims of a lot of things.” Interview with High Court Judge, *supra* note 90.

169. SOSPA, *supra* note 32, § 132(e) (setting eighteen as the age at which unmarried girls are considered capable of consenting to sex).

170. Interview with Edda Mariki, *supra* note 57.

171. See *infra* Part II(C) for a discussion on the right to physical integrity.

172. Interview with John Michael, Teacher, in Kisarawe, Tanzania (Mar. 10, 2005).

In behaviourism, the people who are in different stages of ages have different characters . . . if a man of fifty marries a girl of seventeen or sixteen, you will see that there is a difference in behaviourism. So it is obvious that this girl will maybe start having a relationship with a boy who is at least near her age rather than having sex with the older man. And it happens that, because he's old, he's not that much sexually active to satisfy this young girl."¹⁷³

Thus, child marriage can create a marital atmosphere ripe for destructive family tensions.

Inherent inequalities and tensions resulting from disparities in age are further exacerbated by laws that allocate unequal rights and responsibilities. For example, under Article 5(1) of the Constitution, one must be at least eighteen to vote.¹⁷⁴ One also must be at least eighteen to enter into a binding obligation under the Law of Contract¹⁷⁵ as only then is it assumed that one has the maturity and capacity to take on legal responsibilities pursuant to the Age of Majority Act.¹⁷⁶ Similarly, a girl under eighteen cannot own property¹⁷⁷ or even bring an action in court¹⁷⁸ to claim her and her family's legal rights. Yet, ironically, a Tanzanian girl of fourteen can be married¹⁷⁹ even though she is still considered unable to vote or make any kind of binding commitment to care for her family's needs.¹⁸⁰ Because her husband is over eighteen,¹⁸¹ the law thus empowers the husband to make all important decisions and manage the family's affairs.

2. Age-Inappropriate Marriages Rob Girls of Their Right to Protection and to Childhood

There was a case . . . of a twelve-year-old girl getting married, then one day she was caught playing with her friends, and the husband broke her legs. This was a young girl, but the guy thought, "no, my wife shouldn't be playing outside, she should be doing something in the house." You have denied her the right to play. She is a child. She has

173. Interview with Fatma Hassan Toufi, Dodoma Paralegal, in Dar es Salaam, Tanzania (Mar. 10, 2005).

174. TANZ. CONST. ch. 1, art. 5(1).

175. Law of Contract Ordinance, § 11, TANZ. LAWS [CAP 345 R.E. 2002] (requiring a person to have attained the "age of majority" in order to be fully competent to contract).

176. Age of Majority Ordinance, § 2, TANZ. LAWS [CAP 431 R.E. 2002] (stating that a person shall attain legal majority on the "eighteenth anniversary of the day on which he was born").

177. Interview with Rehema Kerefu-Sameji, *supra* note 57 (noting that "you can't own property until you have attained the age of eighteen in Tanzania").

178. Civil Procedure Code, 1966, Government Notice (GN) 410/1966, Order XXXI.

179. Law of Marriage Act, §§ 13(2)(a)-(b), TANZ. LAWS [CAP 29 R.E. 2002] (allowing a girl as young as 14 to get married with court approval).

180. Tanzania's Law Reform Commission highlighted this absurdity, pointing out that the marriage contract has more "far reaching obligations than normal commercial contracts." LAW REFORM COMMISSION, INQUIRY AND REPORT, *supra* note 26, at 19, para. 1.6.2.

181. Law of Marriage Act, §§ 13(1), TANZ. LAWS [CAP 29 R.E. 2002].

*the right to play. So, there is more harm, and you have violated all the rights of that girl.*¹⁸²

—*Legal Advocate, Dar es Salaam*

As an integral component of its legal obligation to protect the family, Tanzania also must better protect its children.¹⁸³ Although Tanzania itself advocated “put[ting] a stop to child marriage” in its 1969 White Paper in recognition of the harms posed to the child bride¹⁸⁴ and subsequently raised the minimum age of marriage to fifteen for girls,¹⁸⁵ it continues to legally sanction child marriage for girls under eighteen.¹⁸⁶ Indeed, despite Tanzania’s admirable commitment to the welfare of its families and children,¹⁸⁷ as detailed in other sections, there is no doubt that marriage under the age of eighteen violates a girl’s right to equal protection, physical integrity, education, employment, and dignity by exposing her to physical, sexual, and emotional abuse while severely constraining her opportunities in life. Moreover, while these violations are serious enough in themselves when they intrude upon the rights of an adult, in the context of children such violations of basic human rights are particularly troubling. This is because, as the CRC emphasizes, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”¹⁸⁸ The ICESCR similarly requires that because of children’s inability to protect themselves, “special measures of protection and assistance should be taken on [their] behalf.”¹⁸⁹ Thus, because children are not able to protect their own rights, international treaties explicitly require states to place special emphasis on protecting children from such harmful practices as child marriage.

Additionally, early marriage violates a girl’s right to her childhood. While rest and leisure is certainly viewed as a fundamental right for all persons under the

182. Interview with Legal Advocate, in Dar es Salaam, Tanzania (Mar. 9, 2005).

183. Indeed, the Preamble to the CRC places the guarantee of fundamental rights for children solidly within the context of protecting the family, requiring that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded [the] necessary protection.” CRC, *supra* note 33, *Preamble*.

184. White Paper, *supra* note 13. The government observed that a higher age of marriage would better protect girls’ health and “prevent the parents from removing their young daughters from schools.” *Id.*

185. Law of Marriage Act, § 13, TANZ. LAWS [CAP 29 R.E. 2002].

186. *See, e.g.*, African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 21(2) (requiring that “effective action”—including legislation—be undertaken to specify a minimum age of marriage of at least eighteen).

187. Indeed, Ali Mohamed Shein, the Vice President of Tanzania, recently reiterated that children are Tanzania’s future and must be protected as such: “We owe it to our children to marshal the necessary political will to provide for their basic needs—we ought not fail them any longer.” Statement by His Excellency Dr. Ali Mohamed Shein, Vice President of the United Republic of Tanzania, Delivered at the Special Session of the United Nations General Assembly on Children, New York (May 9, 2002), <http://www.un.org/ga/children/tanzaniaE.htm>.

188. CRC, *supra* note 33, *Preamble*.

189. ICESCR, *supra* note 43, art. 10(3).

UDHR,¹⁹⁰ recreation is considered so fundamental to children¹⁹¹ that it has been specifically incorporated into both the CRC and the African Charter on the Rights and Welfare of the Child. In identical language, both treaties require a state to ensure a child's right to "rest and leisure, to engage in play and recreational activities appropriate to the age of the child."¹⁹² By its very nature, early marriage robs a girl of this right to childhood. Child marriage saddles a girl, without her consent, with family responsibilities such as childcare that should only be undertaken by a responsible adult. In turn, she is denied the ability to attend school, play with peers her own age, and fully develop the life skills that will benefit her and her family when she eventually attains an appropriate age for marriage. Psychologically, the consequences of denying a child her right to rest and leisure can be quite significant. As one Tanzanian social researcher recently noted:

Life will never be the same [for a child bride]. She still has fear, and still has her brain growing and having to prepare. She's still a child and wants to play with other children, and you have given her these responsibilities . . . This girl at the age of fourteen has her child—it means she hasn't got time to prepare herself very well. By preparation she needed to have education, she needed to have time to learn with the other children¹⁹³

However, unfortunately the harms of early marriage are not limited to the child bride herself; her children also can be injured or killed by the practice. Of course, all persons in Tanzania have the right to life and health,¹⁹⁴ and Tanzania has made an additional commitment to protect the health of children under the CRC and the African Charter on the Rights and Welfare of the Child, which explicitly direct that states take all appropriate measures to reduce infant and child mortality.¹⁹⁵

190. UDHR, *supra* note 39, art. 24 ("Everyone has a right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.").

191. Indeed, sociologists increasingly believe that true childhood and adolescence are crucial to a child's future well-being because in contrast to the much simpler past, in today's society "the preparation time for entry into adulthood has greatly increased with the specialization of tasks and the increasing education needed to perform them." *See generally* MARCELA VILLARREAL, *ADOLESCENT FERTILITY: SOCIO-CULTURAL ISSUES* 4 (1998).

192. CRC, *supra* note 33, art. 31; African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 12(1).

193. Interview with Tanzania Gender Networking Programme Activist, in Dar es Salaam, Tanzania (Mar. 11, 2005).

194. The Constitution explicitly guarantees that "[e]very person has the right to live and to the protection of his life by the society in accordance with the law." TANZ. CONST. ch. 1, art. 14. By extension, the right to life necessarily incorporates a right to health. *See infra* section II(C), discussing the Right to Physical Integrity.

195. CRC, *supra* note 33, art. 24(2)(a) (requiring that States Parties "take appropriate measures . . . to diminish infant and child mortality"); African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 14(2)(a) (requiring that State Parties "take measures . . . to reduce infant and child mortality").

As discussed in more detail in the Right to Physical Integrity section, by allowing child marriage Tanzania continues to not only violate these treaties, but also to threaten the very existence of its own next generation in the process. Flora Massoy, a Morogoro paralegal, recounted numerous stories of infants who never had a chance at life due to the tender age of their mothers, including the particularly poignant story of a girl who was married at eleven and, after experiencing complications during delivery, “buried her child at twelve.”¹⁹⁶

Moreover, even if they survive birth, the children of child brides are particularly susceptible to ill-health and poverty due to the immaturity and lack of life-skills of their mothers. Tanzania has itself recognized this connection: “[Because] many girls bear children when they are children themselves, [they] cannot assume any meaningful parenthood role. These child mothers and their children are being pushed further into poverty in the coming century.”¹⁹⁷ A girl under eighteen simply cannot contribute to the welfare of the family to the extent that a woman who had obtained full legal, physical, and mental capacity could. Indeed, it is for this reason that CEDAW General Recommendation 21 stipulates that “when men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act.”¹⁹⁸

Thus, by failing to protect one generation of children, laws which condone child marriage contribute to a vicious cycle in which the next generation of children is also physically, emotionally, and economically victimized. In order to protect a child’s fundamental right to recreation and to age-appropriate activities as provided in international conventions, and by extension to protect the family unit as a whole, child marriage must be eliminated in Tanzania. Indeed, it is only by doing this that Tanzania can truly meet its own constitutional aspiration to protect the welfare of its people.¹⁹⁹

E. CHILD MARRIAGE VIOLATES THE RIGHT TO DIGNITY BY DENYING WOMEN THEIR RIGHT TO CONSENT TO MARRIAGE

Child marriage violates the right to dignity in two ways. First, because the right to dignity is the foundational right for all human rights, the violations of the child wife’s rights to equal protection, physical integrity, and family, discussed above, and to education, employment, and development, discussed below, necessarily constitute a violation of dignity. Second, child marriage violates the right to

196. Interview with Flora Massoy, WLAC Paralegal (Morogoro), in Dar es Salaam, Tanzania (Mar. 10, 2005). Due partly to cases like this, infant mortality in Tanzania has been measured at an unacceptably-high 102 deaths per every 1,000 live births. UNICEF, AT A GLANCE: UNITED REPUBLIC OF TANZANIA, http://www.unicef.org/infobycountry/Tanzania_statistics.html.

197. *Revised Initial Report*, CRC, *supra* note 114, at 17, para. 25.

198. *General Recommendation No. 21*, CEDAW, *supra* note 35, para. 36.

199. TANZ. CONST. ch. 1, art. 8(1)(b) (“[T]he primary objective of the government shall be the welfare of the people.”).

dignity because it allows girls to be married off without their consent.

The right to dignity is so fundamental that the preambles of all major human rights instruments to which Tanzania is a party recognize the right to dignity.²⁰⁰ Indeed, the UDHR emphasizes the right to dignity as the foundational right for all other human rights, reminding states that all persons are entitled to “the economic, social and cultural rights indispensable for his dignity.”²⁰¹ The Tanzanian Constitution adopted this ideal, mandating the government to ensure “that human dignity is preserved and upheld in accordance with the spirit of the UDHR”²⁰² and providing that “[e]very person is entitled to recognition and respect of his dignity.”²⁰³ Further, the Women’s Protocol to the African Charter mandates special measures to protect women’s dignity: “States parties shall adopt and implement appropriate measures to ensure the protection of every women’s right to her respect for her dignity”²⁰⁴

The right to voluntarily enter into marriage is inherent to a woman’s dignity. The CEDAW committee has reinforced this link between consent and dignity, stating that “[a] woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being”²⁰⁵ The Law of Marriage Act itself recognizes this in section 9(1), defining marriage as “the voluntary union of a man and woman.”²⁰⁶ In addition, the UDHR, CEDAW, and the ICCPR all require the “free and full consent” of both parties in entering a marriage.²⁰⁷ By denying girls any meaningful consent, child marriage delivers them into a form of slavery. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery thus prohibits “[a]ny institution or practice whereby a child or young person under the age of 18 years is delivered . . . to another person . . . with a view to the exploitation of the

200. UDHR, *supra* note 39, *Preamble* (“Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person”); ICESCR, *supra* note 43, *Preamble* (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”); ICCPR, *supra* note 42, *Preamble* (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”); CEDAW, *supra* note 44, *Preamble* (“Noting that the Universal Declaration of Human Rights . . . proclaims that all human beings are born free and equal in dignity and rights”); CRC, *supra* note 33, *Preamble* (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”); African Charter, *supra* note 47, *Preamble* (“Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence”); Women’s Protocol to the African Charter, *supra* note 35, *Preamble* (“Recognizing the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity”).

201. UDHR, *supra* note 39, *Preamble*.

202. TANZ. CONST. ch. 1, art. 9(f).

203. TANZ. CONST. ch. 1, art. 12(2).

204. Women’s Protocol to the African Charter, *supra* note 35, art. 3(4).

205. *General Recommendation No. 21*, CEDAW, *supra* note 35, para. 16.

206. Law of Marriage Act, § 9(1), TANZ. LAWS [CAP 29 R.E. 2002].

207. UDHR, *supra* note 39, art. 14; CEDAW, *supra* note 44, art. 16(b); ICCPR, *supra* note 42, art. 23.

child or young person or of his labor.”²⁰⁸

Child brides are incapable of consenting to marriage. As the Human Rights Committee explained, “Many factors may prevent women from being able to make the decision to marry freely. One factor relates to the minimum age for marriage. The age should be set by the State . . . [to] ensure women’s capacity to make an informed and uncoerced decision.”²⁰⁹ Under Tanzanian law, girls under the age of eighteen are incapable of consenting to sexual activity,²¹⁰ and they do not have the capacity to enter into contracts,²¹¹ bring an action in court,²¹² or vote.²¹³ Additionally, the CEDAW Committee recommends eighteen as the minimum age of marriage because “marriage should not be permitted before [men and women] have attained full maturity and capacity to act.”²¹⁴ Without the ability to consent to sexual activity and without the capacity and maturity to act, a girl cannot be capable of consenting to marriage.

The Law of Marriage Act facially requires a girl’s consent in marriage,²¹⁵ but effectively transfers her right to consent to her father. If the girl is under eighteen, the law requires the consent of both the girl and her father.²¹⁶ However, true consent of a girl under eighteen is a fallacy because consenting to marriage means consenting to sexual activity and to a life-altering contract.²¹⁷ Thus, the Law of Marriage Act, in effect, bestows an exclusive right to consent upon the father.

Codified customary law and the Islamic Restatement Act drop all pretence of the girl’s consent. Under codified customary law, a “daughter” who has not yet reached the age of twenty-one “shall not be married without her father’s consent or the consent of her father’s representative.”²¹⁸ The girl is significantly absent as an actor in this transaction, and she is only “free to marry” upon “attaining the age of 21.”²¹⁹ Under the Islamic Restatement Act, parties who have not attained

208. 226 U.N.T.S. 3, art. 1(d), *entered into force* Apr. 30, 1957, *acceded to by Tanzania* Nov. 28, 1962, available at <http://www1.umn.edu/humanrts/instree/f3scas.htm>.

209. *General Comment No. 28*, Equality of rights between men and women (Article 3), Human Rights Committee (Sixty-eighth session, 2000), U.N. GAOR, 56th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10, at para. 23, (2000), available at <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm> [hereinafter *General Comment No. 28*, HRC].

210. SOSPA, *supra* note 32, § 130(2)(e).

211. Law of Contract Ordinance, § 11, TANZ. LAWS [CAP 345 R.E. 2002].

212. Civil Procedure Code, 1966, Government Notice (GN) 410/1966, Order XXXI.

213. TANZ. CONST. ch. 1, art. 5(1).

214. *General Recommendation No. 21*, CEDAW, *supra* note 35, para. 36.

215. Law of Marriage Act, § 16(1), TANZ. LAWS [CAP 29 R.E. 2002] (“No marriage shall be contracted except with the consent, freely and voluntarily given, by each of the parties thereto.”).

216. *Id.* §§ 16(1), 17. “A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent . . . of her father.” *Id.* § 17(1).

217. Under § 130(2)(e) of SOSPA, sexual intercourse with a girl under the age of 18 constitutes rape, and she cannot consent to it.

218. GN 279, *supra* note 4, rule 3. When the girl’s father is deceased, a guardian may marry her off, but “he must first consult the widow to gain her consent.” GN 436, *supra* note 7, sched. 1, rule 13. Thus, the guardian must obtain the widow’s consent, but not the girl’s who is to be married.

219. GN 279, *supra* note 4, rule 4.

puberty, “may be validly contracted in marriage by their respective guardians.”²²⁰ Under the Shafi’i and Shiah Ismaili schools, “*women of all ages are incompetent* to enter into a contract of marriage but may be validly contracted in marriage by their respective guardians.”²²¹ The Shafi’i school explicitly allows “the father or the paternal grandfather acting as guardian for marriage of a woman,” who is a virgin, to contract a marriage on her behalf “*without her consent*.”²²² According to the Hanafi school, even “where a woman . . . is competent to enter into a valid contract of marriage on her behalf,” her marriage may be “dissolved by a court” “at the instance of any of the persons who, being agnates, would have been her guardians of marriage had she been incompetent”²²³ The woman’s right to consent to her marriage is thus completely eviscerated.

Courts have recognized that marriage without consent is invalid and a violation of dignity. In *Jonathan v. Republic* and *Mallya v. Republic*, Tanzanian High Courts have held that tribal marriage customs of abducting and raping a girl does not constitute marriage.²²⁴ The *Jonathan* court found that the girl’s consent in such situations was nonexistent, and in view of the Law of Marriage Act, UDHR, CEDAW, and the ICCPR,²²⁵ “seriously offended the complainant’s fundamental right to choose her spouse and marry on her own volition.”²²⁶ Additionally, the *Mallya* court deplored the use of custom as a defense for rape, finding that “[s]uch customs are dehumanizing and they contaminate human respect and dignity.”²²⁷ Marriage of a girl who is not yet capable of consenting suffers from the same problems as a marriage solemnized by rape and abduction: it is “dehumanizing” and a violation of her fundamental right to dignity.

F. CHILD MARRIAGE INTERFERES WITH GIRLS’ RIGHT TO EDUCATION

Tanzania guarantees all children the right to an education but has not delivered on its promise to girls. The Tanzanian Constitution declares that “[e]very person has the right to education . . . an equal and adequate opportunity to all per-

220. Islamic Restatement Act, *supra* note 5, § 5(2). The Human Rights Committee explicitly expressed concern over the use of a marital guardian, “who is generally male” and “consents to the marriage instead of the woman herself, thereby preventing women from exercising a free choice.” *General Comment No. 28*, HRC, *supra* note 209, para. 23.

221. Islamic Restatement Act, *supra* note 5, § 5(2) (emphasis added).

222. *Id.* § 37(2) *Exception* (emphasis added).

223. *Id.* § 40(1).

224. *Jonathan v. Republic*, [2001] TLR 53 (Tanz. High Ct. 2001); *Mallya v. Republic*, [2001] TLR 88 (Tanz. High Ct. 2001).

225. This case specifically quotes the Law of Marriage Act, § 19(1), TANZ. LAWS [CAP 29 R.E. 2002] and the UDHR, *supra* note 39, art. 16(2) (although it accidentally cites UDHR art. 14(2)); CEDAW, art. 16(b); and ICCPR, art. 23). See *Jonathan*, [2001] TLR 53, at 3-5.

226. *Jonathan*, [2001] TLR 53, at 5.

227. *Mallya*, [2001] TLR 88, at 3 (citing Law of Marriage Act, § 9(1), TANZ. LAWS [CAP 29 R.E. 2002]; UDHR, art. 16(2); CEDAW, art. 2).

sons.”²²⁸ Similarly, international law affirms that “[e]veryone has the right to education.”²²⁹ However, Tanzania’s child marriage laws and education regulations expelling married and pregnant girls interfere with a girl’s right to education.

Girls in Tanzania do not have equal access to education. While Tanzania has successfully created gender parity in primary education, unequal representation plagues secondary schools. In 2004, 3,456,822 girls attended primary schools, making up forty-eight percent of total primary school attendance.²³⁰ However the situation dramatically shifts in secondary education.²³¹ The Tanzanian National Bureau of Statistics identified a large discrepancy between girls and boys’ attendance as they age.²³² In 2004, 199,963 girls attended secondary education, forty-four percent of total secondary attendance.²³³ Few girls graduated. Only 4,674 girls completed Form 6, representing just thirty-three percent of the graduating class.²³⁴ These numbers demonstrate that girls face interference with their education between the entrance and completion of secondary school.

The Tanzanian government asserted that early marriage and pregnancy are the primary causes of the low school attendance and high dropout rate among girls.²³⁵

[G]irls’ education is hampered by a number of factors as they go up through the levels of education. Among these factors is discrimination against girls by parents who favor boys The tendency has been for parents to pay fees for boys and leave girls at home . . . [in part] to prepare them for *marriage*.²³⁶

Even though Tanzania recognizes that child marriage and pregnancy interfere with the governmental goal of gender parity in school, the law continues to sanction marriage for school age girls. A girl married at twelve discussed the conflict girls confront when faced with a desire to continue school and the pressure to marry: “It’s not possible for a girl to work for two masters: education

228. TANZ. CONST. ch. 1, arts. 11(2)-(3); *see also* ICESCR, *supra* note 43, arts. 13(2)(a)-(c) ; CRC, *supra* note 33, arts. 28(1)(a)-(c).

229. UDHR, *supra* note 39, art. 26(1) (“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”).

230. MINISTRY OF EDUCATION AND CULTURE, BASIC STATISTICS IN EDUCATION, UNITED REPUBLIC OF TANZANIA 1995-2004, 10-11 (2004) [hereinafter EDUCATION STATISTICS].

231. *Id.* at 40-41.

232. NAT’L BUREAU OF STATISTICS, TANZANIA REPRODUCTIVE AND CHILD HEALTH SURVEY 13 (1999) (“There is a strong differential in educational attainment between sexes, especially as age increases.”) [hereinafter REPRODUCTIVE SURVEY].

233. EDUCATION STATISTICS, *supra* note 230, at 41.

234. *Id.*

235. *Id.*

236. *Id.* (emphasis added).

and the husband.”²³⁷ She said she would have preferred to have finished school first and then marry, but she did not have the choice.²³⁸ If Tanzania law prohibits child marriages, then more girls will attend school because they will not be pressured into marriage as school girls.

Moreover, education regulations, promulgated by the Minister of Education, expel students for marriage or pregnancy.²³⁹ They provide for “the expulsion of a pupil from a school” where “the pupil has committed . . . an offence against morality” or “has entered into wedlock.”²⁴⁰ Pregnancy is defined as “an offence against morality.”²⁴¹ Although the regulations appear gender neutral, they have a greater impact on girls. “Almost half of women marry before age 18 and two-thirds marry before age 20.”²⁴² This is a problem when the average age of school attendees in secondary school is fourteen to nineteen.²⁴³ Less than half of the women in Tanzania even have the opportunity to finish secondary education because they marry before the age at which they could complete secondary school. Men do not face this situation because they cannot marry before they turn 18, and the median age at first marriage for men is 24.²⁴⁴

Education regulations regarding pregnancy also work to deny girls an education. In fact, over 3,000 Tanzanian girls are expelled annually from school due to pregnancy.²⁴⁵ Tanzania itself recognized that “[g]irls are particularly victimized by the routine expulsion” for pregnancy.²⁴⁶ By contrast, few men are subjected to any penalties. If a school boy impregnates a school girl, often he will not be expelled because no physical signs will implicate him. Furthermore, as a Tanzanian school teacher explained, girls will not reveal the name of the boys who impregnated them because they fear the boys will be sent to jail.²⁴⁷ If the boys go to jail, girls would not be able to collect maintenance for the baby.²⁴⁸ Moreover even if a man is penalized for impregnating a school girl, the penalty is minor in comparison to the penalty a girl faces. For instance, in *Messe v. Republic*, the court fined a man 2,500 shillings for impregnating a school girl.²⁴⁹ The girl faced a much harsher penalty. Expelled from school, pregnant by a

237. Interview with Shani Rais, *supra* note 56.

238. *Id.*

239. The Education (Expulsion and Exclusion of Pupils from Schools) Regulations 2002, Government Notice (GN) 295/2002, Section 4-(b)-(c).

240. *Id.*

241. Interview with Joseph Mungai, Minister of Education and Culture, in Dar es Salaam (Mar. 8, 2005). Interview with Shani Rais, *supra* note 56.

242. REPRODUCTIVE SURVEY, *supra* note 232, at 66.

243. *Id.* at 49. Approximately 86.28% of students in Forms 1-6 in 2004 were between fourteen and nineteen years old.

244. *Id.*

245. *Revised Initial Report*, CRC, *supra* note 114, at 58, para. 320(f).

246. *Id.* at 58, para. 320(b).

247. Interview with Deborah Mbalilaki, Tanzanian Teacher, in Dar es Salaam, Tanzania (Mar. 10, 2005).

248. *Id.*

249. *Messe v. Republic*, [1984] TLR 5 (Tanz. High Ct. 1984).

forty-eight year old married man who already had fourteen dependants (ten children), this girl faces a future life of hardship without an education to help her.

Tanzania must improve girls' access to secondary school. The African Charter on the Rights and Welfare of the Child require State parties to take "all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education."²⁵⁰ CEDAW, CRC, and the Women's Protocol to the African Charter also require states to reduce the drop out of girls.²⁵¹ The CRC Committee recognized the harmful disruption of a girl's education by child marriage: "the female child is often subject to harmful traditional practices, such as early and/or forced marriages, which violate her rights and make her more vulnerable to HIV infection, including because such practices often interrupt access to education and information."²⁵² By permitting child marriage and expelling married and pregnant children, Tanzania has failed to meet its obligations to protect the right to education.

Girls, like boys, need an education. When the government raised the minimum age of marriage to eighteen for boys in 1971, it reasoned that boys should marry later to complete school.²⁵³ Girls likewise need to develop sufficient knowledge and skills before assuming responsibility for a family. Tanzania must raise the minimum age of marriage and eliminate the education regulations in order to meet its objectives and protect the right of girls to an education.

G. CHILD MARRIAGE IMPEDES THE DEVELOPMENT OF CHILD BRIDES AND TANZANIA BY DENYING WOMEN EQUAL ACCESS TO EMPLOYMENT

Child marriage is a looming obstacle to the development of individual women and the nation as a whole. Violations of girls' rights to education and health create gender inequalities in employment. When women cannot develop economically, this, in turn, stunts Tanzania's development. The practice of child marriage thus must be abandoned to achieve a better future.

1. Child Marriage Violates Women's Rights to Employment and Development

Child marriage prevents women from equally participating in the workforce and exercising their right to economic development. Women are guaranteed the interrelated rights to employment and development under the Constitution and international law. The Constitution requires the government to "make appropriate

250. African Charter on the Rights and Welfare of Child, *supra* note 34, art. 11(6).

251. CEDAW, *supra* note 44, art. 10(f) (requiring State Parties to target the "reduction of female student drop-out rates"); Women's Protocol to the African Charter, *supra* note 35, art. 12(2)(c) (requiring State Parties to "promote the enrolment and retention of girls in schools"); CRC, *supra* note 33, art. 28(1)(e); *General Comment No. 3*, CRC, *supra* note 131 (requiring State Parties to "[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates").

252. *General Comment No. 3*, CRC, *supra* note 132, para. 11.

253. White Paper, *supra* note 13, para. 7.

provisions for the realisation of a person's right to work"²⁵⁴ and ensure "that the use of national resources places emphasis on the development of the people and . . . is geared towards the eradication of poverty."²⁵⁵ Similarly, international law embodied in the ICESCR recognizes "the right of everyone to the opportunity to gain his living by work,"²⁵⁶ the enjoyment of which is necessary to exercise "the right to freely pursue . . . economic, social, and cultural development."²⁵⁷

The rights to employment and development are violated by child marriage. Child wives are often neither educated nor healthy enough to actively and freely participate in the workforce. As Tanzania's government recognized, "[e]arly marriage for many young women occurs at the expense of their education and health," preventing their growth and development.²⁵⁸

Women in Tanzania suffer from greater unemployment and are often limited in the employment they can retain because of their lack of education and skills training. The 2000-01 Labour Force Integration Survey shows that female unemployment exceeded male unemployment by 26.7%.²⁵⁹ Women who are able to find employment are often confined to Tanzania's "informal" labor force because they lack the skills and literacy to obtain other jobs.²⁶⁰ The majority of women do not work in the informal sector by choice: rather, the main reason women cited to explain placement in the informal sector was inability to find another job.²⁶¹

Even outside the informal sector, women are confined to low-paying jobs

254. TANZ. CONST., ch. 2, art. 11(1).

255. *Id.* ch. 2, art. 9(i).

256. ICESCR, *supra* note 43, art. 6(1); *see also* UDHR, *supra* note 39, art. 23(1); Women's Protocol to the African Charter, *supra* note 35, art. 13.

257. ICESCR, *supra* note 43, art. 1(1); *see also* UDHR, *supra* note 39, art. 22; CEDAW, *supra* note 44, *Preamble*, art. 3; African Charter, *supra* note 47, art. 22(1); Women's Protocol to the African Charter, *supra* note 35, art. 3(2).

258. THE RESEARCH AND ANALYSIS WORKING GROUP OF THE POVERTY MONITORING SYSTEM, POVERTY AND HUMAN DEVELOPMENT REPORT 2002 92, <http://www.tanzania.go.tz/prsp.html> (click "full text") [hereinafter POVERTY AND HUMAN DEVELOPMENT REPORT].

259. NAT'L BUREAU OF STATISTICS, UNITED REPUBLIC OF TANZANIA, 2000/01 INTEGRATED LABOUR FORCE SURVEY 73, tbl. 6.3 (2003) <http://www.tanzania.go.tz/statisticsf.html> (click on "Integrated Labour Force Survey," then "Chapter 6.") [hereinafter LABOUR FORCE SURVEY]. This calculation was made using the statistics based on the national definition of employment. *Id.*

260. *Consideration of Reports Submitted by States Parties: United Republic of Tanzania*, Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 45th Sess., Supp. No. 38, at 78, U.N. Doc. A/45/38 (1990), available at <http://documents.un.org>. (click "welcome," then click "simple search," and insert the U.N. Doc. No. at "symbol.") The informal sector includes enterprises that are not separate legal entities from the households that own them. That is, they are unincorporated enterprises owned by households. This definition excludes rural agriculture, but includes urban agriculture, livestock keeping, and fishing. LABOUR FORCE SURVEY, *supra* note 259, at 57 (click on "Chapter 5").

261. LABOUR FORCE SURVEY, *supra* note 259, at 60, tbl. 5.4 (click on "Chapter 5"). The second most popular reason given was the family's need for additional income. Women who worked in the informal sector as a secondary activity were also surveyed. Among these women, the most common motivation was to supplement the family income and the second most common motivation was the inability to find another job. *Id.*

because they lack education. 2001 statistics show that nearly twice as many men as women completed their secondary education.²⁶² Correspondingly, twice as many men than women work as professionals and associate professionals.²⁶³ Women are substantially more represented than men in agricultural occupations, and only slightly more represented than men as service/shop workers.²⁶⁴ The impact of this difference is telling. The predominantly male professionals and associate professionals earn fifty to sixty-thousand more Tanzanian Shillings *per month* than the mostly female service/shop and agricultural workers.²⁶⁵ As grim as these statistics are, they, in fact, understate the economic disempowerment of women. The above statistics do not take into account that some agricultural workers receive no remuneration. Women make up two-thirds of these unpaid agricultural workers,²⁶⁶ indicating that the monthly median income of women agricultural workers is actually much lower than reported.

Child marriage prevents women from achieving employment on a level equal to men. Women are not making an affirmative choice to remain in low-paying positions: in an economy where fifty percent of the population is on or below the poverty line,²⁶⁷ such a choice is untenable. Rather, violations of child wives' rights to health and education destroy their opportunities and violate their rights to employment and development.

2. Child Marriage Hinders Tanzania's Development

The violation of women's rights to employment and development does not just harm Tanzanian women, but it also harms the entire nation. As the CEDAW Committee recognized, child marriage "not only affects women personally but also limits the development of their skills and independence and reduces access to employment, thereby detrimentally affecting their families and communities."²⁶⁸ Indeed, as one women's rights researcher in Dar es Salaam lamented: "If I were to say of all reasons for continued poverty, I think that that this [early marriage] is one big contributing factor to the deep poverty in this country."²⁶⁹

In its Vision 2025 Development Plan, Tanzania recognized that the nation's development hinges upon ensuring "that markets permit a wide participation of

262. *Id.*

263. *Id.* at 26, tbl.3.3 (click on "Chapter 3.").

264. *Id.*

265. *Id.* tbl. 9.3 (click on "Chapter 9."). The median monthly pay in 2000 and 2001 for professionals was 75,000 Tanzanian Shillings, and for associate professionals was 68,000 Tanzanian Shillings. The median monthly pay during the same period for agricultural workers was 10,000 Tanzanian Shillings, and for service and shop workers 20,000 Tanzanian Shillings.

266. *Id.* at 32, tbl.3.7 (click on "Chapter 3.").

267. INTERNATIONAL COOPERATIVE ALLIANCE, TANZANIA COOPERATIVE COUNTRY STUDY (1999), <http://www.foundation-partnership.org/pubs/tanzania/index.php?sub=appendix4> [hereinafter INTERNATIONAL COOPERATIVE ALLIANCE].

268. *General Recommendation No. 21*, CEDAW, *supra* note 35, para. 37.

269. Interview with Tanzania Gender Networking Programme Activist, *supra* note 193.

men, women, youths and the entire citizenry.”²⁷⁰ Women constitute fifty-two percent of the currently economically active labor force,²⁷¹ yet child marriage bars them from attaining the education and skills needed to fully participate in the market. Although more women than men are economically active, a greater percentage of women are unemployed: in 2001, 11.2% of women were unemployed, as compared to 9.4% of the men.²⁷² Tanzania cannot develop as a nation when the so many of its citizens have their opportunities cut off.

Further, poverty in Tanzania is closely tied to women’s equality in all areas, including health, education and employment. The Women’s Protocol to the African Charter thus highlights “women’s essential role in development,” repeatedly reaffirmed in U.N. development plans.²⁷³ The World Bank Group similarly emphasizes that “[p]romoting gender equality is now deemed so essential to reducing poverty and improving governance that it has become a development objective in its own right.”²⁷⁴ Tanzania itself has identified the need for gender equality in order to achieve poverty reduction.²⁷⁵ Child marriage increases a woman’s vulnerability to poverty by shrinking her employment prospects,²⁷⁶ devastating Tanzanian families and society. The abolition of child marriage is thus crucial to women’s right to employment and the alleviation of poverty in Tanzania.

III. GUARDIANSHIP: CUSTOMARY GUARDIANSHIP IS BASED ON OUTDATED BIASES THAT HARM WOMEN AND TANZANIA

A. DOMESTIC LAW DISEMPOWERS WOMEN BY PERMITTING GUARDIANSHIP

*[T]hose are one of those practices which we need to get rid of. I mean a woman is not a child. She’s an adult. She’s a responsible person. Why should there be someone to take [care] of the wife and the children—it’s because we equate the wife to be equal to the children!*²⁷⁷

—Dr. Palamagamba John Kabudi, Family Law Professor

Customary views of women as helpless children are outdated, but they form

270. UNITED REPUBLIC OF TANZANIA, PRESIDENT’S OFFICE, PLANNING COMM’N, DEVELOPMENT VISION 2025, para. 4.3(ii) (2005), http://www.tanzania.go.tz/vission_2025f.html; see also *General Recommendation No. 21*, CEDAW, *supra* note 35, para. 37 (the restriction of women’s economic autonomy “not only affects women personally but also limits the development of their skills and independence and reduces access to employment, thereby detrimentally affecting their families and communities.”).

271. LABOUR FORCE SURVEY, *supra* note 259, at 129-30.

272. *Id.*

273. Women’s Protocol to the African Charter, *supra* note 35, *Preamble*.

274. THE WORLD BANK GROUP, PRIVATE DEVELOPMENT SECTOR-GENDER INITIATIVE, <http://www.ifc.org/ifcext/economics.nsf/Content/GI-GenderInitiative>.

275. See generally POVERTY AND HUMAN DEVELOPMENT REPORT, *supra* note 258.

276. *Id.* at 92.

277. Interview with Dr. Palamagamba John Kabudi, Family Law Professor, University of Dar es Salaam, in Dar es Salaam, Tanzania (Mar. 8, 2005).

the cornerstone of the customary guardianship authorized by Tanzanian law. While many of those who do not experience guardianship believe the practice is dying, interviews with other Tanzanian citizens reveal otherwise. Both the Islamic Restatement Act and codified customary law perpetuate customary biases that view women as incompetent children, rather than as capable adults. The Islamic Restatement Act perpetuates the myth of female incapacity by offering legal recognition to the Shafi'i and Shiah Ismaili beliefs that a woman's guardian must consent to her marriage because women are incompetent.²⁷⁸ Customary law authorizes guardianship over women when their husbands are travelling or no longer living. Guardians assume control over the women's actions,²⁷⁹ property,²⁸⁰ and children.²⁸¹ Guardianship laws thus transfer decision-making capability from the woman to her guardian, legalizing male dominance in the family, household, and society.

As discussed below, Tanzania's guardianship laws violate the rights of women to the detriment of their families and society. Guardianship undercuts women's dignity by treating them as property to be transferred from one owner to the next or as children without decision-making capacity. It further violates women's right to property by disempowering them with regards to their own property and rendering them dependent on a guardian for all benefits and transactions. This, in turn, inhibits Tanzania's development. Guardianship also violates the right to family, because it allows a guardian to interfere with the family and remove the children from the mother's care, disregarding the child's best interests. Finally, by authorizing guardianship over women but not men, by enabling only men to serve as guardians, and by allowing only men to appoint or dismiss guardians, guardianship laws violate women's right to equality. As discussed in Part VII, the only solution is to repeal the current forms of guardianship, empower women to act equally in their marriages and households, and recognize that the interests of children are best served when they are allowed to remain in their parents' care.

B. GUARDIANSHIP VIOLATES THE RIGHT TO DIGNITY BY TREATING WOMEN AS PROPERTY AND CHILDREN

Guardianship denies women's right to dignity by dehumanizing and infantilizing them. The UDHR, the foundational document of the international human rights movement, enshrines the concept of dignity.²⁸² This right is further

278. Islamic Restatement Act, *supra* note 5, § 5(1)(a). As discussed above, according to the Hanafi school, the valid marriage of even a woman regarded as competent can be "dissolved" by court "at the stance of any of the persons who . . . would have been her guardians of marriage had she been incompetent . . ." *Id.* § 40(1).

279. GN 436, *supra* note 7, rules 46, 47.

280. *Id.* rules 12, 14, 19, 43, 44.

281. *Id.* rules 11, 13-15, 44.

282. The UDHR emphasizes that "[a]ll human beings are born free and equal in dignity." UDHR, *supra* note 39, art. 1.

recognized by Tanzania's Constitution²⁸³ and in the preambles of every major human rights instrument.²⁸⁴ Guardianship violates women's right to dignity because it both treats them as property to be transferred from one owner to the next and as children without decision-making capacity.

1. Guardianship Treats Women as Property That May Be Transferred From One Man to Another

*In most cases, that woman is considered as a cook A lot of them cannot give their opinion to men. A lot of them cannot speak in front of men. And they are considered as property.*²⁸⁵

—Magda Aquiline, *Women's Legal Aid Centre*

Guardianship dehumanizes women by treating them as the property to be sold, bought, and inherited by men. Both codified customary law and the Islamic Restatement Act treat women as objects, whose consent to marriage is irrelevant. Under customary law, fathers consent to the marriage of daughters under age twenty-one in exchange for brideprice, or the payment of money or cattle by the prospective husband,²⁸⁶ and under the Shafi'i and Shiah schools, a guardian consents to a woman's marriage.²⁸⁷ Women are thus treated as property to be handed off from fathers/guardians to husbands. As one of a man's possessions, his widow can even "be inherited" by one of his brothers.²⁸⁸ Additionally, codified customary law authorizes the temporary transfer of women: Just as he may ask a neighbor to look after his home while he is away, a man who is travelling may appoint a guardian to look after his wife.²⁸⁹ This guardian may supervise the actions of the wife and even hold her accountable for adultery, protecting the husband's property interests in his wife.²⁹⁰ Yet, fundamental to the

283. TANZ. CONST. ch. 1, art. 9(f), 12(2).

284. UDHR, *supra* note 39, *Preamble* ("Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person . . ."); ICESCR, *supra* note 43, *Preamble* ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family . . ."); ICCPR, *supra* note 42, *Preamble* ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family . . ."); CEDAW, *supra* note 44, *Preamble* ("Noting that the Universal Declaration of Human Rights . . . proclaims that all human beings are born free and equal in dignity and rights . . ."); CRC, *supra* note 33, *Preamble* ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"); African Charter, *supra* note 47, *Preamble* ("Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence"); Women's Protocol to the African Charter, *supra* note 35, *Preamble* ("Recognising the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity . . .").

285. Interview with Magda Aquiline, Attorney Women's Legal Aid Centre, Dar es Salaam (Mar. 6, 2005).

286. GN 279, *supra* note 4, rule 1.

287. Islamic Restatement Act, *supra* note 5, § 5(2).

288. GN 436, *supra* note 7, rule 7; *see also* GN 279, *supra* note 4, rules 62, 64.

289. GN 436, *supra* note 7, rule 42.

290. *Id.* rule 47.

right to dignity is “the right to respect as a person,” as set out in Women’s Protocol to the African Charter and echoed in the ICCPR; in interpreting this provision, the Human Rights Committee explained that it is “particularly pertinent for women,” who “may not be treated as objects to be given together with the property of the deceased husband to his family.”²⁹¹ The guardianship laws of Tanzania violate women’s right to dignity because they do not respect women as persons, but instead treat them as property that may be transferred and controlled.

2. Guardianship Infantilizes Women by Denying Them the Right to Make Decisions about Themselves, their Family and their Property

Guardianship is based on outdated views of the woman as a child. Dr. John Kabudi, a family law professor, emphasized the absurdity of being able to appoint a guardian for his wife: “No, no. I wouldn’t appoint someone to take care of my wife. She’s an adult . . . she can think.”²⁹² Despite this reality, guardianship laws continue to infantilize women, violating their dignity.

Guardianship strips a woman of her right to make decisions about herself, her family, and property.²⁹³ Instead, she is treated as a child who must follow the orders of her guardian. Guardians are able to control the actions of women as they would young children. Although all citizens are guaranteed freedom of movement in the Constitution and international law,²⁹⁴ guardianship laws prohibit the wife from leaving the household “without the guardian’s consent.”²⁹⁵ The legal assumption that women are children denies them enjoyment of their fundamental rights. Additionally, the guardian “can hold the wife accountable for committing adultery,”²⁹⁶ constructing marriage as a relationship in which a man is responsible for controlling the actions of a child-like wife, rather than a relationship between equals.²⁹⁷

A narrative from a thirty-year-old woman of the Mzaramo tribe illustrates the absurdity this can produce. When asked what would happen if her youngest child became sick while her husband was away, she stated that she would have to ask

291. Women’s Protocol to the African Charter, *supra* note 35, art. 3(2). Article 16 of the ICCPR likewise protects everyone’s “right to recognition . . . as a person before the law.” ICCPR, *supra* note 42, art. 16. *See also General Comment No. 28, HRC, supra* note 209, para. 19.

292. Interview with Dr. Palamagamba John Kabudi, *supra* note 277.

293. This further violates women’s rights to family and property, as shown below. *See infra* Part III(C)-(D).

294. TANZ. CONST. ch. 1, art. 17(1); ICCPR, *supra* note 42, art. 12(1)-(3); African Charter, *supra* note 47, art. 12(1); CEDAW, *supra* note 44, art. 15(4).

295. GN 436, *supra* note 7, rule 46.

296. *Id.* rule 47.

297. Interestingly, the Law of Marriage Act specifically addresses a widow’s freedom of movement and association. It provides that “[n]otwithstanding any custom to the contrary, a woman whose husband has died shall be free . . . to reside wherever she may please . . . to remain unmarried . . . [or] to marry again any man of her own choosing.” Law of Marriage Act, § 68, TANZ. LAWS [CAP 29 R.E. 2002].

her eldest son for permission to go to the hospital.²⁹⁸ Her eldest son was nine years old.²⁹⁹ This particular woman faced repercussions of being beaten by her husband if her son did not account for her movements and behavior.³⁰⁰ To subject a thirty-year-old mother of five children to the will of a nine-year-old son is a severe affront to her dignity.

Widows are similarly treated as children and forced into a false dependency. The widow is entirely dispossessed of her marital property and placed at the mercy of her guardian: “The widow has no share of the inheritance if the deceased left relatives of his clan. Her share is to be cared for by her children.”³⁰¹ Instead of allowing the widow, as an adult, to use the marital property to care for herself and her children, the law reverses things—the mother becomes a dependent of her children or another male guardian.³⁰² By allowing guardians to usurp control from women, guardianship laws infantilize women and violate their right to dignity. To restore the dignity of its women, Tanzania must abolish guardianship.

C. GUARDIANSHIP LAWS PREVENT WOMEN FROM EXERCISING THEIR FUNDAMENTAL RIGHT TO OWN AND CONTROL PROPERTY

Codified customary law discriminates against women in the area of property rights. These laws transfer a woman’s right to oversee agriculture,³⁰³ supervise livestock,³⁰⁴ and manage the family budget³⁰⁵ to a male guardian during her husband’s absence. Both the appointment of a guardian when a woman’s husband is away and when a woman’s husband is deceased violate women’s fundamental right to manage property.

When a woman’s husband is away for an extended period of time, he can appoint a guardian “to protect his wife, children, and property,”³⁰⁶ with the corresponding rights to oversee “livestock and agricultural activities”³⁰⁷ and “all domestic outdoor matters related to the household.”³⁰⁸ Thus, the woman must suddenly defer to a stranger’s management of her household. Although the rationale of “protection” is given, the reality disempowers the woman and violates her right to property. As Lucy Tesha Merere from the Women Advancement Trust explains:

298. Interview with Pili Said, in Kisarawe, Tanzania (Mar. 10, 2005).

299. *Id.*

300. *Id.*

301. Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, sched. 2, Laws on Inheritance [Sheria za Urithi], in *Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS.* [CAP 358 R.E. 2002] [hereinafter GN 436, sched. 2], rule 27.

302. If her son is an adult, “he will be appointed” guardian. GN 436, *supra* note 7, rule 4.

303. *Id.* rules 12, 43.

304. *Id.* rules 14, 19, 43.

305. *Id.* rules 14, 44.

306. *Id.* rule 42.

307. *Id.* rule 43.

308. *Id.* rule 44.

If a child is sick, [the wife] can't [make the] decision to say that I have three tins of beans, maybe I should sell one tin and take the child to the hospital. She has to wait for the husband. The husband might come tomorrow morning. The child might be dying . . . and she can tell the husband and the husband has to instruct.³⁰⁹

Similarly, after a woman's husband dies, a male guardian is appointed "to protect the children," "their mother," and "their property against loss and destruction,"³¹⁰ and given the authority to supervise "agricultural work,"³¹¹ "all outdoor domestic activities,"³¹² and the "slaughter . . . [sale] or exchange" of "domestic animals for the benefit or needs of the household."³¹³ Again, guardianship disempowers the woman by appointing a male guardian to take control over the property. Alex Gaithan Mgongolwa, a human rights attorney, has seen many cases in which the relatives of a deceased man take advantage of the guardianship provisions to deprive the family of property:

In today's life, a wife immediately starts to hide property so her husband's family doesn't come. The simple issue is property grabbing. [The guardian] is not interested in the children, just the property . . . [there was a] famous case where the husband died and he left money. The wife was taking the body from where he died—when she returned home, everything was taken by the relatives.³¹⁴

Thus, rather than protecting the family, guardianship contributes to the family's vulnerability and enables their dispossession. Guardianship works in conjunction with customary inheritance, which provides the widow with "no share of the inheritance if the deceased left relatives of his clan," to strip women of the ability to care for themselves and their families.³¹⁵ By harming families, these laws, in turn, impoverish Tanzania.

Discriminatory guardianship laws must be abolished as they violate Tanzania's domestic laws and international obligations that protect a woman's right to property. The Tanzanian Constitution specifically guarantees all Tanzanians the

309. Interview with Lucy Tesha Merere, Women Advancement Trust, in Dar es Salaam, Tanzania (Mar. 7, 2005).

310. GN 436, *supra* note 7, rule 11. Interestingly, the woman is not protected or valued in her own right, but rather as the children's mother.

311. *Id.* rule 12.

312. *Id.* rule 14. This refers to such things as facilitating meditations, attending livestock auctions, and the payment of school fees, rent, and taxes. *Id.*

313. *Id.* rule 19.

314. Interview with Alex Mgongola, former Women's Legal Aid Centre attorney, in Dar es Salaam, Tanzania (Mar. 11, 2005).

315. GN 436, sched. 2, *supra* note 301, rule 27.

right to property.³¹⁶ Moreover, the UDHR stipulates that “everyone has the right to own property” and “no one shall be arbitrarily deprived of his property.”³¹⁷ CEDAW explicitly requires that State Parties accord to women “a legal capacity identical to that of men and the same opportunities to exercise that capacity . . . [including] equal rights to conclude contracts and administer property.”³¹⁸ CEDAW further provides that State Parties must ensure that married women enjoy the same rights as their husbands with regard to the ownership and management of property.³¹⁹ Consequently, the restrictions placed by guardianship on a woman’s right to manage her property conflict with one of the most fundamental rights of all Tanzanians.

Tanzanian court decisions have interpreted these constitutional and international law guarantees to strike down customary law provisions that similarly violate women’s right to property. In *Mohamed v. Makamo*, the Tanzania High Court found that customary law awarding almost all of the marital assets to the man upon divorce, without determining the contribution of each spouse to the acquisition of property during marriage, violated the prohibition against discrimination based on gender under the Constitution and CEDAW.³²⁰ Similarly, in *Ephrahim v. Pastory*, the Court found that customary inheritance laws permitting men but not women to sell clan land violated the same non-discrimination provisions under the Constitution and CEDAW, as well as parallel provisions under the African Charter and the ICCPR.³²¹ Tanzania should likewise abolish customary guardianship provisions that deprive women of their right to own and manage property when their spouses are absent.

The guardianship laws’ discriminatory property provisions also directly conflict with more recent provisions of Tanzanian law relating to property rights. For example, Section 56 of the Law of Marriage Act—which came into force a full eight years after the codification of guardianship laws—provides that “a married woman shall have the same right as a man to acquire, hold, and dispose of property, whether movable or immovable, and the same right to contract, the same right to sue and the same liability to be sued in contract or otherwise.”³²² With regard to immovable property, the Land Act also expressly accords both wives and widows the right to manage and sell property that they own jointly

316. TANZ. CONST. ch. 1 art. 24(1) (“[E]very person is entitled to own property, and has a right to the protection of his property held in accordance with the law.”).

317. UDHR, *supra* note 39, art. 17(1)-(2).

318. CEDAW, *supra* note 44, art. 15(2).

319. *Id.* art. 16(h); *see also* Women’s Protocol to the African Charter, *supra* note 35, arts. 6, 7 (relating to women’s equal property rights during and after marriage, respectively).

320. *Mohamed v. Makamo*, [2001] (Civil App.) 45 (Tanz. High Ct.).

321. *Ephrahim v. Pastory & Kaizilege*, [1990] LRC (Const) 757 (Tanz. High Ct. 1990).

322. Law of Marriage Act, § 56, TANZ. LAWS [CAP 29 R.E. 2002]. Indeed, under § 114(2)(b) of the Law of Marriage Act, a woman’s contribution to the marriage is considered during the division of matrimonial assets at divorce. This creates an absurd situation in which a woman is economically better off after divorce than she is after her husband dies; after divorce, she is able to control and dispose of property as she wishes.

with their husbands or have inherited: “[T]he right of every woman to acquire, hold, use, and deal with, land shall to the same extent and subject to the same restrictions be treated as a right of any man.”³²³ The enactment of these two laws shows that Tanzania recognizes the need to take affirmative action to protect women’s right to property. Tanzania must take the next step and abolish guardianship laws undermining women’s exercise of this right.

D. GUARDIANSHIP VIOLATES THE RIGHT TO FAMILY BY UNLAWFULLY INTERFERING WITH THE FAMILY AND DENYING CHILDREN PROTECTION

Guardianship violates the fundamental right to family. The Tanzanian Constitution states that “[e]very person is entitled to respect and protection of . . . his family and of his matrimonial life.”³²⁴ This protection is reiterated in international law, which recognizes the family as “the natural and fundamental group unit of society.”³²⁵ Indeed, ICCPR Article 17(1) dictates that the family is protected from unlawful interference: “no one shall be subjected to arbitrary or unlawful attacks with his . . . family.”³²⁶ Additionally, the CRC and the African Charter on the Rights and Welfare of the Child afford the child special protection, directing that “[i]n all actions concerning [the child] . . . the best interests of the child shall be a primary consideration.”³²⁷ The Law of Marriage Act itself recognizes “the welfare of the infant” as “the paramount consideration” in custody proceedings.³²⁸ Guardianship laws violate the right to family because they unlawfully interfere with the family and disregard the child’s best interests.

The appointment of a guardian with decision-making power over the family’s property, budget, and schooling³²⁹ constitutes interference with the family and ignores the child’s best interests. Honorable Bahati, Chairman of the Law Reform Commission, identifies how the principles of non-interference and best interests of the child work together: “In the practical system now, which we have . . . the wife who has the best interests of the children would invariably be the mother. So the mother should be left alone with her children and the property.”³³⁰ The Women’s Protocol to the African Charter recognizes this doctrine: “A widow

323. Land Act, 1999, § 3(2) (subsequently codified at TANZ. LAWS [CAP 113 R.E. 2002]).

324. TANZ. CONST. ch. 1, art. 16(1).

325. ICESCR, *supra* note 43, art. 10(1); *see also* African Charter, *supra* note 47, art. 18; ICCPR, *supra* note 42, art. 23(1); African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 18(1).

326. ICCPR, *supra* note 42, art. 17(1).

327. CRC, *supra* note 33, art. 3(1); African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 4(1); *see also* CEDAW, *supra* note 44, art. 16(1)(d, f) (“In all cases the interest of the children shall be paramount.”).

328. Law of Marriage Act, § 125(2), TANZ. LAWS [CAP 29 R.E. 2002]. The Act, however, leaves a loophole for “the customs of the community” to come in. *Id.* § 125(2)(c).

329. Guardianship law specifically defines the guardian’s authority over “all outdoor domestic activities” to include the payment of “school fees.” GN 436, *supra* note 7, rule 14. A guardian further has the power to marry off the widow’s daughters after consulting with her. *Id.* rule 13.

330. Interview with Honorable A. Bahati, *supra* note 62.

shall automatically become the guardian and custodian of her children.”³³¹ Yet, in Tanzania, during a husband’s travels or after his death, guardianship laws remove the wife as mother from her role within the family and often replace her with someone who fails to protect her children.

Guardians who are appointed to protect the family are often motivated by greed and thus ignore the needs of the family. A social worker in Ilala explained how guardianship is supposed to work when a husband is away: “This man if he goes away from the village and finds some employment in the town, he should send back money to his family so that children can go to school, they can buy food, have a good place to sleep.”³³² The social worker noted, however, that the guardian sometimes takes that money and uses it for himself.³³³ This phenomenon is seen even more vividly in guardianship after a man’s death. As one activist explained, “many guardians adopt children not because they love them but because they love the property that is remaining with them.”³³⁴ Indeed, as Bishop Elinaza Sendoro has pointed out, “[t]hey say they will take care of the children . . . but in the long run, they don’t do it. Instead, they benefit from the properties of the deceased.”³³⁵

One particularly poignant story from a twenty-two-year-old girl of the Kurya tribe illustrates the problems with this form of guardianship.³³⁶ When her father died, her uncle was appointed guardian and retained control of her father’s house, his cattle, and death benefits.³³⁷ He was instructed to administer the deceased’s property, provide basic necessities to the widow and children, and ensure that the children’s school fees were paid.³³⁸ Instead, he took the property for himself, and did nothing for the girl and her family.³³⁹ Necessities such as food and clothing were not provided for the family.³⁴⁰ Rather, the girl’s mother, without the benefit of the marital property she had contributed towards, struggled to provide these necessities.³⁴¹ The uncle did not pay the school fees, and the girl’s mother continued to pay them for as long as she could afford.³⁴² The appointment of the guardian did not just disregard the best interests of the children, but was harmful to the welfare of the family.

Guardianship laws further empower guardians to not only assume decision-making power within the family, but to physically remove children from their mother’s custody. As the court in *Exaveri v. Twamgambo* asserted, neither the

331. Women’s Protocol to the African Charter, *supra* note 35, art. 20(b).

332. Interview with Bailari Athumani, *supra* note 56.

333. *Id.*

334. Interview with Tanzania Gender Networking Programme Activist, *supra* note 193.

335. Interview with Bishop Elinaza Sendoro, *supra* note 62.

336. Interview with WLAC client, in Dar es Salaam, Tanzania (Mar. 8, 2005).

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

widow nor her children have the right to remain with each other: “Under these rules, as far as custody or guardianship of children whose father is dead is concerned the mother does not feature anywhere in that order.”³⁴³ This stems from customary law’s rejection of maternal rights. The codification provides that “[c]hildren belong to the father,”³⁴⁴ and in the case of illegitimate children, to their maternal grandfather.³⁴⁵ Such provisions directly contradict CEDAW Article 16(1)(d), which recognizes “the same rights and responsibilities” for parents in matters relating to their children,” and violate the mother’s right to care for her children.³⁴⁶ Additionally, the law ignores the well-being of children and violates their right “to parental care and protection.”³⁴⁷ As set out in the African Charter on the Rights and Welfare of the Child: “No child shall be separated from his parents against his will” unless a court finds this separation necessary “in the best interest of the child.”³⁴⁸ The Law of Marriage Act thus recognizes that only under “exceptional circumstances” is it “undesirable that the infant be entrusted to either parent.”³⁴⁹

Children are adversely affected when their mothers are physically removed from their lives. As Legal and Human Rights Centre director Helen Kijo-Bisimba stated simply: “If a child is taken from his mother, the child suffers.”³⁵⁰ Moreover, such separation from a mother after the loss of their father can be particularly devastating for children. As district official Grace Mesaki lamented, “You can’t let children lose two parents just like that.”³⁵¹ Such emotional suffering is contrary to the child’s best interests and to Tanzania’s Constitutional dictate that “the primary objective of the Government . . . be the welfare of the people.”³⁵²

Guardianship causes great harm to the family. By removing the mother from

343. *Exaveri v. Twamgambo*, [1989] (Tanz. High Ct., 1989) (unreported).

344. GN 279, *supra* note 4, rule 104; *see also id.* rule 175 (“Children born to married people shall belong to the father.”).

345. *Id.* rule 178 (“Illegitimate children belong to the . . . [maternal] grandfather.”); *see also id.* rule 125 (assigning the child of a wife’s adulterous relationship to “the maternal uncles.”).

346. CEDAW, *supra* note 44, art. 16(1)(d).

347. African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 19(1) (“Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.”).

348. *Id.* (“No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.”); *see also* CRC, *supra* note 33, art. 9(1) (“[A] child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”). Even after this separation occurs, the CRC directs states to “respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.” CRC, *supra* note 33, art. 9(3).

349. Law of Marriage Act, § 125(1), TANZ. LAWS [CAP 29 R.E. 2002].

350. Interview with Helen Kijo-Bisimba, Director Legal and Human Rights Centre, in Dar es Salaam, Tanzania (Mar. 8, 2005).

351. Interview with Grace Mesaki, *supra* note 123.

352. TANZ. CONST. ch. 1, art. 8(1)(b).

her role as caregiver and household manager, and even going so far as to sever the mother-child relationship, the practice of guardianship destroys families and causes physical and psychological damage to children. As the natural and fundamental unit of society, the family deserves protection, and the institution of guardianship must be abolished.

E. GUARDIANSHIP LAWS DISCRIMINATE AGAINST WOMEN, THEREBY VIOLATING THEIR RIGHT TO EQUALITY

Guardianship laws discriminate against women on the basis of gender, thereby violating a woman's right to equality under Tanzania's Constitution³⁵³ and International obligations.³⁵⁴ Under these laws, guardians are only appointed by men and over women and children; generally only men can serve as guardians; only men can dismiss guardians.

1. Guardianship Laws Discriminate Between Women and Men

Tanzania's guardianship laws empower men to impose guardians on women and children and not the other way around. Under customary law, a man can assign a guardian over his wife and children when he travels,³⁵⁵ and the clan counsel can appoint a similar guardian upon a man's death.³⁵⁶ No parallel provisions empower women to assign guardians over their spouses or children. When asked whether there are cases when a wife or her relatives assign a guardian for her husband when she travels or dies, Bailari Athumani, Tanzania's Principal Social Welfare Officer, laughed and responded "No, no—never."³⁵⁷ Furthermore, "if the woman dies, you cannot find a case of a [family] claiming the property of the man."³⁵⁸ Honorable Bahati, the Chairman of the Law Reform Commission confirmed: "If the wife dies, there isn't much of a problem because the husband takes everything. He keeps the children."³⁵⁹ Similarly, the Islamic Restatement Act only provides marital guardians for women and children.³⁶⁰

Additionally, the laws either favor men or prohibit women from serving as

353. *Id.* ch. 1, art. 12(1) ("[H]uman beings are born free, and are all equal.").

354. Equal protection is guaranteed in almost identical language in the following international documents: UDHR, *supra* note 39, art. 7 ("All are equal before the law and are entitled without any discrimination to the equal protection of the law"); ICCPR, *supra* note 42, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law"); CEDAW, *supra* note 44, art. 15(1) ("States Parties shall accord to women equality with men before the law"); the African Charter, *supra* note 47, art. 3 ("Every individual shall be equal before the law," and "Every individual shall be entitled to equal protection of the law"); Women's Protocol to the African Charter, *supra* note 35, art. 8 ("Women and men are equal before the law and shall have the right to equal protection and benefit of the law.").

355. GN 436, *supra* note 7, rule 42.

356. *Id.* rule 2. "The clan council shall appoint a guardian of the deceased's minor children." *Id.*

357. Interview with Bailari Athumani, *supra* note 56.

358. *Id.*

359. Interview with Honorable A. Bahati, *supra* note 62.

360. Islamic Restatement Act, *supra* note 5, § 5(2).

guardians. One Tanzanian woman, who as a child was forced to leave her mother and live with a guardian, explained that “[a]ccording to custom you can’t choose a daughter, you must choose a man It would [have been] better to remain with my mother.”³⁶¹ Customary law states that if the husband dies and “the first son is an adult, he will be appointed as the guardian of his younger siblings.”³⁶² Thus, a woman who was managing her household and family may find herself taking orders from her son. Other choices for a guardian is a “brother from within the deceased’s clan”³⁶³ or the “deceased’s brother,” especially if the widow agrees “to be inherited” by him.³⁶⁴ The Islamic Restatement Act likewise discriminates in its marital guardianship provisions. Generally, “a male shall be preferred to a female,”³⁶⁵ and according to the Shaf’i and Shiah Ismaili schools, “no woman may act as a guardian for marriage.”³⁶⁶

Moreover, only men can dismiss guardians. Customary guardianship laws offer no protection for the widows and her children against abusive guardians but permit men to dismiss guardians at will. One lawyer from the Tanzania Women Lawyer’s Association described the abuse she suffered when the clan assigned her distant uncle as guardian: the uncle chased off her mom, married off her younger sister for the brideprice, and refused to send them to school.³⁶⁷ Her mother could not stop the uncle: “The clan council has the power to remove and replace [the guardian] with another one in his place, following complaints made by the widow or any relatives of the deceased’s male relatives.”³⁶⁸ Women, unfortunately, have little voice in clan meetings. According to attorney Alex Mgongola, only men attend clan meetings.³⁶⁹ And once the clan has identified a guardian, the woman has “no room for objection.”³⁷⁰ Women have limited legal recourse if the clan assigns an abusive guardian because “guardianship accusations shall not be accepted by the magistrate’s court” unless the clan council heard the case.³⁷¹

Although women can go to court if dissatisfied with the clan counsel’s decision, this is an unsatisfactory remedy and not feasible in practice. As an

361. Interview with a Tanzanian woman, in Dar es Salaam, Tanzania (Mar. 7, 2005).

362. GN 436, *supra* note 7, rule 3.

363. *Id.* rule 4.

364. *Id.* rule 7.

365. Islamic Restatement Act, *supra* note 5, § 32(4).

366. *Id.* § 31(2). “According to the Shiah Ithna’ Asheri school the father and nearest paternal grandfather are alone entitled to be guardians for marriage.” *Id.* § 32(5).

367. Interview with Lawyer, Tanzania Women’s Lawyer’s Association, in Dar es Salaam, Tanzania (Mar. 9, 2005).

368. GN 436, *supra* note 7, rule 8.

369. Interview with Alex Mgongola, *supra* note 314; *see also* Interview with Flora Massoy, *supra* note 196 (discussing clan meetings, “women just go to sit and listen, unless you have a few who will talk, but generally they don’t talk but listen while men are planning. They don’t even give objections to issues that oppress a widow.”).

370. *Id.*

371. GN 436, *supra* note 7, rule 22.

advocate at the Women's Research and Documentation Centre explained, a woman who proceeds to court will "be taken as a social outcast."³⁷² Even brave women who go to court find themselves unable to escape an abusive guardian. One Tanzanian woman first went to an "elder uncle to complain" about her guardian, and when he did not help, she went to court.³⁷³ Proceedings, however, came to a halt when the uncle "threatened to kill" her and her family. Moreover, as an attorney noted, "[S]ometimes even court officials take advantage of the ignorance of women You find the environment very, very hostile."³⁷⁴

2. Generalized Gender Stereotypes Do Not Justify this Equal Protection Violation

Guardianship laws reflect outdated stereotypes that do not serve a useful purpose or justify discrimination. The Minister of Health pointed to their absurdity:

In [m]y husband's tribe, the tribal law says that if he is travelling, he should appoint a relative or two of them to look after me I laughed. Why should someone look after me? How can they be a guardian for me? These things are now dying . . . I told them, I travel so much, why don't I appoint someone to look after my husband?³⁷⁵

These ill-fitting guardianship laws are more destructive than protective of women. According to attorney Alex Mgongola, customary guardianship laws are applied not because women need men to manage their household, but rather "because men prefer [those provisions] very much."³⁷⁶ Women, in fact, can and do manage themselves, their families, and their households. As the Law Reform Commission noted, "[i]n many cases, the mother has often raised the child single handedly [sic]."³⁷⁷ The Law of Marriage Act recognizes the claims of both parents,³⁷⁸ and where the marriage is annulled, the mother is "entitled to the custody of the infant child."³⁷⁹

Furthermore, gendered stereotypes do not justify an equal protection violation. CEDAW, in fact, requires Tanzania to combat stereotypes. States must "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and . . . practices which are based on the

372. Interview with Various Members/Employees YW5, Women's Research and Documentation Center, in Dar es Salaam, Tanzania (Mar. 9, 2005).

373. Interview with WLAC Client, *supra* note 336.

374. Interview with Alphonse Katemi, *supra* note 62.

375. Interview with Honorable Anna Abdallah, *supra* note 55.

376. Interview with Alex Mgongolwa, *supra* note 314.

377. THE LAW REFORM COMMISSION OF TANZANIA, REPORT OF THE COMMISSION ON THE LAW RELATING TO CHILDREN IN TANZANIA, at 73, para. 121 (Apr. 1994).

378. Law of Marriage Act, § 12(1), TANZ. LAWS [CAP 29 R.E. 2002].

379. *Id.* § 128.

idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”³⁸⁰ The Women’s Protocol to the African Charter echoes this language.³⁸¹ As long as some women desire to and are capable of managing their households, the law must not stand in their way. As the United States Supreme Court has cautioned, courts should “take ‘a hard look’ at generalizations or ‘tendencies’” and “may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”³⁸² Tanzania must repeal its customary guardianship provisions because they violate women’s right to equal protection and cannot be justified by baseless stereotypes.

IV. WEIGHT OF CUSTOMARY LAW: DISCRIMINATORY CUSTOMS VIOLATING FUNDAMENTAL RIGHTS MUST BE INVALIDATED

As one prominent Tanzanian lawyer recently emphasized, “Customs which are repugnant must be abolished.”³⁸³ Customs that have a discriminatory impact on women certainly qualify as repugnant as they violate both the Tanzanian Constitution’s explicit guarantees of equality and freedom from discrimination for all persons,³⁸⁴ as well as Tanzania’s international obligations to ensure the equality of women in both law and practice. Indeed, CEDAW Article 2(f) explicitly mandates that state parties “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women,”³⁸⁵ while CEDAW Article 5(a) further requires that states take affirmative steps to “modify the social and cultural patterns of conduct . . . with a view to achieving the elimination of prejudices and customary [practices] . . . based on the idea of the inferiority or superiority of either of the sexes.”³⁸⁶ Accordingly, Tanzania has a duty to repeal

380. CEDAW, *supra* note 44, art. 5(2).

381. Women’s Protocol to the African Charter, *supra* note 35, art. 2(2) (“[M]odify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices . . . based on the idea of the inferiority or the superiority of either of the sexes, or on the stereotyped roles for women and men.”).

382. *United States v. Virginia*, 518 U.S. 515, 541 (1996).

383. Interview with Lawyer, Tanzania Women’s Lawyers Association, *supra* note 86; *see also* Interview with Dr. Palamagamba John Kabudi, *supra* note 277 (similarly arguing that courts have inherent “powers to strike off” repugnant customary laws that conflict with the Bill of Rights of the Tanzanian Constitution).

384. *See, e.g.*, TANZ. CONST. ch. 1, art. 12(1) (“All human beings are born free, and all are equal.”); TANZ. CONST. ch. 1, art. 13(1) (“All persons are equal before the law and are entitled without any discrimination, to equal protection and equality before the law.”); TANZ. CONST. ch. 1, art. 13(2) (“No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.”); TANZ. CONST. ch. 1, art. 13(5) (defining “discriminate” as to “satisfy the needs, rights or other requirements of different persons on the basis of their . . . gender . . .”).

385. CEDAW, *supra* note 44, art 2(f).

386. *Id.* art. 5(a); *see also* African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 1(3) (mandating that states “discourage” customs that are “inconsistent with the rights, duties and

its discriminatory age of marriage and guardianship customary laws.

Tanzanian courts have repeatedly ruled that harmful customary law and practices cannot be used to circumvent protection of women's rights. As early as 1968, one High Court judge held that the traditional practice of not allowing females to inherit their husbands' or fathers' land "had long outlived its usefulness" in that it "put[] the wife and daughters [of a deceased man] into terrible confusion, fear and misery The age of discrimination based on sex is long gone."³⁸⁷ Not long after this case, the new Constitution—with its explicit guarantee under Section 13 of equality for "all" human beings³⁸⁸—came into effect. Cognizant of this new constitutional obligation, in 1990 in *Ephraim v. Pastory*, Judge Mwalusanya declared unenforceable a customary law which prevented women, but not men, from selling clan land.³⁸⁹ The judge noted that not only did the customary law in question harm women, but it also flew "in the face of our Bill of Rights as well as the international conventions to which we are signatories."³⁹⁰

In 2000 Tanzania passed a constitutional amendment explicitly forbidding discrimination on the basis of gender,³⁹¹ and courts have established that violations of women's fundamental rights cannot be justified by reference to an "obnoxious" or "dehumanizing" custom. For example, in *Jonathan v. Republic*, the defendant argued that in committing a brutal rape he had simply obeyed a Chagga customary practice which permitted forceful abduction and rape as a means of legitimizing customary marriage.³⁹² The High Court judge summarily dismissed this defense as "improbable and fallacious"³⁹³ and ruled that "in view of . . . domestic and international law," customary law could not be used as an excuse to violate a woman's right to bodily integrity or a marriage freely chosen.³⁹⁴ There was no justification for "the obnoxious customary practice of grabbing women, locking them up and sexually assaulting them in the name of Chagga customary marriage."³⁹⁵ Similarly, in *Mallya v. Republic*, another High Court judge again dismissed the customary law argument that rape was a legitimate means to marriage.³⁹⁶ The court agreed with the state attorney that the

obligations contained in the present Charter"); Women's Protocol to the African Charter, *supra* note 35, art. 2(2) (requiring states to "modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices.").

387. *Heamtzo v. Malasi*, [1968] HCD 127 (Tanz. High Court 1968), *cited in* *Ephraim v. Pastory & Kaizilege*, [1990] LRC (Const) 757 (Tanz. High Ct. 1990).

388. *See generally* TANZ. CONST. ch. 1, arts. 12-13.

389. *Ephraim*, [1990] LRC (Const) 757. (referring to Rule 20 in Schedule 2 of GN 436: "Women are allowed to inherit except clan land. They can use clan land without selling it during their lifetime.").

390. *Id.* at 763.

391. TANZ. CONST. ch. 1, art. 13(5).

392. *Jonathan v. Republic*, [2001] TLR 53, 2 (Tanz. High Ct. 2001).

393. *Id.* at 3.

394. *Jonathan*, [2001] TLR at 5.

395. *Id.* at 6.

396. *Mallya v. Republic*, [2001] TLR 88, 2 (Tanz. High Ct. 2001).

use of customary law as a defense to rape was an “abuse of custom.”³⁹⁷ It condemned “[s]uch customs” as “dehumanizing” and specifically referred to Tanzania’s obligation under Article 2(f) of CEDAW to “prohibit[] discriminatory practices and customs.”³⁹⁸ The Tanzanian government is similarly obliged to repeal discriminatory customary laws governing age of marriage and guardianship.

V. WEIGHT OF RELIGIOUS LAW: RELIGIOUS FREEDOM DOES NOT PROTECT THE ISLAMIC RESTATEMENT ACT’S DISCRIMINATORY AGE OF MARRIAGE AND MARITAL GUARDIAN PROVISIONS

The Islamic Restatement Act’s discriminatory and harmful provisions on age of marriage and marital guardianship must be repealed. Tanzania’s Constitution and international law do not protect harmful religious practices. Additionally, Islamic scholars contest the basis of age of marriage and marital guardianship provisions. This ongoing scholarly debate invites new interpretations, including a human rights approach.

A. DISCRIMINATORY AND ABUSIVE RELIGIOUS PRACTICES HAVE NO PROTECTION

Tanzanian and international law protects religious beliefs.³⁹⁹ The law does not, however, protect religious practices that infringe on fundamental rights. Thus, under the Tanzanian Constitution, religion may not be exercised “in a manner that causes interference with or curtailment of *the rights and freedoms of other persons* or the public interest.”⁴⁰⁰ In the ICCPR, the same article that protects freedom of religions also restricts it as “subject . . . to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or *the fundamental rights and freedoms of others*.”⁴⁰¹ Similar limitations on religious practice exist in the CRC and African Charter on the Rights and Welfare of the Child.⁴⁰² Accordingly,

397. *Id.* at 2.

398. *Id.* at 3.

399. TANZ. CONST. ch. 1, art. 19(1) (“Every person has the right to freedom of thought or conscience, belief or faith, and choice in matters of religion.”); ICCPR, *supra* note 42, art. 18(1) (“Everyone shall have the right to freedom of thought, conscience and religion.”); UDHR, *supra* note 39, art. 18 (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”); CRC, *supra* note 33, art. 14(1) (guaranteeing the “freedom of thought, conscience and religion” to children).

400. TANZ. CONST. ch. 1, art. 30(1) (emphasis added).

401. ICCPR, *supra* note 42, art. 18(3) (emphasis added).

402. CRC, *supra* note 33, art. 14(3) (Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others); African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 1(3) (“Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”).

religion cannot be used as an excuse to trample on the rights of others.

International law, in fact, obligates State legislators to combat discriminatory religious attitudes: “States parties should ensure that . . . religious . . . attitudes are not used to justify violations of women’s right to equality before the law.”⁴⁰³ As the Human Rights Committee emphasized, “religion do[es] not authorize any State, group or person to violate any right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.”⁴⁰⁴ Thus, if a religion promotes a practice that violates women’s rights, the government can and should prohibit it.

Courts in other countries have recognized that there is no right to religious laws, and states can pass laws that prohibit religious practices. In *Bhewa v. Mauritius*, Muslim plaintiffs argued that the right to freedom of religion entitled them to have Islamic law govern their marriage, divorce, and inheritance.⁴⁰⁵ The Supreme Court of Mauritius disagreed, reasoning:

[T]he state and religion each has its own sphere, the former that of law-making for the public good and the latter that of religious teaching, observance, and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law.⁴⁰⁶

The court further held that even if religious freedom could be interpreted to include the enactment of personal religious laws, it could be permissibly derogated “to safeguard the family and to ensure the largest measure of non-discrimination against women.”⁴⁰⁷ In fact, this derogation was “not only reasonably so justifiable,” but necessary “in furtherance of Mauritius’ ICCPR obligations.”⁴⁰⁸

In *Reynolds v. United States*, the United States Supreme Court similarly ruled that freedom of religion did not curtail the state’s ability to pass laws that interfere with religious practices.⁴⁰⁹ In *Reynolds*, a Mormon tried to argue that the legislature violated his constitutional right to freedom of religion by prohibiting polygamy. The United States Supreme Court rejected this argument finding that state laws “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”⁴¹⁰ To

403. *General Comment No. 28*, HRC, *supra* note 209, para. 5.

404. *Id.* para. 32.

405. *Bhewa v. Mauritius*, [1991] LRC (Const.) 298, 301 (Mauritius Sup. Ct.) (1990).

406. *Id.* at 308.

407. *Id.* at 309.

408. *Id.*

409. *Reynolds v. United States*, 98 U.S. 145 (1879).

410. *Id.* at 166.

hold otherwise “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government would exist only in name under such circumstances.”⁴¹¹

Tanzania itself recognizes the superiority of state law over religious practice. As Ramadhan Mtiga, a Muslim from Kisararwe, asserted: “This is not an Islamic state; it is a non-religious, neutral country. Everyone believes different beliefs. Therefore, I think any secular law that is passed must be respected because you can’t favor one religion over others.”⁴¹² Thus, Tanzania prohibits Muslims from maintaining religious-based criminal laws in the Primary Islamic Restatement Act.⁴¹³ Furthermore, Tanzania has taken steps to limit harmful religious practices in personal law. Under the Judicature and Application of Laws Act, “[T]he rules of customary law and the rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act.”⁴¹⁴ Tanzania thus can and should explicitly repeal the Islamic Restatement Act’s discriminatory age of marriage and marital guardian provisions.

B. TANZANIAN SCHOLARS AND MUSLIMS CONTEST THE VALIDITY OF THE ISLAMIC RESTATEMENT ACT’S AGE OF MARRIAGE AND MARTIAL GUARDIAN PROVISIONS

Not only are the Islamic Restatement Act’s discriminatory age of marriage and marital guardian provisions contrary to domestic and international law, many Tanzanian Muslims question their accuracy. Discriminatory interpretations of marital age and guardians are not based on fundamental religious texts like the Koran or Hadiths. Instead, these practices are at the center of an ongoing religious debate, encouraging reform and a more human rights-centred approach.

The Islamic Restatement Act sets puberty as the minimum age of marriage for girls and boys without a guardian,⁴¹⁵ but this is widely contested and stems from neither the Koran nor Hadiths.⁴¹⁶ Tanzanian Muslims reflect this diversity of opinion. According to Sheikh Chizenga, “a girl is ready [for marriage] when she is starting to have menstruation.”⁴¹⁷ However, a Muslim from Kiserawe claimed

411. *Id.* at 167.

412. Interview with Ramadhan Mtiga, Community Member, in Dar es Salaam, Tanzania (Mar. 10, 2005).

413. The Act prohibits any “provision purporting to declare any act or omission criminal.” Primary Islamic Restatement Act § 2(1). This citation refers to the primary Islamic Restatement Act. The Primary Law should not be confused with the Subsidiary Islamic Restatement Act, identified simply as Islamic Restatement Act throughout this report.

414. Judicature and Application of Laws Act, § 11(4), TANZ. LAWS [CAP 358 R.E. 2002].

415. Islamic Restatement Act, *supra* note 5, § 5(1) (“Every Moslem of sound mind who has attained puberty may enter into a contract of marriage.”). However, according to the Safi’i and Shiah Ismaili schools, “women of all ages, are incompetent to enter into a contract of marriage” and can only “be validly contracted in marriage by their respective guardians.” *Id.* § 5(2).

416. Salma Maoulidi, *Which Is the Duty for Muslims, Marriage or Education?*, THE AFRICAN OPINIONS, Apr. 24, 2004, at 6.

417. Interview with Sheikh Hassan Chizenga, in Dar-es-Salaam, Tanzania (Mar. 9, 2005).

that under Islam it is not enough for a girl to menstruate; she must be at least eighteen in order to complete her education and have the maturity to care for a family.⁴¹⁸ Furthermore, no consensus exists among Islamic schools regarding the age of puberty itself. The Islamic Restatement Act only highlights this confusion. It states, “it shall be presumed that a person of either sex who has reached the age of fifteen years has attained puberty,”⁴¹⁹ and further that “[n]o male under the age of twelve years and no female under the age of nine years shall be held to have attained puberty.”⁴²⁰ It then provides an exception for the Shiah Ithna’ Asheri school, which presumes “that males attain puberty at the age of fifteen years and females attain puberty at the age of nine years.”⁴²¹ Puberty was traditionally defined at nine for girls because the Prophet supposedly married a six or seven year old girl, Ayesha, and waited to consummate the marriage until she turned nine.⁴²² However, scholars now question this historical assumption: “new research challenges the real age at which Ayesha was married to the Prophet indicating she was much older than is commonly claimed.”⁴²³ In light of these disputes, Morocco and Egypt, two Islamic countries, discarded the concept of puberty and raised the minimum age of marriage to fifteen and sixteen, respectively, for girls and eighteen for men.⁴²⁴

Similarly, the necessity and role of a marital guardian is subject to debate. The Shafi’i and Shiah Ismaili schools require a marital guardian for women of all ages, while other schools only provide for marital guardians for parties that have not attained puberty.⁴²⁵ Generally, the marital guardian of a woman “who has attained puberty and who is of sound mind,” cannot contract her in marriage without her consent.⁴²⁶ However, according to the Shafi’i school, the marital guardian may contract a marriage on behalf of a virgin “without her consent.”⁴²⁷ In Algeria, by contrast, the practice of marital guardians has been “made almost pro forma.”⁴²⁸ Now the woman can conclude her own marriage and only the “presence” of a guardian, chosen by the woman herself, is necessary.⁴²⁹ As the necessity or role of a guardian is rooted in neither the Koran nor Hadiths, the way

418. Interview with Alhaji Issa Kitenge, Community Member, in Kiserawe, Tanzania (Mar. 10, 2005).

419. Islamic Restatement Act, *supra* note 5, § 6(2).

420. *Id.* § 6(2).

421. *Id.* § 6 *Exception*.

422. ANWAR HEKMAT, *WOMEN AND THE KORAN: THE STATUS OF WOMEN IN ISLAM* 109 (1997).

423. Maoulidi, *supra* note 416.

424. DAWOUD S. EL ALAMI, *THE MARRIAGE CONTRACT IN ISLAMIC LAW* 55-56 (1992). Egypt prohibited child marriages in Law 78 of 1931 99: “A marriage suit cannot be heard if the husband and wife are aged below eighteen and sixteen.” Morocco defined the age of marriage as eighteen for men and “fifteen-years-old” for girls. *Id.*

425. Islamic Restatement Act, *supra* note 5, §§ 5(1), 30.

426. *Id.* § 37(2).

427. *Id.* § 37(2) *Exception*. A court can annul this marriage if the woman “satisfies the court that the contract is to her manifest disadvantage and that the marriage has not been consummated.” *Id.*

428. UNITED STATES, AMERICAN EMBASSY IN ALGIERS, REACTIONS TO ALGERIA’S UPDATED FAMILY CODE (Mar. 14, 2005).

429. *Id.*

is open for a practice more protective of women's fundamental rights.

Tanzanian Muslims and scholars challenge the legitimacy of interpretations in the Islamic Restatement Act. The Tanzania Women Representatives to the Regional Conference on Women, Islam and Family Planning asserted that Tanzania suffered from "[i]ntentional misinterpretations of the Koran to suit male-dominated situations."⁴³⁰ A Tanzanian Law Professor, Chris Maina, agreed that discriminatory interpretations of Islam were due, in part, to the lack of women jurists. "You have never met a female Sheikh. There are none. So the interpretation is always against women."⁴³¹ Sheikh Chizenga also rejected provisions of the Islamic Restatement Act.⁴³² He pointed to the existence of conflicting and unreliable opinions in Islamic jurisprudence, necessitating a scholar "to dig more and find [what the] right one is."⁴³³

Thus, Tanzania must repeal the age of marriage and martial guardian provisions of the Islamic Restatement Act. The Constitution, the Law of Marriage Act, and international law oblige Tanzania to invalidate these discriminatory and harmful practices. Furthermore, they have no firm basis in Islamic law, and many Tanzanians disagree with these interpretations.

VI. COMPARATIVE LAW: AS DEMONSTRATED BY THE EXAMPLE OF OTHER COUNTRIES, TANZANIA CAN ACCELERATE ITS OWN RATE OF ECONOMIC AND SOCIAL DEVELOPMENT THROUGH THE ELIMINATION OF CHILD MARRIAGE AND GUARDIANSHIP

Tanzania should follow the lead of other countries and further its own economic and social development by eliminating child marriage and guardianship. Tanzania itself has made this link in its National Population Policy, which has as its principle objective "to reinforce national development . . . in order to improve the quality of life of the people."⁴³⁴ To achieve this goal, Tanzania has set a number of objectives, including the promotion of marriage and child bearing after the age of 18 years and the improvement of women's status in society.⁴³⁵ Indeed, as Nyerere recognized, "[i]f we want our country to make full and quick progress now, it is essential that our women live on terms of full equality with

430. REPORT OF THE REGIONAL CONFERENCE ON WOMEN, ISLAM AND FAMILY PLANNING, NIAMEY, NIGER, Oct. 23-25, 1995 (Kalimi Mworio, Adama Diop, & Dorothy Nyongo eds., 1996).

431. Interview with Chris Peter Maina, Law Professor at University of Dar es Salaam, in Dar es Salaam, Tanzania (Mar. 11, 2005).

432. Interview with Sheikh Hassan Chizenga, *supra* note 417.

433. *Id.*

434. UNITED REPUBLIC OF TANZANIA, PRESIDENT'S OFFICE, THE PLANNING COMM'N, NATIONAL POPULATION POLICY 7 (1992), <http://www.tanzania.go.tz/pdf/NPP%201992.pdf> [hereinafter NATIONAL POPULATION POLICY].

435. *Id.* at 22. Relatedly, Tanzania, in coordination with UNICEF, is also presently attempting to significantly reduce "child mortality and malnutrition [and] improve educational performance" by 2010 in order to be in a more favorable position to attain its corresponding goals of "reducing poverty [and] enhancing the quality of human life, thus fully realising the human rights of children" by 2025. UNITED REPUBLIC OF TANZANIA & UNICEF, MASTER PLAN OF OPERATIONS 2002-2006 13-14 (2002).

their fellow citizens who are men.”⁴³⁶ Sri Lanka provides a concrete example of how raising the minimum age of marriage to eighteen and protecting girls’ development can be beneficial for an entire society. Many of Tanzania’s African neighbors have noted this connection, enacting legislation for a later age of marriage and for the empowerment of women through the abolition of guardianship. It is in Tanzania’s best interests to follow this lead.

A. INCREASING THE MINIMUM AGE OF MARRIAGE CAN ACCELERATE TANZANIA’S RATE OF HUMAN AND ECONOMIC DEVELOPMENT: THE SRI LANKAN EXAMPLE

Increasing the minimum age of marriage to eighteen for both males and females constitutes a crucial first step in a country’s economic and social development process. This is because later ages of marriage for females facilitate greater gender equity, which essentially refers to a situation in which men and women stand on relatively equal ground with regard to access to governmental resources such as education, as well as women’s corresponding participation in economic and political processes.⁴³⁷ In turn, economists increasingly believe that achieving such equity is a prerequisite for development: “Human development is impossible without gender equity. As long as women are excluded from or marginalized in the development process, both human and economic development will remain ineffective and skewed.”⁴³⁸ Indeed, noting that those countries having the lowest rankings on the UN’s Human Development Index generally have a much higher proportion of married fifteen to nineteen-year-old women compared to their more successful counterparts, one prominent statistician recently concluded that “the negative relationship between early marriage and national development is quite striking.”⁴³⁹

The government of Sri Lanka long ago recognized the fact that higher ages of marriage can accelerate economic development. In 1957, Sri Lanka mandated that all citizens attend school until at least the age of eighteen, thus significantly reducing the number of marriages of children who had not yet reached their full educational and economic potential.⁴⁴⁰ At the same time, the government took steps to ensure that all marriages were registered and that consent to the marriage

436. JULIUS K. NYERERE, *FREEDOM AND SOCIALISM* 339 (1968), *cited in* COLIN CREIGHTON & C.K. OMARI, *GENDER, FAMILY AND WORK IN TANZANIA* 222 (2000).

437. UNITED NATIONS DEVELOPMENT PROGRAMME, *SRI LANKA NATIONAL HUMAN DEVELOPMENT REPORT: REGIONAL DIMENSIONS OF HUMAN DEVELOPMENT 1998 3-4*, 42-43 (1999), <http://hdr.undp.org.in/APRI/>.

438. UNITED NATIONS DEVELOPMENT PROGRAMME, *TANZANIA HUMAN DEVELOPMENT REPORT: THE STATE OF PROGRESS IN HUMAN RESOURCE DEVELOPMENT A1-2 1999* (Feb. 2000), <http://www.tzonline.org/pdf/>.

439. MATHUR ET AL., *supra* note 150. The expert further noted that “[w]hen the relationship between age at marriage and development is examined, it becomes clear that later marriage is a precondition for the attainment of desired development goals.” *Id.*

440. ALICE W. CLARK, *GENDER AND POLITICAL ECONOMY: EXPLORATIONS OF SOUTH ASIAN LEGAL SYSTEMS* 247-54 (1993).

had been freely given by both parties.⁴⁴¹ As a result of the government's proactive encouragement of a later age of marriage, average marriage ages among Sri Lankan females increased from 20.7 years in 1946 to over twenty-five years by the mid-1980s.⁴⁴² As a result of marrying later, Sri Lankan women were able to finish their education and find employment without impediment.⁴⁴³

Partly as a consequence of women's later marriage and their corresponding active participation in the economy, Sri Lanka—which at mid-century had difficulties in meeting even the most basic needs of its population—has experienced phenomenal economic success over the past few decades despite a long-standing internal conflict which has decimated substantial parts of its territory. Sri Lanka now enjoys one of the developing world's highest literacy rates at over ninety-two percent,⁴⁴⁴ an average life expectancy of 72.5 years per person, and a still-rising per capita income of \$3,570.⁴⁴⁵ Indeed, as a result of this success, the Sri Lankan government recently enacted even stricter penalties for marrying before the age of eighteen.⁴⁴⁶ Similar improvements in education, employment, and overall social welfare levels have been linked to later ages of marriage in South Korea, Thailand, and Taiwan.⁴⁴⁷

Tanzania should follow the example of these countries in order to facilitate its own much-needed economic and human development. Currently, Tanzania's development lags well behind many of its regional cohorts, with an average per-capita income of less than \$600 per year even by optimistic estimates, highly skewed literacy rates between males and females, and an average life expectancy of only 43.5 years.⁴⁴⁸ Studies in Tanzania indicate that early marriage is partly responsible for this situation as girls have not been able to complete the education that would allow them to “improve health, knowledge and skills” and to use such

441. *Id.*; see also Ordinance to Consolidate and Amend the Law Relating to Marriages Other Than the Marriages of Muslims and to Provide for the Registration Thereof, No. 12, 1956 (Sri Lanka).

442. CLARK, *supra* note 440, at 254.

443. *Id.* at 262-63; see also ANJU MAHOLTRA & AMY ONG TSUI, *Marriage Timing in Sri Lanka: The Role of Modern Norms and Ideas*, 58 J. OF MARRIAGE & FAM. 476, 476-81 (1996).

444. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORTS: INDICATORS FOR SRI LANKA 2002 (2003), http://hdr.undp.org/statistics/data/cty/cty_f_LKA.html. Moreover, Sri Lanka boasts an even higher youth literacy rate of over ninety-seven percent for those between the ages of fifteen and twenty-four. *Id.*

445. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD 140 (2004), <http://hdr.undp.org/reports/global/2004>.

446. Marriage Registration Ordinance, No. 19, 1907, § 22, amended by Marriage Registration (Amendment) Act, No. 12, 1997, § 2 (Sri Lanka), cited in CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, SOUTH ASIA 232-33, 242 (1st ed. 2004), http://www.crlp.org/pdf/pdf_wowosa_srilanka.pdf. The 1997 act also increased the already-substantial penalties for failure to register a marriage. *Id.*

447. MATHUR, *supra* note 150, at 12; see also MAHOLTRA & TSUI, *supra* note 443, at 477.

448. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORTS: INDICATORS FOR UNITED REPUBLIC OF TANZANIA 2002 (2003), http://hdr.undp.org/statistics/data/cty/cty_f_TZA.html. It is estimated that only sixty-nine percent of Tanzanian females above fifteen are literate, while over eighty-nine percent of their male counterparts are. *Id.* at 10.

“acquired capabilities for productive economic [and] social purposes.”⁴⁴⁹ Child marriage is thus fatal not only to women’s economic viability, but also to Tanzania’s economic viability in an increasingly competitive regional and global environment.

B. TANZANIA SHOULD FOLLOW THE LEAD OF OTHER AFRICAN COUNTRIES BY RAISING ITS LEGAL MINIMUM AGE OF MARRIAGE AND ABOLISHING GUARDIANSHIP

There is a growing awareness of the harms of early marriage and guardianship on the rights of women. As a result, a number of African countries have moved to increase the legal minimum age of marriage to eighteen and have abolished guardianship laws that subjugate women to male authority in marital and child custody matters.

African countries have identified the need to reform discriminatory age of marriage laws and protect the development of girls. For example, Ethiopia previously permitted girls who were at least fifteen years of age to marry.⁴⁵⁰ However, in 2000, Ethiopia revised its Family Code to establish the minimum age of marriage at eighteen years of age for both men and women.⁴⁵¹ Similarly, in 1998, Ghana passed the Children’s Act which established the minimum age of marriage for *all* marriages at eighteen years, regardless of the sex of the party.⁴⁵² Nigeria likewise set its age of marriage to eighteen in its Child’s Rights Act of 2003.⁴⁵³ Further, there have been strong political movements in Kenya,⁴⁵⁴ Mali,⁴⁵⁵ and Cameroon⁴⁵⁶ to eradicate the practice of child marriage and to raise the legal minimum age of marriage for both men and women. Thus, the current

449. UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), TANZANIA HUMAN DEVELOPMENT REPORT: THE STATE OF PROGRESS IN HUMAN RESOURCE DEVELOPMENT A1-2 1999 (Feb. 2000), <http://www.tzonline.org/pdf/Tanzaniahumandevreport.pdf>.

450. Women of the World: Anglophone Africa Progress Report, *supra* note 64, at 24.

451. *Id.* Only upon a showing of “serious cause” by a parent or guardian is the Minister of Justice able to grant an age reduction of up to two years. *Id.*

452. Previously, Ghana had no legal minimum age requirements for customary or Islamic marriages, which usually meant that girls got married at a much younger age than boys. CTR. FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, ANGLOPHONE AFRICA 47 (1st ed. 1997), http://www.reproductiverights.org/pub_bo_wowafrica.html [hereinafter Women of the World: Anglophone Africa].

453. Section 21 of the Child’s Rights Act, entitled “Prohibition of child marriage,” provides, “No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatsoever.” Child’s Rights Act, Act No. 26 (2003) 116:90 O.G., G.N. 210, § 21 (Nig.) [hereinafter Child’s Rights Act, Nigeria]. Nigeria thus responded to criticism from the Committee on the Rights of the Child, which expressed “concern[] about the persistence of early marriage” and urged Nigeria to address this “harmful practice.” *Consideration of Reports Submitted by States Parties: Nigeria*, Committee on the Rights of the Child, at paras. 15, 36, U.N. Doc. CRC/C/15/Add.61 (1996), *available at* <http://www1.umn.edu/humanrts/crc/nigeria1996.html>.

454. Women of the World: Anglophone Africa Progress Report, *supra* note 64, at 60.

455. CTR. FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, FRANCOPHONE AFRICA 141(1999), http://www.reproductiverights.org/pub_bo_wowfr.html [hereinafter Women of the World: Francophone Africa].

456. *Id.* at 82.

trend in Africa is to increase the legal minimum age of marriage to eighteen years of age for both men and women.

Moreover, African countries have recognized the need to abolish guardianship over adult women in to ensure marital equality and the ability of women to make decisions regarding their families and households. Ethiopia, a country that formerly crowned the husband the head of the family in its Civil Code,⁴⁵⁷ now specifies that spouses have “equal rights in the management of the family.”⁴⁵⁸ South Africa, too, has discarded its customary notions of guardianship; a South African High Court held that provisions of a 1978 law naming a husband guardian over his wife were “outmoded and anachronistic.”⁴⁵⁹ These provisions have since been overturned by Matrimonial Property Act 88 of 1984.⁴⁶⁰ In addition, the Recognition of Customary Marriages Act codifies the equal status of husbands and wives: “[a] wife in a customary marriage has, on the basis of equality with her husband . . . full status and capacity.”⁴⁶¹ Finally, the Côte d’Ivoire has taken a significant step in recognizing women’s rights by explicitly deeming a woman “head of household” when her husband is absent.⁴⁶² Thus, African countries have abolished laws that prevent women from exercising the same decision-making power as their husbands.

Furthermore, countries have discarded customary notions hindering women from exercising equal rights and responsibilities as their husbands with regard to their children. Kenya’s customary laws assign guardianship to the father.⁴⁶³ However, the new marriage bill mandates that the best interests of the child are now to be the primary consideration in assigning guardianship.⁴⁶⁴ Under Ghana’s various customary laws, a child belongs to either the mother or the father, depending on tribal custom.⁴⁶⁵ However, in 1998, Ghana passed the Children’s Act which requires custody determinations to be made solely by considering the best interests of the child.⁴⁶⁶ Similarly, in Nigeria’s Child’s Rights Act of 2003, “the welfare of the child” is “the first and paramount consideration” in proceedings on the custody, upbringing, and property of the child.⁴⁶⁷ This Act

457. Women of the World: Anglophone Africa, *supra* note 452, at 23 (*citing* Civ. Code art. 635 (Eth.)).

458. Women of the World: Anglophone Africa Progress Report, *supra* note 64, at 24 (*citing* Rev. Family Code art. 50(1), 66 (2000) (Eth.)).

459. CTR. FOR REPRODUCTIVE LAW AND POLICY, LEGAL GROUNDS: REPRODUCTIVE AND SEXUAL RIGHTS IN AFRICAN COMMONWEALTH COUNTRIES 21 (2005) (*citing* *Prior v. Battle*, [1999] (2) SA 850 (S. Afr. High Ct. 1999)).

460. *Id.*

461. Women of the World: Anglophone Africa Progress Report, *supra* note 64, at 105 (1st ed. 2001) (*citing* Recognition of Customary Marriages Act § 6 (1998) (S. Afr.)).

462. Women of the World: Francophone Africa, *supra* note 455, at 124.

463. Women of the World: Anglophone Africa, *supra* note 452, at 67.

464. Women of the World: Anglophone Africa Progress Report, *supra* note 64, at 61.

465. Women of the World: Anglophone Africa, *supra* note 452, at 44.

466. Women of the World: Anglophone Africa Progress Report, *supra* note 64, at 41 (*citing* The Children’s Act § 45(1) (1998) (Ghana)).

467. Child’s Rights Act, Nigeria, *supra* note 453, § 71.

further specifically provides that “in the death of a parent, the surviving parent shall be the guardian of the child.”⁴⁶⁸ Thus, African countries have recognized maternal rights and are replacing the preference for awarding child custody to a male guardian with an emphasis on the welfare of the child.

These countries’ success in raising the minimum age of marriage and abolishing discriminatory guardianship laws are due in significant part to the greater priority that these countries have begun to place on women’s rights. In 1993, Ethiopia’s Population Policy emphasized female empowerment and the need to remove “all legal and customary practices militating against the full enjoyment of economic and social rights by women.”⁴⁶⁹ Similarly, in 2000, the Kenyan National Population Policy for Sustainable Development aimed to “empower women by, among other strategies, eliminating harmful traditional practices.”⁴⁷⁰ Moreover, Ghana,⁴⁷¹ Nigeria,⁴⁷² and South Africa⁴⁷³ have policies that explicitly identify women’s empowerment as a national priority. Consequently, these countries have sought reform of their age of marriage and guardianship laws in order to ensure that their female citizens are capable of fully realizing and exercising their fundamental rights.

Like these other African countries, Tanzania has unambiguously recognized women’s rights as a national priority. In 1992, Tanzania issued a National Population Policy that stated a need for a “gender perspective in development planning” and identified “gender equality and women empowerment” as priority issues in meeting its development goals.⁴⁷⁴ By acknowledging the need to elevate the status of women, Tanzania has committed itself to improving the welfare of its female citizens by eradicating harmful customs and traditions that impact women.⁴⁷⁵ In order to abide by its commitment, Tanzania should reform its discriminatory age of marriage and guardianship laws. Tanzania should set the minimum age of marriage at eighteen for both men and women and should abolish guardianship laws that prevent women from exercising their fundamental rights.

VII. TANZANIA’S DUTY TO ACT: TANZANIA MUST ENACT NEW LAWS TO ABOLISH CHILD MARRIAGE AND GUARDIANSHIP

Tanzania should enact legislation to remedy the violations caused by child marriage and guardianship. The Tanzanian Constitution and international docu-

468. *Id.* § 83(1). Uganda’s Children Act likewise recognized “welfare principles” as “guiding” and a “child’s right to stay with parents” unless “a competent authority determines” that this is not “in the best interests of the child.” Children Act, Cap. 59 §§ 3, 4 (2000) (Uganda).

469. Women of the World: Anglophone Africa Progress Report, *supra* note 64, at 55-56.

470. *Id.* at 55-56.

471. *Id.* at 37.

472. *Id.* at 75.

473. *Id.* at 98.

474. NATIONAL POPULATION POLICY, *supra* note 434.

475. *Id.*

ments expressly direct legislators to take affirmative action to enable all individuals to realize their fundamental rights. Article 9(a) of the Constitution, a provision meant to inspire legislation, instructs Parliament “to direct [its] policies and programmes towards ensuring . . . that human dignity and other human rights are respected and cherished.”⁴⁷⁶ Significantly, the Constitution requires non-discrimination on the basis of sex.⁴⁷⁷ The African Charter contains similar language, requiring States “to undertake to adopt legislative . . . measures to give effect to” the rights articulated in the Charter.⁴⁷⁸ This clause is immediately followed by the directive that every individual “be entitled to the enjoyment of the rights . . . without distinction of any kind such as . . . sex.”⁴⁷⁹ Likewise, the ICCPR, ICESCR, CEDAW, CRC, and African Charter on the Rights and Welfare of the Child all contain provisions requiring states to take measures to guarantee rights to all persons, regardless of sex.⁴⁸⁰ CEDAW specifically directs states “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, customs and practices which constitute discrimination against women.”⁴⁸¹ Tanzania thus must take legislative steps to abolish child marriage and guardianship and protect the fundamental rights of its women and girls.

These two practices have resulted in numerous human rights violations. Child marriage robs girls of their childhood and violates Tanzania’s constitutional, statutory, and international guarantees of the rights to equal protection, physical integrity, family, dignity, education, and employment. Guardianship laws infantilize adult women, denying mothers their right to raise their children and depriving wives of their right to live and make decisions without a guardian’s consent. These laws violate Constitutional, statutory, and international guarantees to the right to dignity, property, family, and equal protection of the law. Additionally, child marriage and guardianship hamper Tanzania’s development. New legislation eradicating these practices is necessary to remedy these harms. The proposed legislation, found in Appendixes A and B, specifies what the new legislation should contain, with annotations that explain the purpose behind each set of provisions.

476. TANZ. CONST. ch. 1, art. 9(a).

477. *Id.* ch. 1, arts. 13(2), (4).

478. African Charter, *supra* note 47, art. 1.

479. *Id.* art. 2.

480. ICCPR, *supra* note 42, arts. 2(1)-(2) (“Each State Party . . . undertakes to respect and to ensure to all individuals . . . without distinction of any kind, such as . . . sex . . . [E]ach State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”); ICESCR, *supra* note 43, arts. 2(1)-(2) (Each State Party to the present Covenant undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . . The State Parties . . . undertake to guarantee that the rights . . . will be exercised without discrimination of any kind as to . . . sex . . .”); *see also* CEDAW, *supra* note 44, art. 3; CRC, *supra* note 33, arts. 2, 4; African Charter on the Rights and Welfare of the Child, *supra* note 34, arts. 1(1), 3.

481. CEDAW, *supra* note 44, art. 2(f); *see also id.* art. 2(c) (charging states “[t]o adopt appropriate legislative . . . measures . . . prohibiting all discrimination against women.”).

First, eighteen should be the minimum age of marriage for all individuals. As discussed above, age eighteen is the benchmark in domestic⁴⁸² and international⁴⁸³ law to distinguish between a child and an adult with full legal capacity to make important decisions.⁴⁸⁴ In fact, international bodies have expressly recommended that the legal age of marriage be set at eighteen, regardless of the sex of the party.⁴⁸⁵ This international consensus has prompted other African countries, such as Ethiopia, Ghana, and Nigeria to raise their minimum age of marriage to eighteen. Tanzania should follow this trend and reconcile its marriage laws with domestic and international law defining the age of a child as under eighteen.

Second, there should be no exception to the minimum age of eighteen for marriage. Although it may seem innocuous or even desirable to exempt a young girl impregnated out-of-wedlock, marriage would still violate her fundamental rights to physical integrity, childhood, dignity, education,⁴⁸⁶ and development.⁴⁸⁷ Marriage would ensure that she remain sexually active while still physically immature, subject her to the physical and psychological domination of a much older husband, and curtail opportunities for education and development. As she is still a child, she could not provide her full and free consent to the marriage with these resulting harms. Moreover, the existence of an exception would undermine the rule. As Robert Makaramba of Tanzania's Human Rights Commission explained, "When you set a standard, and give an exception, people go to the exception. So, let's maintain the standard."⁴⁸⁸

Enforcement of the marriage laws must also be improved to ensure compliance with the minimum age requirement. Mobile registration units and public radio programs could reach rural communities to better educate the public about these

482. TANZ. CONST. ch.1, art. 5(1); SOSPA, *supra* note 32, § 3; Age of Majority Ordinance, § 2 TANZ. LAWS [CAP R.E. 2002]; Law of Contract Ordinance, § 11, TANZ. LAWS [CAP 345 R.E. 2002]; Tanzania Citizenship Act, 1995, § 3(3), Act No. 6/1995; Registration and Identification of Persons Act, § 7(1), Act No. 11/1986; Civil Procedure Code, 1966, Government Notice (GN) 410/1966, Order XXXI.

483. CRC, *supra* note 33, art. 1; African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 2.

484. As the Government itself recognized in selecting eighteen as the minimum age of marriage for boys in the Law of Marriage Act, this is the age at which basic rights and capabilities attach—logic that should apply with equal force to women. White Paper, *supra* note 13, para. 7.

485. African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 21(2); Women's Protocol to the African Charter, *supra* note 35, art. 6(b); *General Comment No. 4*, CRC, *supra* note 35, para. 20; *General Recommendation No. 21*, CEDAW, *supra* note 35, para. 36.

486. In addition to raising the legal minimum age of marriage to eighteen, Tanzania should repeal the education regulations expelling married and pregnant children from school to ensure that the right to education of all Tanzanians is protected. Tanzania's Law Reform Commission likewise recommended that pregnant girls be permitted to return to school. LAW REFORM COMMISSION REPORT ON CHILDREN 17.

487. This, of course, would not affect the status of the out-of-wedlock child, who would still be entitled to maintenance from the father, as provided under §§ 129-130 of the Law of Marriage Act.

488. Interview with Robert Makaramba, Commissioner, Human Rights Commission, in Dar es Salaam, Tanzania (Mar. 9, 2005) (The views of Mr. Makaramba do not represent the view of the Commission.).

laws and increase registration of births and marriages.⁴⁸⁹ In addition, anyone in the community should be able to prevent a child marriage from taking place by petitioning a court for an injunction against a marriage officiant, parent, guardian, or adult party. Finally, victims of child marriage should be given the right to petition a court for an annulment and damages before they reach the age of twenty-one. Because children under eighteen do not have standing to bring court actions,⁴⁹⁰ the Social Welfare Office⁴⁹¹ and NGOs should be empowered to bring suits for these remedies on their behalf. Victims would additionally have three years after reaching majority in which to bring suit on their own. Damages would compensate the victim for pain and suffering, loss of education and employment, and injury to health stemming from the marriage. Violators of age of marriage laws would thus be financially responsible to their victims.

Criminal penalties would serve as another important means of deterrence. They would ensure that the government takes responsibility for enforcing the law so that the burden does not fall solely upon the victims and NGOs. However, criminal fines should be the penalty for violators, instead of imprisonment. Girls are less likely to report their underage marriages to the police if they fear that their husbands or parents will be sent to jail.⁴⁹² More importantly, girls will be unable to obtain maintenance payments to support their children if the men are imprisoned. To ensure that these girls and their children have the economic means to survive, criminal fines should be mandatory against marriage officiants but discretionary against the victim's parents and the adult party to the marriage. In an economy where fifty percent of the population is on or below the poverty line,⁴⁹³ it is important for the available financial resources to first compensate and maintain any children before money is collected by the government. Consequently, the criminal penalties focus on marriage officiants, who are in the best position to prevent violations of the law because they are the ones legitimizing marriages.

Additionally, guardianship laws must be abolished to ensure women's and

489. The Committee on the Rights of the Child specifically recommended that Tanzania utilize mobile registration units to improve registration. *Consideration of Reports Submitted by State Parties: United Republic of Tanzania*, Committee on the Rights of the Child, U.N. GAOR, 27th Sess., Supp. No. 156, U.N. Doc. CRC/C/15/Add.156, at para. 35, (2001), available at <http://documents.un.org>. (click "welcome," then click "simple search," and insert the U.N. Doc. No. at "symbol.>"). This idea was also supported by interviewed Tanzanians. See e.g., Interview with Adam Mambi, Law Reform Commission, in Dar es Salaam, Tanzania (Mar. 7, 2005); Interview with Eugene Mniwasa, *supra* note 57.

490. Civil Procedure Code, 1966, Government Notice (GN) 410/1966, Order XXXI.

491. The Social Welfare Department routinely deals with women's and children's issues and is thus the most appropriate body to deal with child marriage issues. Indeed, the Law Reform Commission recommended that Social Welfare officers take a more active role in ensuring children's welfare. See, e.g., THE LAW REFORM COMMISSION OF TANZANIA, REPORT OF THE COMMISSION ON THE LAW RELATING TO CHILDREN IN TANZANIA 11, 41, 51, 75 (Apr. 1994).

492. Interview with Deborah Mbalilaki, *supra* note 247; Interview with Alice Chigumile, Director of Prosecutions, in Dar es Salaam, Tanzania (Mar. 11, 2005).

493. INTERNATIONAL COOPERATIVE ALLIANCE, *supra* note 267.

children's rights. First, to realize the equality and dignity to all citizens, a guardian may not be appointed over an adult woman who is not mentally incapacitated. Second, the best interests of the child must be the paramount consideration in custody and guardianship determinations over children.⁴⁹⁴ Children have a right to parental care,⁴⁹⁵ and as recognized by Tanzanians, remaining with a parent is most often in the best interests of the child.⁴⁹⁶ Thus, a court must make a determination that it is *not* in the best interests of the child for him or her to remain with a parent before the child is removed from the parent's care.⁴⁹⁷ Custody over minor children after a parent's death should automatically go to the surviving parent.⁴⁹⁸ Affording a widow and her children their rights to remain with each other would more effectively protect their welfare.

Enacting new legislation to abolish the practices of child marriage and guardianship would fulfill Tanzania's obligation to ensure the enjoyment of fundamental rights, guaranteed under its Constitution and international conventions, by all of its citizens. Tanzania has already shown its commitment to complying with international law by adding gender as a basis for non-discrimination in its Constitution. It should now take the next step and eliminate the practices of child marriage and guardianship that violate women's fundamental rights and thereby hinder Tanzania's development. As Adam Mambi of the Law Reform Commission acknowledged, Tanzanians believe that now is the time for change:

As of now, the world is talking of the rights of women and children. Formerly, that was not there . . . [T]he Bill of Rights was enshrined in our Constitution in the 1980's . . . [T]he world is pushing us—democracy, you know. And we have to change. And we are trying. The international conventions—we have to comply with those conventions. So that is why . . . many changes have taken [and will take] place.⁴⁹⁹

494. CRC, *supra* note 33, art. 3(1); African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 4(1); CEDAW, *supra* note 44, art. 16(1)(d), (f). The child's "best interests" are defined as the fostering of the child's emotional, psychological, and physical well-being, as well as the protection of the child's rights as identified in the CRC and the African Charter on the Rights and Welfare of the Child. See Guardianship Act 2005, *infra* Appendix B.

495. African Charter on the Rights and Welfare of the Child, *supra* note 34, art. 19(1).

496. See, e.g., Interview with Honorable A. Bahati, *supra* note 62; Interview with Tanzanian Woman, *supra* note 62; Interview with Honorable Milton Mahanga, *supra* note 62; Interview with Edda Mariki, *supra* note 57; Interview with Bishop Elinaza Sendoro, *supra* note 62; Interview with Alphonse Katemi, *supra* note 62. See also Law of Marriage Act, § 125(1), TANZ. LAWS [CAP 29 R.E. 2002] (recognizing that only "exceptional circumstances" make it "undesirable that the infant be entrusted to either parent").

497. This parallels CRC, art. 9(1) and the African Charter on the Rights and Welfare of the Child, art. 19(1).

498. Women's Protocol to the African Charter, *supra* note 35, art. 20(b) ("[A] widow shall automatically become the guardian and custodian of her children after the death of her husband, unless this is contrary to the interests and welfare of the children").

499. Interview with Adam Mambi, *supra* note 489.

APPENDIX A:
AGE OF MARRIAGE AMENDMENT ACT 2005

ARRANGEMENT OF SECTIONS

Section Title

PART I
PRELIMINARY PROVISIONS

1. Short Title and Commencement
2. Application
3. Repealed and Amended Provisions

PART II
AGE OF MARRIAGE AMENDMENTS

4. Definitions
5. Consent and Age of Marriage
 - (a) Remedies
6. Remedies for Underage Party
7. Court Injunction
 - (b) Penalties
8. Penalties for Child Marriage
9. Penalties for Contempt of Court
 - (c) Enforcement
10. Enforcement of a Remedy
11. Enforcement of a Criminal Penalty
12. Enforcement through Education
13. Enforcement through Registration
14. Education Regulations

PART III
TRANSITIONAL PROVISIONS

15. Conflict of Laws
16. Existing Law

A BILL
for

An Act to Provide for Procedures, Remedies and Penalties to Prevent Child Marriages

PART I
PRELIMINARY PROVISIONS

*Short Title and
Commencement.*

1. This act shall be cited as the Age of Marriage Amendment Act 2005 and shall come into force on such date as Parliament determines.

Application.

2. This Act shall apply in Tanzania Mainland.

*Amended and
Repealed Provisions.*

3. The sections set forth in Schedule 1 are hereby amended or repealed in the manner required.

PART II
AGE OF MARRIAGE

Whereas Tanzania committed itself to amending discriminatory laws by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women which requires “State Parties . . . to take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” in Article 2(f).

Whereas Tanzania committed itself by ratifying the International Covenant on Civil and Political Rights, Article 2(2), “to adopt[ing] such legislative. . . measures as may be necessary to give effect” to the rights of equal protection, life, protection of the family, dignity, education, and employment.

Whereas the Law of Marriage Act permits child marriages and does not provide effective penalties to prevent illegal, underage marriages.

Whereas child marriages endanger a girl’s right to life and health. Child mothers and their babies face great risks of dying in childbirth, contracting HIV / AIDS, and suffering from fistula.

Whereas child marriages force little girls to assume adult responsibilities as children, thereby stripping them of their right to childhood and right to engage in recreational activities appropriate to their age.

Whereas child marriages have broad impacts on girls because these marriages prevent girls from pursuing their right to education as well as their right to seek employment opportunities outside the home.

Whereas the lack of birth certificates and marriage certificates exacerbates the lack of enforcement against child marriage.

Now, therefore be ordained and enacted as follows:

The above section outlines the violation of the following rights:

1. *The Right to Equal Protection* is provided for in Articles 9, 12, 13(1), 13(5) of the Tanzanian Constitution, Articles 3, 14, 16, 24, 26 of the ICCPR, Article 3 of the ICESCR, Articles 2, 7 of the UDHR, Articles 1, 2, 3, 5, 13, 15, 16 of CEDAW, Article 2 of the CRC, Articles 2, 3, 5, 7, 14, 18 of the African Charter, and Article 3 of the African Charter on the Rights and Welfare of the Child.
2. *The Right to Life and Health* is provided for in Articles 14, 16 of the Tanzanian Constitution, Articles 3, 5, 25 of the UDHR, Articles 6, 7, 18 of the ICCPR, Article 12 of the ICESCR, Articles 6, 14, 24, 27, 34, 36 of the CRC, Articles 4, 5, 16 of the African Charter, and Articles 5, 14 of the African Charter on the Rights and Welfare of the Child.
3. *The Right to Protection of the Child* is provided for in Articles 24, 25 of the UDHR, Article 10 of the ICESCR, Articles 23, 24 of the ICCPR, Articles 5, 16 of the CEDAW, Articles 3, 9, 12, 18, 24, 31 of the CRC, Article 18 of the African Charter, and Articles 4, 12, 19, 20 of the African Charter on the Rights and Welfare of the Child.
4. *The Right to Dignity* is provided for in Articles 9, 12 of the Tanzanian Constitution, Articles 1, 6, 16, 22, 23 of the UDHR, Articles 10, 13 of the ICESCR, Articles 8, 23 of the ICCPR, the preamble, and Article 16 of CEDAW, the preamble of the CRC, the preamble and Article 5 of the African Charter, and the preamble, and Article 21 of the African Charter on the Rights and Welfare of the Child.
5. *The Right to Education* is provided for in Article 11 of the Tanzanian Constitution, Article 26 of the UDHR, Articles 10, 13 of the ICESCR, Articles 5, 10, 14, 16 of CEDAW, Articles 28, 29 of CRC, Articles 17, 25 of the African Charter, and Article 11 of the African Charter on the Rights and Welfare of the Child.
6. *The Right to Employment* is provided for in Articles 9, 11, 22, 23 of the Tanzanian Constitution, Articles 23, 25 of the UDHR, Articles 6, 7, 8 of the ICESCR, Articles 11, 14 of the CEDAW, Article 32 of the CRC, and Article 29 of the African Charter.

Definitions.

4. In this Act unless the text otherwise requires -
 - a) A “boy” is a male person of the age of under 18 years.
 - b) A “girl” is a female person of the age of under 18 years.
 - c) A “man” is a male person of the age of 18 years or over.
 - d) A “woman” is a female person of the age of 18 years or over.

- e) An “adult party” is a person of the age of 18 years or over.
- f) A “child marriage” is a marriage in which one or both parties is under the age of 18.
- g) An “officiant” is any religious, civil or community leader that presides over a marriage ceremony.

The definitions for a girl/boy and man/woman here mirror those in Section 3 of the Sexual Offences Special Provisions Act.

*Consent and
Age of Marriage.*

- 5. No marriage shall be valid unless entered into freely by the full and informed consent of the parties in compliance with Section 16 of the Law of Marriage Act.

Because marriage is an institution that involves significant responsibilities, it is crucial that both parties are fully aware of and willing to undertake such responsibilities.

A number of international documents consider consent to be a vital prerequisite for marriage: UDHR Article 16(2), CEDAW Article 16(1)(b), CEDAW General Recommendation No. 21 paragraphs 11 and 16, ICCPR Article 23(3), HRC General Comment No. 28 paragraph 23, and ICESCR Article 10(1).

- a) Only persons 18 or over the age of 18 years may marry.

Tanzanian law defines the age of a child as below the age of 18 in several different contexts. For example, the voting age is set at 18 under Article 5(1) of the Constitution. Section 11 of the Law of Contracts and Order XXXI of the Civil Procedure Code only give individuals the ability to contract and to bring suits once they have attained the age of majority, which is defined under Section 2 of the Age of Majority Decree as 18. Section 3 of the Sexual Offences Special Provisions Act defines the age of sexual consent at 18. Furthermore, Section 3(3) of the Citizenship Act, Section 7(1) of the Registration Act, and Section 2(1) of the Law of Marriage Act all define the age of a child as under 18.

Moreover, the current international consensus defines a child as a person under the age of 18. See Convention on the Rights of the Child Article 1 and African Charter on the Rights of the Child Article 2.

Significantly, the African Charter on the Rights and Welfare of the Child Article 21(2), the Women’s Protocol to the African Charter Article 6(b), CRC General Comment No. 4 paragraph 20, and CEDAW General Recommendation No. 21 paragraph 36 specifically state that the marriage age for both men and women should be set at 18.

- b) No customary, traditional or religious practices may confer legal capacity on those other than the intended parties to contract marriage or on those parties who do not meet the minimum age of marriage.

This act shall be supreme and govern all marriages legally recognized in Tanzania.

The High Court has held in several cases, including *Ephrahim v. Pastory & Kaizilege*, *Jonathan v. Republic*, *Mallya v. Republic*, and *Mohamed v. Makamo*, that customary law is subordinate to the Constitution and international law. Thus, because child marriage violates fundamental rights guaranteed by the Constitution and international law, it cannot be justified by customary law.

- c) Proof of minimum age must be produced at the time of marriage. Proof of age may be established by:
 - 1) A valid birth certificate.
 - 2) If no valid birth certificate exists, proof of age may be established by medical records, school records, or certificate of identity and age issued by the ward secretary.

When Tanzanians were interviewed regarding registration of births and marriages, many noted that registration was still not widespread, particularly in the rural areas. Consequently, while the first and primary method of proof of age should be a valid birth certificate, the registration system is currently inadequate to meet this requirement. Therefore, as an interim measure, other options of proving age should be provided. For example, age may be proved by “a certificate purporting to be signed by a medical practitioner registered or licensed under the provisions of the Medical Practitioners and Dentists Ordinance as to the age of a child or young person shall be evidence thereof and shall be receivable by a court without proof of signature unless the court orders otherwise.” § 16(2) of Tanzania Children and Young Persons Act.

(a) Remedies

Remedies for Underage Party.

- 6. –
 - a) Any party who was under the age of 18 at the time of marriage can annul the marriage by petitioning a Primary or District Court at any time before he or she turns 21 years old.
 - b) An annulment of a marriage under this Section does not alter

the status of the children born to the underage couple, and each party is entitled to the property that was his or hers at the time of marriage.

- 1) To determine custody and maintenance of children, refer to sections 125–137 of the Law of Marriage Act.
- 2) To determine the division of assets jointly acquired by the couple during the marriage, the court shall consider the duration of the marriage and contributions to family property.

Under Section 96 (b) of the Law of Marriage Act, a girl could only petition a court for an annulment of her marriage while she was under the age of 18. This requirement was discriminatory because it only applied to girls married under the age of 18 and not boys. Any party to a marriage conducted in violation of this Act should be able to petition a court for an annulment before he or she reaches the age of 21.

However, in order to ensure the welfare of the couple's joint children, the children's status shall not be affected by the annulment of the marriage. The father shall remain obligated to provide for his children.

- c) A party under the age of 18 can seek damages before he or she turns 21 years old from his or her parents or guardians and the adult party to the marriage if he or she contracted the marriage after this Act came into force.
 - 1) Upon proof of minority status at marriage, a party shall be entitled to compensation for pain and suffering.
 - 2) In addition, a party may be awarded damages at the court's discretion for loss of education, loss of employment, and injury to health.
 - 3) In determining the award for damages, the court shall consider the duration of the marriage.

Because child marriage always violates a child's dignity, pain and suffering is presumed.

It is in the court's discretion to determine additional damages that are appropriate for the particular circumstances of the parties involved.

Court Injunction.

7. –

- a) Anyone can seek an injunction to prevent an underage marriage against the officiant, the parents, guardians, or adult parties to the marriage.

By empowering the court to issue injunctions to prevent child marriages, courts may become more involved in enforcing the prohibition against child marriages. This provision was modeled after The Child Marriage Restraint Act (Act No. 19 of 1929) (India), *available at* <http://law.indiainfo.com/enactments/childact.html>. An injunction prior to the marriage may prevent these marriages.

(b) *Penalties*

*Penalties for
Child Marriage.*

8. –
- a) It is an offense to consent to or to knowingly marry a person under the age of 18.
 - b) Parties participating in child marriages shall face criminal penalties:

Criminal penalties, such as fines and /or imprisonment, are common for violations of marriage laws. A search of comparative law demonstrates that States such as India, Israel, and the United States impose criminal penalties for violations of marriage laws.

Under current Tanzanian law, violators are criminally liable under §§ 148, 155 of the Law of Marriage Act.

- 1) An officiant of a marriage ceremony who knew or had reason to know that one of the parties to the marriage was under the age of 18 at the time of marriage shall be fined.
 - i. The minimum penalty shall be 100,000 Tanzanian Shillings.
 - ii. An officiant's license to perform marriages shall also be revoked.

The penalty for the officiant is revocation of the officiant's license. If officiants fear the loss of licenses and income, they will not perform the ceremonies. If no officiant presides over child marriages, child marriages will be prevented.

This penalty is mandatory. The government must take responsibility for upholding the prohibition against child marriages. Because officiants represent the government in an official capacity, officiants must be bound to uphold the law and must be penalized for violating it.

- 2) The parents or guardians of the parties and the participants of the marriage ceremony who knowingly participated in a marriage that included a party under the age of 18 may be fined 100,000 Tanzanian Shillings.

The penalty section rejects imprisonment, the current penalty under §§ 148 and 155 of the Law of Marriage Act. During the Tanzania fact-finding project, a teacher and state prosecutor indicated that the imprisonment penalty deterred rather than encouraged enforcement against child marriages. Child wives hesitate to take action if their parents, spouses, or neighbors face imprisonment.

Additionally, Section 7 of this Act rejects imprisonment because it contemplates the possibility that a child wife might be pregnant or have children. If the husband or parents are imprisoned, the child wife may not be able to secure maintenance for her children. Fines deter child marriages without penalizing the children of these marriages.

This penalty is discretionary. The government may choose to pursue the husband or parents involved but only if the husband or parents have sufficient funds. If funds are limited, it is better that available resources be devoted to the maintenance of children and payment of damages under Section 6.

- 3) The party who, at the time of the marriage, was under the age of 18 cannot be fined.
- 4) A party over the age of 18 at the time of the marriage ceremony may be fined if that party knew or had reason to know that the other party was under the age of 18 may be fined 100,000 Tanzanian Shillings.
- 5) All penalties shall be adjusted for inflation.
 - i. The Ministry of Justice and Constitutional Affairs shall annually issue new guidelines for fines incorporating any changes due to inflation.
 - ii. If the Ministry of Justice and Constitutional Affairs fails to issue new guidelines, the court shall consider inflation when imposing a fine.

The Law of Marriage Act is currently unclear regarding penalties for an underage party. It does not indicate whether the underage party would be penalized. This provision clearly sets out the expectation that the underage party did not have responsibility for the marriage. This provision is modeled after India's Child Marriage Restraint Act, 1929, which clearly exempts the underage party from fines or imprisonment. The Child Marriage Restraint Act (Act No. 19 of 1929) (India), *available at* <http://law.indiainfo.com/enactments/childact.html>.

*Penalties for
Contempt of Court.*

9. -

- a) A party who violates a court-ordered injunction under Section 6(c) of this Act, and a party who refuses to pay court-ordered damages or a fine under Sections 6(d) or 7 of this Act, shall be held in contempt of court.
- b) Such a party may be subject to a maximum of 3 months' imprisonment and further fines, in addition to the penalties set out in Section 7 of this Act, at the discretion of the court.

The court may use his/her discretion to impose a fine or imprisonment for contempt of court. The injunction penalties would be in addition to penalties in Section 7 for violating child marriage laws.

The government may choose to pursue parents or guardians, but only if they have discretionary funds. If the parents or guardians have only limited funds, all available resources should be devoted to maintenance of children and the payment of damages under Section 6.

The determination of the necessity for imprisonment will be made solely by the court. If the charged party is financially incapable of paying a fine, he/she should *not* face imprisonment. The court shall inquire into the financial resources of the violator and determine the amount and schedule of payment for unsatisfied damages or fines.

(c) Enforcement

*Enforcement
of a Remedy.*

10. -

- a) A party under the age of 18 at the time of marriage under Section 6 may obtain assistance in seeking a remedy from the district office of the Social Welfare Department or an NGO.
- b) A party under the age of 18 at marriage may also seek assistance from the ward tribunal, and the ward tribunal shall refer the matter to the district office of the Social Welfare Department.
- c) After receiving a request from a party to the marriage, the district office of the Social Welfare Department or NGO shall represent the party as a next-of-friend in court if the party is still under the age of 18.

The Social Welfare Department routinely deals with women's and children's issues and is thus the most appropriate body to deal with child marriage issues. Indeed, the Law Reform Commission recommended that Social Welfare officers take a more active role in ensuring children's welfare. *See, e.g., UNITED REPUBLIC OF TANZANIA, THE LAW REFORM COMMISSION OF TANZANIA REPORT OF THE COMMISSION ON THE LAW RELATING TO CHILDREN IN TANZANIA PRESENTED TO THE MINISTER FOR JUSTICE AND CONSTITUTION AFFAIRS 41, 51, 75 (Apr. 1994), available at <http://www.lrc-tz.org/publications.html>.*

Because ward tribunals are more accessible to villagers in rural areas, empowering them to assist parties will make remedies more accessible to those affected by child marriage.

NGOs are particularly effective advocates of women's and children's rights. Therefore, allowing NGOs to assist victims of child marriage will ensure better enforcement of the Act.

Pursuant to Order XXXI of the Civil Procedure Code, a person under the age of 18 does not have standing to bring an action in a court of law; consequently, an NGO or the district office of the Social Welfare Department shall petition the court on behalf of the minor as a next-of-friend.

*Enforcement
of a Criminal
Penalty.*

11. -

- a) Anyone may file a notice directly with the Social Welfare Department or the Police regarding a child marriage.
- b) Anyone may notify the Ward Tribunal regarding a known child marriage. The Ward Tribunal shall then inform the Social Welfare Department or the Police of this marriage.
- c) If the notice is received prior to the wedding, the Social Welfare officer or Police officer shall initiate proceedings for an injunction with the primary or district court.
- d) If the notice is received by the Social Welfare Department or Police after the marriage ceremony, the Officer
 - 1) shall initiate proceedings against the officiant in primary or district court to collect the fine and to revoke the officiant's license,
 - 2) shall inform the claimant of other remedies permitted under this Act in Section 6, and
 - 3) may initiate proceedings in primary or district court to collect a fine from the parent, guardian, or party over the age of 18 who consented to or participated in the underage marriage.

Although the *Law of Marriage Act* subjects parties, parents, guardians, and other participants to imprisonment in §§ 148 and 155, the law does not indicate who is responsible for monitoring or enforcing the law. Responses from the law enforcement community during a series of interviews highlighted confusion. When we spoke with a police commander, he informed us that child marriage, even though it carries criminal penalties, “is not a criminal activity; it is a social activity. If there is an offense, Social Welfare will take action.” However, the Assistant Commissioner of the Social Welfare Department and the Principal Social Welfare Officer at the local Ilala office did not know of a single case of child marriage where action was taken. Furthermore, the Assistant Director of the Directorate of Public Prosecution assured the fact-finding interviewers that the criminal nature of the child marriage violation brought it under the jurisdiction of the police. The new proposed bill clearly identifies that both of these government bodies are responsible for taking action.

The law expressly permits anyone to file a complaint with the local government official. By localizing the complaints and permitting complaints from anyone, this section hopes to encourage community-reporting. The local government official, familiar with the government, courts, and NGOs, can then begin the proceedings through the appropriate legal channels.

The local ward tribunal, social welfare department, or police department should inform the complainant of the possibility of collecting damages in Section 6. Additionally, the ward tribunal, social welfare department, or police department should refer the complainant to NGOs or to Social Welfare officers who could assist in representing the claim in court.

The Tanzanian Law Reform Commission advises involving the ten cell leader, the ward tribunal, and the social welfare offices to better protect general children’s rights. See the UNITED REPUBLIC OF TANZANIA, THE LAW REFORM COMMISSION OF TANZANIA REPORT OF THE COMMISSION ON THE LAW RELATING TO CHILDREN IN TANZANIA PRESENTED TO THE MINISTER FOR JUSTICE AND CONSTITUTION AFFAIRS, ¶¶ 124, 209 (Apr. 1994), available at <http://www.lrc-tz.org/publications.html>.

- 4) Fines shall be paid directly to the Social Welfare Department office or to the Police.

The fines are paid to the social welfare office and the police to assist in covering operational expenses and to provide an incentive for enforcement.

*Enforcement
through Education.*

12. –

During interviews conducted in Tanzania, it was discovered that many Tanzanians, even within the legal community, did not have knowledge of and/or access to many domestic and international laws. For example, a primary court judge interviewed on March 10, 2005 in Kisarawe noted that while she was interested in learning more about Tanzania's newer laws and international obligations, in many rural areas even judges are not informed of such laws and/or have no way of obtaining information about a law even if they are cognizant of its existence. For this reason, it is necessary to place strong emphasis on educating government officials as well as everyday citizens about the new age of marriage laws in order to increase the law's reach and ultimate effectiveness.

As the Law Reform Commission indicated, child rights are not currently protected because the "community is not quite well conversant with relevant child laws and the existing social framework of child care and maintenance. It has also been noted that the community has not been able to resolve various child-related problems." UNITED REPUBLIC OF TANZANIA, THE LAW REFORM COMMISSION OF TANZANIA REPORT OF THE COMMISSION ON THE LAW RELATING TO CHILDREN IN TANZANIA PRESENTED TO THE MINISTER FOR JUSTICE AND CONSTITUTION AFFAIRS 16 (Apr. 1994), *available at* <http://www.lrc-tz.org/publications.html>.

- a) To promote enforcement of this Act, the Administrator General shall educate all officials currently licensed and all applicants seeking licenses to marry regarding the provisions of this Act.

Because marriage officiants are the ones most directly involved in legitimizing marriages, education should be targeted at ensuring that they in particular are cognizant of and apply the provisions of this act.

- b) The Ministry of Community Development, Women and Children shall produce radio and television programmes in order to educate the public regarding the provisions of this law.
 - 1) The Administrator General shall send annual reports to the Minister of Community Development, Women and Children assessing compliance with this Act.

Annual reports monitored by a responsible body are necessary to ensure continued awareness and compliance with the law.

Because the Ministry of Community Development, Women and Children is actively involved in women's and children's affairs, it is the most appropriate body to monitor compliance with these provisions.

Radio and television programs have been shown to be particularly effective media of communication to educate the public. Radio is especially accessible to individuals who live in rural areas. For example, the Women's Legal Aid Centre has used its "Mwangaza" radio program to educate rural communities about public interest, social development, and "burning nationwide" issues.

- c) Judicial, social welfare, customary, and police officials shall be sent information regarding the provisions of this law.

Many members of the community must be educated about this law, especially those who have a role in legitimizing marriages and enforcing the laws in order to ensure the law's application and thus effectiveness.

- d) The Ministry of Education shall be responsible for developing and distributing a curriculum that instructs girls and boys in primary school that they only have a right to marry once they turn 18.

By educating the public at the primary school level, children can learn about their rights from an early age. This leads to a greater possibility that they will assert these rights if necessary.

*Enforcement
through Registration.*

13. –

Due to faulty registration systems, child marriages cannot be monitored, and the prohibition against them cannot be enforced. The inadequacy of registration systems and the need to improve registration systems was noted in the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 2018 (XX), 20 U.N. GAOR Supp. (No. 14) at 36, U.N. Doc. A/60141 (1965), available at <http://www1.umn.edu/humanrts/instreet/o2rcmar.htm>. See also UNICEF/Innocenti Research Centre, *Early Marriage: Child Spouses*, INNOCENTI DIGEST, Mar. 2001, available at <http://www.unicef-icdc.org/publications/pdf/digest7e.pdf>.

- a) The Administrator General shall establish mobile registration units to be deployed in the rural areas to record births, marriages, and divorces.

The Committee on the Rights of the Child recommended that Tanzania utilize mobile registration units to improve registration: “The Committee encourages the State party to introduce practical measures to facilitate birth registration, such as the introduction of mobile birth units.” *See Consideration of Reports Submitted by State Parties: United Republic of Tanzania*, Committee on the Rights of the Child, U.N. GAOR, 27th Sess., Supp. No. 156, ¶ 35, U.N. Doc. CRC/C/15/Add.156 (2001), available at <http://www1.umn.edu/humanrts/crc/tanzania2001.html>.

- b) Mobile registration units shall register new births, marriages, and divorces, as well as record late and delayed registrations.
- c) Mobile registration units shall educate the public regarding the benefits of registration and the provisions of this Act.

Many interviewees cited lack of awareness and education as the reason that Tanzanians violated the prohibition against child marriage. The Tanzanian Administrator General indicated that lack of registrations was partially due to lack of public awareness. Mobile Registration Units can serve as a powerful tool to reach people in rural areas and educate them about this new law.

Education Regulations.

14. -

- a) All Education Regulations penalizing pregnant or married students by expulsion are hereby repealed.
- b) A student who marries or becomes pregnant during his / her school years shall be permitted to continue his / her education.

The Education Regulations that penalize pregnant or married girls prevent girls from obtaining an education must be repealed. The Education (Expulsion and Exclusion of Pupils from Schools) Regulations 2002, Sections 4(b)-(c), Government Notice (GN) 295/2002.

Over 3,000 girls are expelled annually from school due to pregnancy or marriage under these regulations. *See Revised Initial Report: United Republic of Tanzania*, Committee on the Rights of the Child, 27th Sess., at 28, U.N. Doc. CRC/C/8/Add. 14/REV. 1 (Sept. 25, 2000), available at <http://documents.un.org>.

These regulations need to be repealed in order to protect girls’ right to education guaranteed to them in the following provisions: Article 11 of the Tanzanian Constitution, Article 26 of the UDHR, Articles 10, 13 of the ICESCR, Articles 5, 10, 14, 16 of CEDAW, Articles 28, 29 of CRC, Articles 17, 25 of the African Charter, and Article 11 of the African Charter on the Rights and Welfare of the Child.

PART III
TRANSITIONAL PROVISIONS

Conflict of Laws.

15. If a conflict exists between this Act and any other laws, this Act shall prevail.

Existing Law.

16. The provisions of the Law of Marriage, the Law of Persons, the Sexual Offenses Special Provisions, and the Islamic Restatement Act identified in the schedule shall be amended or repealed in the manner required.

SCHEDULE

1. Section 13 of the Law of Marriage Act of 1971 is repealed in its entirety.
2. Section 17 of the Law of Marriage Act of 1971 is repealed in its entirety.
3. Section 38(1)-(a) of the Law of Marriage Act of 1971 is repealed in its entirety.
4. Section 39(c) of the Law of Marriage Act of 1971 is repealed in its entirety.
5. Section 96(1)-(b) of the Law of Marriage Act of 1971 is repealed in its entirety.
6. Section 97(2) of the Law of Marriage Act of 1971 is repealed in its entirety.
7. Section 148 of the Law of Marriage Act of 1971 is repealed in its entirety.
8. Section 130(2)(e) of the Sexual Offenses Provision Act of 1998 is repealed in its entirety. It is replaced by: "It shall be an offense of rape to have carnal knowledge of any person under the age of 18."
9. Section 5 of the Islamic Law (Restatement) Act is repealed in its entirety.
10. Section 6 of the Islamic Law (Restatement) Act is repealed in its entirety.
11. Section 30 of the Islamic Law (Restatement) Act is repealed in its entirety.
12. Section 31-1(2) of the Islamic Law (Restatement) Act is repealed in its entirety.
13. Section 32 of the Islamic Law (Restatement) Act is repealed in its entirety.
14. Section 37-(1) and 37-(2) Exception of the Islamic Law (Restatement) Act is repealed in its entirety.
15. Section 38 of the Islamic Law (Restatement) Act is repealed in its entirety.
16. Rules 2-4 and 86A of Government Notice 279 are hereby repealed in their entirety.
17. Rule 4 of Government Notice 279 is repealed in its entirety. It is replaced by: "After attaining the age of 18, an individual is free to marry."
18. Rule 164 of Government Notice 279 is repealed in its entirety.

APPENDIX B:
GUARDIANSHIP ACT 2005

ARRANGEMENT OF SECTIONS

Section Title

PART I
PRELIMINARY PROVISIONS

1. Short Title and Commencement
2. Application
3. Amended and Repealed Provisions

PART II
GUARDIANSHIP

4. Definitions
 - (a) *Jurisdiction*
5. Jurisdiction to Appoint a Guardian
 - (b) *Guardianship over Adults*
6. For Whom a Guardian May be Appointed
7. Duties of a Guardian with an Adult Charge
8. Guardianship over Mentally Incapacitated Adults
 - (c) *Guardianship/Custody over Children*
9. Rights and Responsibilities of a Husband and Wife
10. Best Interests of the Child
11. Duties of a Parent or Guardian
12. Parents as Primary Guardians
13. Procedures for Determining Guardianship over Children

PART III
TRANSITION PROVISIONS

14. Conflict of Laws
15. Existing Law

A BILL
for

An Act to Provide Procedures to Determine Guardianship.

PART I
PRELIMINARY PROVISIONS

*Short Title and
Commencement.*

1. This act shall be cited as the Guardianship Act, 2005 and shall come into force on such date as the Parliament determines

Application.

2. This Act shall apply in Tanzania Mainland.

Amended and Repealed Provisions.

3. The sections set forth in the Schedules are hereby amended or repealed in the manner set forth.

PART II GUARDIANSHIP

Whereas Tanzania committed itself to amending discriminatory laws by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women which requires “State Parties . . . to take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” in Article 2(f).

Whereas Tanzania committed itself by ratifying the International Covenant on Civil and Political Rights, Article 2(2), “to adopt[ing] such legislative. . . measures as may be necessary to give effect” to the rights of dignity, property, protection of family, and equal protection.

Whereas Tanzania committed itself to eliminate discrimination against women in matters relating to marriage and family relations by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women, which guarantees men and women “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children” in Article 16(d).

Whereas Tanzania committed itself, by ratifying the African Charter on the Rights and Welfare of the Child, Article 4(1), to ensure that “in all actions concerning the child. . . the best interests of the child shall be the primary consideration.”

Whereas the guardianship laws equate adult wives with the insane and minors, depriving women of their right to dignity.

Whereas the practice of guardianship does not protect women and children but establishes a system of abuse where a family member is permitted to confiscate property without caring for the deceased’s family with little legal remedy.

Whereas the practice of guardianship automatically assigns custody rights to the father or his relatives without consideration of the welfare or best interests of the children.

Whereas the practice of guardianship laws discriminate between men and women because only men can be guardians, and only men can appoint and dismiss guardians.

The above section outlines the violation of the following rights:

1. *The Right to Dignity* is provided for in Articles 9, 12 of the Tanzanian Constitution, Articles 1, 6, 16, 22, 23 of the UDHR, Articles 10, 13 of the ICESCR, Articles 8, 23 of the ICCPR, the preamble and Article 16 of CEDAW, the preamble of the CRC, the preamble and Article 5 of the African Charter, and the preamble and Article 21 of the African Charter on the Rights and Welfare of the Child.
2. *The Right to Property* is provided for in Article 24 of the Tanzanian Constitution, Article 17 of the UDHR, Articles 14, 15, 16 of the CEDAW, and Article 14 of the African Charter.
3. *The Right to Protection of the Family* is provided for in Article 16 of the Tanzanian Constitution, Articles 12, 16, 19, 25 of the UDHR, Article 10 of the ICESCR, Articles 17, 23 of the ICCPR, Articles 5, 10, 16 of the CEDAW, Articles 7, 9, 16, 18 of the CRC, Articles 18, 29 of the African Charter, and Articles 10, 18, 19 of the African Charter on the Rights and Welfare of the Child.
4. *The Right to Protection of the Child* is provided for in Articles 24, 25 of the UDHR, Article 10 of the ICESCR, Articles 23, 24 of the ICCPR, Articles 5, 16 of the CEDAW, Articles 3, 9, 12, 18, 24, 31 of the CRC, Article 18 of the African Charter, Articles 4, 12, 19, 20 of the African Charter on the Rights and Welfare of the Child.
5. *The Right to Equal Protection* is provided for in Articles 9, 12, 13(5) of the Tanzanian Constitution, Articles 3, 14, 16, 24, 26 of the ICCPR, Article 3 of the ICESCR, Articles 2, 7 of the UDHR, Articles 1, 2, 3, 5, 13, 15, 16 of CEDAW, Article 2 of the CRC, Articles 2, 3, 5, 7, 14, 18 of the African Charter, and Article 3 of the African Charter on the Rights and Welfare of the Child.

Now, therefore be ordained and enacted as follows:

Definitions.

4. In this Act unless the text otherwise requires –
 - a) A “child” is a person under the age of eighteen.
 - b) An “adult” is a person of the age of eighteen years or over.
 - c) A “guardian” is a person with the responsibility of providing care for and serving the best interests of his or her charge.

- d) A “guardian over a child” is a person who, in addition to having all the responsibilities of a guardian, has legal and physical custody of that child.
- e) A “charge” is a person who is under the care of a guardian.
- f) “The Law of Persons” means a Local Customary Law (Declaration) Order issued pursuant to Schedule 1 *in Judicature and Application of Laws Act*

The definition of the child is set at eighteen to achieve consistency with Tanzanian and international law. Section 2 of the Age of Majority Decree defines the age of majority at 18 years. Individuals must be 18 to vote under § 5(1) of the Constitution, enter Contracts under § 11 of the Law of Contracts, and bring an action in court under Order XXXI of the Civil Procedure Act. Similarly, § 3(3) of the Citizenship Ordinance, § 7(1) of the Registration Ordinance, § 3 of the Sexual Offences Special Provisions Act and § 2(1) of the Law of Marriage Act itself define a child as person under the age of 18. Additionally, Article 1 of the Convention on the Rights of the Child and Article 2 of the African Charter on the Rights and Welfare of the Child define a child as a person under the age of 18.

Tanzanian laws alternately use the terms custody and guardianship when describing the custody, care and maintenance of children. Section 8(1) of the Affiliation Ordinance and §§ 125, 128, 133-4 of the Law of Marriage Act refer to custody of children. Codified customary law in Government Notice No. 436 uses the term guardianship. The term guardianship, as used in this Act, refers to the guardian, custodian, or caretaker of any child.

(a) Jurisdiction

Jurisdiction to

Appoint a Guardian.

5. –

- a) Original jurisdiction to appoint a guardian under the provisions of this Act shall be vested in the High Court, a court of a resident magistrate, a district court, and a primary court.
- b) A clan council has no jurisdiction to appoint a guardian for any person under this Act.

(b) Guardianship over Adults

For Whom a Guardian

may be Appointed.

- 6. A guardian may be appointed for an adult only if that adult is mentally incapacitated.

*Duties of a Guardian
with an Adult Charge.*

7. It shall be the duty of a guardian with an adult charge, to the degree that the charge cannot do so him or herself, ensure the necessities of—
 - a) Adequate Diet;
 - b) Clothing;
 - c) Shelter;
 - d) Medical attention; and
 - e) All other aspects of a decent standard of living.

Adult charges are afforded the same rights as any other adult. The civil, political, economic, social, and cultural rights afforded to all persons in the ICCPR and ICESCR are equally afforded to incapacitated persons. This has been reaffirmed by the international community in the Declaration on the Rights of Disabled Persons, proclaimed by General Assembly resolution 3447 on 9 December 1975. The guardian's responsibilities to provide a decent standard of living to his or her adult charge is necessary to ensure realization of all the rights guaranteed to that charge.

The above provision recognizes that incapacitated persons may need more care than other adults, but it also respects their dignity. The right to dignity is guaranteed in the preamble of every major human rights document, and the Declaration on the Rights of Disabled Persons reaffirms this right for incapacitated persons. Thus, out of respect for the charge's dignity, a guardian provides care only to the degree that the charge cannot do so him or herself.

*Guardianship over
Mentally Incapacitated
Adults.*

8. If a person is mentally incapacitated, a guardian shall be appointed by court order.
 - a) The court will consider testimony of the person purported to be mentally incapacitated, of medical and other experts, and of any other person the court deems appropriate, to determine—
 - 1) Whether that person suffers any mental incapacity and,
 - 2) To what degree that person needs a guardian.
 - b) After making this determination, the court will appoint a guardian and confer that guardian with responsibilities appropriate for the care of that particular charge.

(c) *Guardianship/Custody over Children*

*Rights and Responsibilities
of a Husband and Wife.*

9. –

- a) A husband and a wife have equal rights and responsibilities in marriage to the best of their abilities.
 - 1) These include but are not limited to the power to acquire and administer property, enter contracts, obtain credit, and enter into financial transactions on behalf of the household.
 - 2) The husband must continue to perform the duties conferred upon him by Section 63 the Law of Marriage Act, but he may not prevent his wife from participating equally in the marriage.
- b) Wives and husbands, independent of death or divorce, have the same legal rights and responsibilities as parents.
 - 1) This right may not be revoked without a court order, pursuant to section 13(b) of this Act or, in the case of divorce, to sections 125 and 126 of the Law of Marriage Act.

Rules 42 through 53 of Government Notice No. 436 in the Law of Persons and Section 5(1)(a) of the Islamic Restatement Act perpetuate the bias that women are incapable of making decisions and running their households. Further, it is inconsistent with Tanzanian law, which bestows certain rights and responsibilities on citizens upon reaching the age of eighteen, including the right to vote, TANZ. CONST. ch.1, art. 5(1), contract and own land. Article 30(1) of the Tanzanian Constitution forbids any person from interfering with the rights of another person.

Subsection (a)(1) lists some of the shared rights and responsibilities of a husband and wife. This list is not exhaustive. Article 16(1)(c) of CEDAW guarantees men and women the same rights and responsibilities during marriage and at its dissolution. Specifically, CEDAW Article 16(1)(h) refers to the same right for both spouses in “the ownership, acquisition, management, administration, enjoyment and disposition of property.” This language is mirrored in section 56 of the Law of Marriage Act which provides that “a married woman shall have the same right as a man to acquire, hold, and dispose of property, whether movable or immovable, and the same right to contract, the same right to sue and the same liability to be sued in contract or otherwise.” CEDAW Articles 16(1)(d)–(f) provide for the same rights and responsibilities pertaining to children. Consequently, section 9(a) of this statute provides equality to a husband and wife in *every* scenario regarding the rights and responsibilities in marriage and in matters relating to children.

*Best Interests of the
the Child.*

10. In all actions concerning children, the best interests of the child shall be paramount.
 - a) The “best interests” of the child refers to the fostering of the child’s physical, intellectual and emotional well-being.
 - b) A child’s opinion on what is in his/her best interests shall be considered by the judicial body determining custody.
 - c) The judicial body considering “best interests” will also consider which environment will protect and foster the child’s rights as identified in this Act as well as in the United Nations Convention on the Rights of the Child and the Organization for African Unity Charter on the Rights and Welfare of the African Child.

Section 10 reaffirms the best interests of the child as the paramount consideration in any matters relating to the child. This standard is articulated in Law of Marriage Act § 125(2), Article 3(1) of the Convention on the Rights of the Child, Article 4(1) of the African Charter on the Rights and Welfare of the Child, and CEDAW Articles 16(1)(d) and 16(1)(f).

Section 10(c) incorporates the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. These documents, together, are the most comprehensive statement on the rights of the child. To preserve the best interests of the child, any determination of “best interests” should consider all of the rights guaranteed to the child, within this act, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child.

*Duties of a
Parent or Guardian.*

11. It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular that duty gives a child the right to-
 - a) Adequate Diet;
 - b) Clothing;
 - c) Shelter;
 - d) Education and Guidance;
 - e) Immunisation; and
 - f) Medical Attention.

This provision identifies the rights of a child that are expected to be protected by a guardian or parent, regardless of marital status. These duties to the child are consistent with the child's right to education and health, as provided by Articles 11 and 14 of the African Charter on the Rights of the Child. They are also consistent with Article 27(3) of the Convention on the Rights of the Child, which recognizes the importance of "nutrition, clothing, and housing." This provision was copied from the Uganda Children's Act, § 5(1).

*Parents as Primary
Guardians.*

12. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.
 - a) No child shall be separated from his or her parents, except when a court, pursuant to section 13(b) of this Act, determines that such separation is in the best interests of the child.
 - b) A child's parents are the automatic and default guardians of the child unless a court, pursuant to section 13(b) of this Act, orders otherwise.

Sections 12(a) and (b) recognize a child's right to remain with his or her parents, as provided for in Article 9(3) of the Convention on the Rights of the Child and Article 19(1) of the African Charter on the Rights and Welfare of the Child. Section 12(a) is modelled after the Uganda Children's Act, § 4(1), which identifies the right of children to live with their parents.

- c) Upon the legal separation or divorce of the parents, the guardianship of a child shall be determined solely by considering the child's best interests, pursuant to sections 125 and 126 of the Law of Marriage Act.

According to Section 12(c), in line with the Law of Marriage Act § 125(2), the welfare of the child remains the most important factor in making custody determinations. Subsection (d) places greater importance on the welfare of the child than the Law of Marriage Act by providing that the welfare of the child is the *sole* consideration in custody considerations.

- d) Upon the death of either parent, guardianship of a child is automatically assigned to the surviving parent.

- e) No parent may assign a guardian to maintain custody over the children if the other parent is alive and capable.

Subsections (d) and (e) secure the right of the child to remain with his or her parents by preventing a guardian from being appointed when at least one of the child's parents is alive and capable. In addition, subsection (d) preserves the widow's right to remain with her children, guaranteed in Article 20(b) of the Women's Protocol to the African Charter.

*Procedures for
Determining Guardianship
over Children.*

13. –

- a) If neither parent may serve as guardian because of incapacity, lack of fitness, or death, the court shall appoint a near relative from within the child's clan or a suitable foster parent to obtain guardianship of the child.
 - 1) The child's best interests shall be the ultimate inquiry in awarding guardianship of the child.
 - 2) A parent declared unfit and removed as guardian pursuant to this section shall not, on the death of the other parent, be entitled to the custody of such child unless the court otherwise orders.
- b) If a court determines that the guardian is not serving the best interests of the child, the child shall be removed from that person's guardianship and the court shall appoint a new guardian.
 - 1) Any person concerned with the welfare of the child, including the child himself, may file a complaint with the Social Welfare Department.
 - (i) If the Social Welfare Department does not maintain an office in the jurisdiction where the person filing the complaint resides, the person may file the complaint with the Ward Tribunal.
 - (ii) The Ward Tribunal or Social Welfare Department office receiving the complaint shall forward the complaint to the appropriate Social Welfare Department office in the jurisdiction of the child's residence.
 - 2) Upon receipt of a complaint, the Social Welfare Department will-
 - (i) Conduct thorough investigations of complaints about the guardian;

- (ii) File a complaint in court; and
 - (iii) Disclose to the court the results of the investigation as to whether the guardian is or is not acting in the best interest of the child.
- 3) The Court shall consider the recommendation of the Social Welfare Department, as well as any other evidence presented by the child, complainant, and guardian.
 - 4) If the guardian is the parent of the child, the presumption shall be that the parent is a fit and capable guardian.
 - (i) This presumption is rebuttable with evidence that it is not in the child's best interests to be under the surviving parents' guardianship.

Subsections (a) and (b) create a system for appointing a new guardian and procedures for complaints regarding the current guardian. A child cannot be removed from a guardian's custody without a court determination. The best interests of the child are of paramount consideration in this determination. This is consistent with Article 3(1) of the Convention on the Rights of the Child and Article 4(1) of the African Charter on the Rights and Welfare of the Child. Subsection (a) responds to situations where the parent is not a suitable guardian for the child. Subsection (b) allows for complaints to be lodged by anyone concerned that the child's guardian is not serving the best interests of the child. By not limiting the set of complainants to a specific group of people, subsection (b) decreases the likelihood that social pressure will prevent harms committed against a child from being reported.

Subsection (b)(1) replaces Section 127 of the Law of Marriage Act with a broader provision that allows "[a]ny person concerned with the welfare of the child" to file a complaint with the Social Welfare Department. Subsection (a)(2) mirrors the language of Section 127(2) of the Law of Marriage Act to ensure that an unfit parent cannot be restored guardianship over a child without a court determination that it is in the child's best interests.

- c) Any person who removes a child from his or her parent without a court order is guilty of the crime of child stealing as set out in section 169 of the Penal Code and is subject to criminal liability.

PART III
TRANSITION PROVISIONS

Conflict of Laws.

14. If a conflict exists between this Act and any other laws, this Act shall prevail.

Existing Law.

15. –
- a) The provisions of the Law of Marriage Act, the Law of Persons and the Islamic Restatement Act identified in schedule 1 are repealed as stated in the schedule.
 - b) The provisions of the Penal Code identified in schedule 2 are amended as stated in the schedule.

SCHEDULE 1 – Repealed Provisions

- 1. Rules 1(a) and 1(d) of Government Notice No. 436, Decree of 1963, Schedule 1 Laws on Guardianship.
- 2. Rules 2 through 27 of Government Notice No. 436, Decree of 1963, Schedule 1, Laws on Guardianship.
- 3. Rules 42 through 53 of Government Notice No. 436, Decree of 1963, Schedule 1, the Laws on Guardianship.
- 4. Rule 27 of Government Notice No. 436, Decree of 1963, Schedule 2, Laws of Inheritance.
- 5. Rule 62 of Government Notice No. 279, Decree of 1963, Schedule 1, Laws of Persons.
- 6. Rule 64 of Government Notice No. 279, Decree of 1963, Schedule 1, Laws of Persons.
- 7. Rule 104 of Government Notice No. 279, Decree of 1963, Schedule 1, Laws of Persons.
- 8. Rule 125 of Government Notice No. 279, Decree of 1963, Schedule 1, Laws of Persons.
- 9. Rule 175 of Government Notice No. 279, Decree of 1963, Schedule 1, Laws of Persons.
- 10. Rule 178 of Government Notice No. 279, Decree of 1963, Schedule 1, Laws of Persons.
- 11. Section 125(2)(c) of the Law of Marriage Act of 1971.
- 12. Section 127 of the Law of Marriage Act of 1971.
- 13. Section 5(1)(a) of the Islamic Law (Restatement) Act.

SCHEDULE 2 – Amended Provisions

1. Section 169 of the Penal Code is hereby amended by inserting the following subsection:

“(1) For the avoidance of doubt, any person who removes a child from his or her parent without a court order is guilty of the crime of child stealing as set out in this section.”