

## INTERNATIONAL STANDARDS REGARDING CHILD MARRIAGE AND AFRICAN LEGAL SYSTEMS

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### ABSTRACT

*Many international human rights instruments guarantee a child's right to be free from early and forced marriage. However, these rights are routinely violated with impunity. The United Nations considers child, early, and forced marriage and unions a violation of the human rights and fundamental freedoms of the child. This practice is particularly pervasive throughout Africa. Although significant progress has been made to eradicate this insidious and harmful practice, in 2023, over 130 million girls in Africa were married before eighteen years of age, which is the minimum age for marriage set by the African Charter on the Rights and Welfare of the Child. The United Nations Children's Fund set a target date of 2030 to eradicate child, early, and forced marriage and unions, but progress made towards this goal is lacking. Child, early, and forced marriage and unions have wide-ranging, adverse consequences on the enjoyment of human rights, including the rights to education and sexual health. Unfortunately, entrenched adverse customs and traditions continue to force children, especially girls, into early marriage. To help eradicate child marriage, many international human rights instruments instruct States to establish and maintain official birth and marriage*

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*registries, which can provide the evidence needed to prosecute those who perform or promote child marriage. To achieve the United Nations Children's Fund's goal, each African country must sign, ratify, and domesticate all relevant regional and international human rights instruments. Next, States must ensure that their customary, statutory, and constitutional laws conform to the provisions of international and regional human rights instruments. Finally, States must provide themselves with governing processes undergirded by separation of powers with checks and balances. The checks and balances must be supported by an independent judiciary and a politically active civil society. In 2016, the Southern African Development Community's Parliamentary Forum designed and adopted a Model Law which States may use to draft and adopt legislation to eradicate child, early, and forced marriage and unions and protect children already in marriage.*

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## INTRODUCTION

Although many international and regional human rights instruments enumerate and guarantee children's rights, the most important are the U.N. Convention on the Rights of the Child ("UNCRC") and the African Charter on the Rights and Welfare of the Child ("African Child Charter").<sup>1</sup> These human rights instruments are important because they deal specifically with children's rights—the UNCRC guarantees children's rights in general, and the African Child Charter enumerates and guarantees the rights of children in Africa. In 2016, U.N. Women stated that over 70 million women and girls marry before they are eighteen years old.<sup>2</sup> Sadly, a third of those women and girls were married before they turned fifteen years old.<sup>3</sup> In regions such as Latin America and West Africa, "early marriages are commonplace and the underlying gender dimensions to this phenomenon often have negative lifelong consequences due to the seriousness of their impacts."<sup>4</sup>

In recent years, the U.N. has adopted the term "child, early and forced marriage and unions" ("CEFMU") to describe marriages that take place before each of the parties reaches the age of eighteen.<sup>5</sup> As defined in Article 1 of the UNCRC, a child is "every human being below the age of eighteen years unless under the law applicable to that child, majority is attained earlier."<sup>6</sup> The law governing CEFMU may

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1. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC]; African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 [hereinafter African Child Charter].

2. U.N. WOMEN, REFORMING THE LEGISLATION ON THE AGE OF MARRIAGE: SUCCESSFUL EXPERIENCES AND LESSONS LEARNED FROM LATIN AMERICA AND THE CARIBBEAN 7 (2016) [hereinafter U.N. Women].

3. *Id.*

4. *Id.*

5. U.N. WOMEN & WORKING GROUP OF THE JOINT INTER-AGENCY PROGRAMME TO END CHILD MARRIAGE AND EARLY UNIONS IN LATIN AMERICA AND THE CARIBBEAN, CHILD, EARLY AND FORCED MARRIAGE AND UNIONS: HARMFUL PRACTICES THAT DEEPEN GENDER INEQUALITY IN LATIN AMERICA AND THE CARIBBEAN 9 (2022) [hereinafter WORKING GROUP].

6. WORKING GROUP, *supra* note 5, at 9–10; UNCRC *supra*, note 1, at art. 1. This implies that States can enact laws stating that majority is attained at an age lower than eighteen years. This represents a loophole in the UNCRC that can be exploited by some States to enable child marriage. For example, the Constitution of Nigeria

also include “marriages where both spouses are 18 or older but other factors make them unready to consent to marriage, such as their level of physical, emotional, sexual and psychosocial development, or a lack of information regarding a person’s life options.”<sup>7</sup> The term “early” describes how the marriage of women under age eighteen years interferes with their schooling, entry into the workforce, and their physical and mental development.<sup>8</sup> The term “forced” describes any marriage or union which is devoid of full and free consent of one of the parties or where a party cannot freely end the marriage.<sup>9</sup> “Forced” takes into account the inequalities between men and women that give rise to CEFMU and questions whether a girl truly has a choice in the partnership.<sup>10</sup> Finally, the term “unions” includes informal marriage or free unions.<sup>11</sup>

Although progress has been made during the last several decades to end the insidious traditional practice of CEFMU, it remains pervasive throughout many countries in Africa.<sup>12</sup> In 2022, the United Nations

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provides that the age of majority is 18 years old. *See* CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, ACT NO. 24, May 5, 1999, at sect. 29(4)(a). However, sect. 29(4)(b) provides that “any woman who is married shall be deemed to be of full age.” *See id.* at sect. 29(4)(b). This loophole has been exploited in some Nigerian states to perpetuate child marriage. For example, one of the senators opposing a constitutional amendment to remove sect. 29(4)(b) has argued that doing so would discriminate against Muslims who believe that marriage should be based on maturity, which is attained when a girl reaches the age of puberty. One such legislator is Senator Ahmed Sani Yerima, who is said to have married a 13-year-old Egyptian girl in 2010. *See* Funmi Falala, *Child Marriage and the Constitution*, VANGUARD (July 25, 2013), <https://www.vanguardngr.com/2013/07/child-marriage-and-the-constitution/>. *See also* Brianna Lee, *Child Marriage*, COUNCIL ON FOREIGN RELATIONS (Dec. 18, 2013), <https://www.cfr.org/article/child-marriage> (noting that Islamic law “allows marriage not by age but by maturity, which is attained once a girl reaches the age of puberty”).

7. Office of the U.N. High Commissioner for Human Rights, *Preventing and Eliminating Child, Early and Forced Marriage*, U.N. Doc. A/HRC/26/22, ¶ 5 (Apr. 2, 2014).

8. WORKING GROUP, *supra* note 5, at 9.

9. Office of the U.N. High Commissioner for Human Rights, *supra* note 7, ¶ 6.

10. *Id.*, at 9.

11. *Id.*, at 10.

12. Divya Srinivasan, *To End Child Marriage in Southern and Eastern Africa, Governments Need to Strengthen Laws and Implementation*, INTER PRESS SERVICE (Oct. 10, 2023), <https://www.ipsnews.net/2023/10/end-child-marriage-southern-east-africa-governments-need-strengthen-laws-implementation/> (providing data on the pervasiveness of child and forced marriage in Southern and Eastern Africa). *See also*

Children’s Fund (“UNICEF”) reported that as many as 12 million girls are forced to marry every year before age eighteen.<sup>13</sup> As of May 2023, over 640 million women were married in childhood.<sup>14</sup> Sub-Saharan Africa and South Asia have the highest rates of child marriage in the world.<sup>15</sup> One hundred and twenty-seven million and 290 million sub-Saharan African and South Asian women, respectively, were married during their childhood.<sup>16</sup>

While recent data shows that the prevalence of CEFMU is declining, there is “substantial heterogeneity in rates of reduction across and within regions and countries, with some high-prevalence areas seeing stagnating progress and even increases.”<sup>17</sup> Although substantial progress has been made in “reducing the prevalence of child marriage” in the Middle East and North Africa during the past 25 years, progress appears to have stalled during the last decade (2011–2021).<sup>18</sup> UNICEF reported that progress throughout the world “has been driven predominantly by a decline in India, though this country is still home to the largest number of child brides worldwide.”<sup>19</sup>

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*Forced and Child Marriage in Africa as a Manifestation of Gender-Based Violence and Inequality*, WALK FREE (May 28, 2019), <https://www.walkfree.org/news/2019/forced-and-child-marriage-in-africa-as-a-manifestation-of-gender-based-violence-and-inequality/> (emphasizing the pervasiveness of child and forced marriage in Africa).

13. UNICEF, CELEBRATING THE FIFTH ANNIVERSARY OF THE UNFPA-UNICEF GLOBAL PROGRAMME TO END CHILD MARRIAGE IN EAST AND SOUTHERN AFRICA: REFLECTING ON THE PROGRESS MADE AND HOW TO MOVE FORWARD BOLDER AND BETTER 3 (2022).

14. UNICEF, IS AN END TO CHILD MARRIAGE WITHIN REACH? LATEST TRENDS AND FUTURE PROSPECTS 2023 UPDATE 5 (2023), <https://data.unicef.org/resources/is-an-end-to-child-marriage-within-reach/> (last visited Nov. 6, 2023).

15. *Id.*

16. *Id.*

17. UNICEF, TOWARDS ENDING CHILD MARRIAGE: GLOBAL TRENDS AND PROFILES OF PROGRESS 11 (2021), <https://data.unicef.org/resources/towards-ending-child-marriage/>.

18. IS AN END TO CHILD MARRIAGE WITHIN REACH?, *supra* note 14, at 3.

19. *Id.*

The past decade in West and Central Africa was pervaded by political and economic crises.<sup>20</sup> This is highlighted in the Sahel,<sup>21</sup> where armed conflict and violent activities by extremist groups have only exacerbated conditions for vulnerable girls.<sup>22</sup> The significant global progress has not proceeded rapidly enough to meet UNICEF's goal of eliminating child marriage by 2030.<sup>23</sup> It will take another 300 years to eradicate CEFMU at the present rate of reduction.<sup>24</sup> UNICEF notes that “[p]ublic-health crises, armed conflicts and climate change all contribute to a more precarious world in which families may seek ‘refuge’ for their girls in child marriage.”<sup>25</sup>

As of 2023, 290 million girls and women in South Asia were subjected to CEFMU before the age of eighteen; 127 million in sub-Saharan Africa; 95 million in East Asia and the Pacific; 58 million in Latin America and the Caribbean; 37 million in the Middle East and North Africa; 20 million in Eastern Europe and Asia; and 13 million in other regions of the world.<sup>26</sup>

In 2015, the U.N. Human Rights Council (“HRC”) recognized that CEFMU is a violation of a child’s human rights.<sup>27</sup> In addition to preventing individuals from living a life free of violence, CEFMU “has wide-ranging and adverse consequences for the enjoyment of human rights,” including the right to education and good physical health.<sup>28</sup> CEFMU disproportionately affects women and girls<sup>29</sup> and

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20. *Id.*

21. The Sahel region or Sahelian acacia savana is the vast semi-arid region of Africa separating the Sahara Desert to the north and tropical savannas to the south. The Sahel region consists of parts or all of Burkina Faso, Cameroon, The Gambia, Guinea, Mauritania, Mali, Niger, Nigeria, and Senegal. However, the Sahel Alliance consists of Mauritania, Mali, Niger, Burkina Faso, and Chad. *See* U.S. Institute of Peace, *Sahel*, U.S. INSTITUTE OF PEACE, <https://www.usip.org/sub-regions/sahel> (last visited Nov. 6, 2023).

22. IS AN END TO CHILD MARRIAGE WITHIN REACH?, *supra* note 14, at 3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 5.

27. G.A. Res. 29/8, U.N. Doc. A/HRC/RES/29/8, at 2 (July 22, 2015).

28. *Id.* at 3.

29. *Id.* at 2.

“constitutes a serious threat to multiple aspects of the physical and psychological health of women and girls.”<sup>30</sup>

Although the highest rates of CEFMU are found in South Asia and sub-Saharan Africa, this article will concentrate solely on how international standards regarding child marriage affect legal systems in Africa. Section I is devoted to an examination of the role of international and regional human rights instruments in enumerating and guaranteeing children’s rights and how CEFMU violates these rights. In Section II, this article examines factors that contribute to CEFMU. While poverty is a major driver of CEFMU in Africa, other factors, such as customs and tradition and the gaps that exist between national laws against child marriage and their enforcement, are also important determinants of child marriage in the continent. Section II also provides an in-depth examination of CEFMU from the perspective of the provisions of international and regional human rights instruments. This article shows how various international human rights law principles (e.g., best interests of the child) can help provide a more holistic understanding of child marriage and its impact on girls and their ability to realize other human rights and fundamental freedoms. How to reform African legal systems to safeguard against CEFMU and improve the protection of children’s human rights is examined in Section III. Mention is made of the South African Development Community (“SADC”) Model Law, which represents a framework that can be used by African legislators to draft and enact legislation to eradicate child marriage. Section IV is devoted to an examination of how African legal systems treat child marriage. Although international and regional institutions, such as the U.N. and the African Union, are critical to efforts to eradicate CEFMU and protect the rights of children, Africa’s municipal legal systems are considered equally important. A summary and conclusion are provided in Section V.

## I. INTERNATIONAL HUMAN RIGHTS LAW AND CHILD MARRIAGE

### A. *Introduction*

Among the international human rights treaties that enumerate and guarantee the rights of children in Africa are the UNCRC and the African Child Charter. In this section, these and other international

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30. *Id.*

treaties will be examined to determine the role that they play in guaranteeing the human rights and fundamental freedoms of African girls. In addition, this section will provide an in-depth overview of the obligations imposed on States Parties to take measures, legislative and otherwise, to meet their obligations under these international and regional human rights instruments. Finally, this section will examine some of the treaty bodies (e.g., the Committee on the Rights of the Child) that have been created by the U.N. to monitor the implementation of international treaties, as well as interpret them. The African Committee of Experts on the Rights and Welfare of the Child, which monitors the implementation of the African Child Charter and interprets this major regional treaty, will be examined.

Except for Somalia, all African countries have ratified the UNCRC.<sup>31</sup> Given that they were under-represented in the drafting of the UNCRC, African countries felt the need for a supplementary convention that specifically addresses the rights of African children. Thus, the African Child Charter reflects and emphasizes the need for African States to take measures to deal with issues specific to the recognition and protection of children's rights in the continent. Important among these are ending child marriage and the betrothal of girls and boys,<sup>32</sup> setting the minimum age for marriage at eighteen years,<sup>33</sup> and making compulsory the registration of all marriages.<sup>34</sup> As of January 2024, all African Union Member States, except five, have ratified the African Child Charter.<sup>35</sup>

In examining CEFMU in Africa, it is important to mention custom and tradition because national laws in many countries in the continent

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31. UNCRC, *supra* note 1.

32. African Child Charter, *supra* note 1, at art. 21(2).

33. *Id.* See also AFRICAN UNION COMMISSION, JOINT GENERAL COMMENT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR) AND THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (ACERWC) ON ENDING CHILD MARRIAGE 1-2 (2017) [hereinafter JOINT GENERAL COMMENT].

34. African Child Charter, *supra* note 1, at art. 21(2).

35. The five States that have not yet ratified the African Child Charter are Morocco, Sahrawi Arab Democratic Republic, Somalia, South Sudan, and Tunisia. See African Union, *African Charter on the Rights and Welfare of the Child: Status List*, [https://au.int/sites/default/files/treaties/36804-sl-AFRICAN\\_CHARTER\\_ON\\_THE\\_RIGHTS\\_AND\\_WELFARE\\_OF\\_THE\\_CHILD.pdf](https://au.int/sites/default/files/treaties/36804-sl-AFRICAN_CHARTER_ON_THE_RIGHTS_AND_WELFARE_OF_THE_CHILD.pdf) (last visited Jan. 1, 2024).



allow the marriage of children under customary law and in special situations (e.g., when they are pregnant), even if they have not yet reached the legal age for marriage.<sup>36</sup> In many communities in Africa, “the male dominated power structure conflates religious injunctions with customary practices to justify marrying off girls before puberty” and this occurs, for example, in both “the Christian traditional regions of Ethiopia” and in the “Muslim countries of Northern West Africa such as Chad, Mali, and Niger.”<sup>37</sup> Aware of the impact of customs and traditions on children’s human rights, the African Child Charter imposes an obligation on States Parties to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.”<sup>38</sup>

The African Child Charter contains two other provisions that are important to the study of CEFMU in the continent. These are the definition of a child as “every human being below the age of 18 years” and the best interests of the child principle.<sup>39</sup> States Parties to the African Child Charter are expected to harmonize all their statutory and customary laws on marriage to conform with Article 2, ensuring that only individuals who are eighteen years or older can legally marry.<sup>40</sup> The African Child Charter also states that “[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”<sup>41</sup>

The other provision is the best interests of the child principle, which states that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”<sup>42</sup> This is important because many proponents of child marriage in various communities in Africa often argue that the practice

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36. See, e.g., Maroyi Mulumeoderhwa, ‘A Girl Who Gets Pregnant or Spends the Night with a Man is No Longer a Girl’: Forced Marriage in the Eastern Democratic Republic of Congo, 20 *SEXUALITY & CULTURE* 1042, 1049, 1053 (noting that girls in eastern Congo are often forced to marry those who impregnant them).

37. Judith-Ann Walker, *Early Marriage in Africa—Trends, Harmful Effects and Interventions*, 16 *AFR. J. REPROD. HEALTH* 231, 233 (2012).

38. African Child Charter, *supra* note 1, at art. 21(1).

39. *Id.* at arts. 2 & 4(1).

40. This is made clear in Article 1. *Id.* at art. 1(1).

41. *Id.* at art. 1(3).

42. *Id.* at art. 4(1).

is carried out in the best interests of the child.<sup>43</sup> For example, Human Rights Watch has determined that in many communities in Africa, poor families, which are unable to meet their basic needs, often believe that “marrying their daughter early is an economic survival strategy: it means one less mouth to feed or educate” and that the girl would be better taken care of at the new husband’s house.<sup>44</sup> In Niger, for example, poor families force their daughters into marriage to older men “in order to obtain dowry money, which is frequently used to settle debts or for financial gain.”<sup>45</sup> Parents in Niger also see marriage as “a benefit to the young bride, with the girl’s status and respect in the community skyrocketing after marriage.”<sup>46</sup> However, many international human rights organizations consider child marriage a human rights violation and hence, it is not considered an action that is in the best interests of the child.<sup>47</sup>

The second important international convention devoted to enumerating and guaranteeing children’s rights is the UNCRC. The UNCRC does not specifically prohibit child marriage. However, it indirectly addresses and prohibits child marriage. For example, Article 2(2) imposes an obligation on States Parties to “take all appropriate measures to ensure that the child is protected against *all forms of discrimination* or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”<sup>48</sup>

Child marriage, which affects mostly girls in Africa, is a “a form of sex discrimination that stems from the parents’ belief that girls are less valuable than boys” and that girls are a major economic burden and

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43. See Caroline Crawford, *Niger’s Approach to Child Marriage: A Violation of Children’s Right to Health?*, 24 HEALTH & HUM. RTS. J. 101, 104 (2022) (for example, in Niger, “many families are motivated to marry their daughters early to alleviate the threat of harm and ensure ‘protection’ for their child”).

44. HUM. RTS. WATCH, *Ending Child Marriage in Africa*, HUM. RTS. WATCH, (Dec. 9, 2015, 11:50 PM), <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa>.

45. Crawford, *supra* note 43, at 104.

46. *Id.*

47. UNICEF, *Child Marriage*, <https://www.unicef.org/wca/child-marriage> (last visited Oct. 27, 2023).

48. UNCRC, *supra* note 1, at art. 2(2) (emphasis added).

educating girls is a waste of resources.<sup>49</sup> Hence, marrying a girl off as soon as possible is not only expected to reduce the overall living costs of the family but could actually improve the family's financial situation through the receipt of a bride price on her head, which may include cows, goats, other farm animals, and even cash.<sup>50</sup> In fact, in many African countries, "girl-children, especially among poor families, are seen as 'economic assets' that can be converted into various forms of wealth (e.g., cows) that can be used to provide for the upkeep of other family members, including especially male children."<sup>51</sup>

Although the UNCRC does not specifically ban child marriage, the latter can be viewed as a violation of Article 6 (right to life).<sup>52</sup> Child marriage often forces girl-brides into early pregnancy or childbirth.<sup>53</sup> Researchers have determined that "[g]irls ages 10–14 are five times more likely to die in pregnancy or childbirth than women aged 20–24 and girls 15–19 are twice as likely to die."<sup>54</sup> A young girl's body is "not yet ready for pregnancy and childbirth, which leads to complications such as obstructed labor and obstetric fistula," posing significant threats to the girl's life.<sup>55</sup> Child marriage also violates other guaranteed rights of children, especially girls, by the UNCRC. For example, Article 24(1) recognizes "the right of the child to the enjoyment of the highest attainable standard of health."<sup>56</sup> However, child marriage is a direct threat to the girl's health. Girls between ten and fourteen years usually have "small pelvises and are not ready for child-bearing" and "[t]heir

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49. Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT'L & COMPAR. L. 123, 128 (1998).

50. Robyn Dixon, *Child Brides Sold for Cows: The Price of Being a Girl in South Sudan*, LOS ANGELES TIMES, (July 29, 2016), <https://www.latimes.com/world/africa/la-fg-south-sudan-child-marriage-snap-story.html> (noting that South Sudanese girls are often "sold into marriage for cows to expand a family's herd").

51. John Mukum Mbaku, *International Law and Child Marriage in Africa*, 7 INDON. J. INT'L & COMPAR. L. 103, 116 (2020).

52. UNCRC, *supra* note 1, at art. 6(1) (stating that "States Parties recognize that every child has the inherent right to life.>").

53. MBAKU, INT'L L. & CHILD MARRIAGE, *supra* note 51, at 158.

54. *Child Marriage: A Violation of Human Rights*, Humanists International (Apr. 23, 2007), <https://humanists.international/2007/04/child-marriage-violation-human-rights/>.

55. *Id.*

56. UNCRC, *supra* note 1, at art. 24(1).

risk for obstetric fistula is 88%.<sup>57</sup> More specifically, obstetric fistula is a major threat to the health of many girls in Africa, especially those who are involved in child marriage.<sup>58</sup>

In addition to the African Child Charter and the UNCRC, there are other international human rights instruments that deal specifically with either marriage-related issues or the rights of children. These include the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (“Consent to Marriage Convention”), the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (“Supplementary Slavery Convention”), and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”).<sup>59</sup>

The U.N. has created several human rights treaty-based bodies that are made up of independent experts that monitor the implementation of international human rights instruments and interpret them. For example, the Committee on Economic, Social and Cultural Rights (“CESCR Committee”) is “the body of 18 independent experts that monitors

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57. Nawal M. Nour, *Child Marriage: A Silent Health and Human Rights Issue*, 2 REVS. OBSTETRICS & GYNECOLOGY 51, 54 (2009).

58. Carrie J. Ngongo et al., *Living with Obstetric Fistula: Learnings from Nine African Countries*, 8 BMJ GLOB. HEALTH 1 (2023) (noting the impact of obstetric fistula on the health of girls and women).

59. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 6, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231 [hereinafter Consent to Marriage Convention]; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1966, 266 U.N.T.S. 3 [hereinafter Supplementary Slavery Convention]; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, opened for signature July 11, 2003, 2131 U.N.T.S. 83, OAU doc. CAB/LEG/66.6 (2003) [hereinafter Maputo Protocol].

implementation of the [ICESCR]”<sup>60</sup> and “seeks to develop a constructive dialogue with State[s] [P]arties, determine[s] whether the Covenant’s norms are being applied, and assess[es] how the implementation and enforcement of the Covenant could be improved so all people can enjoy these rights in full.”<sup>61</sup> All States Parties to the ICESCR are required to submit regular reports to the CESCR Committee detailing how they are implementing the rights enumerated in the ICESCR.<sup>62</sup> The CESCR Committee is also granted “competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated.”<sup>63</sup>

International human rights law expert, Sylvain Aubry, has noted that “[a]s an interpretation of the [ICESCR], CESCR Committee’s General Comment 24 reflects legally binding obligations for the 165 States that have ratified the Covenant, which states must follow as they consider the involvement of private actors in service delivery.”<sup>64</sup> Other international and regional human rights treaty-based bodies include the Committee on the Rights of the Child (which monitors the UNCRC), the African Committee of Experts on the Rights and Welfare of the Child (which monitors the African Child Charter), and the Committee on the Elimination of Discrimination against Women (which monitors the implementation of the CEDAW). Given the importance of the general comments and recommendations issued by these treaty bodies to the implementation of the human rights treaties, this article will refer to their work as it seeks to examine how African countries can eradicate CEFMU and minimize its impact on girls in the continent.

According to the U.N. Human Rights Council (“HRC”), international human rights treaties guarantee the “right of all individuals to enter into marriage with the free and full consent of both

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60. *Committee on Economic, Social and Cultural Rights*, U.N. HUM. RTS. <https://www.ohchr.org/en/treaty-bodies/cescr> (last visited Oct. 28, 2023).

61. *Id.*

62. *Introduction to the Committee: Committee on Economic, Social and Cultural Rights*, UNHR, <https://www.ohchr.org/en/treaty-bodies/cescr/introduction-committee> (last visited Oct. 28, 2023).

63. *Id.*

64. Sylvain Aubry, *What does the U.N. Committee on Economic & Cultural Rights’ New General Comment Say about States Human Rights Obligations in Relation to the Privatisation of Social Services?*, RIGHT TO EDU. (July 17, 2017), <https://www.right-to-education.org/es/node/943>.

parties.”<sup>65</sup> For example, the ICCPR guarantees this right in Article 23(3), which states that “[n]o marriage shall be entered into without the *free and full consent of the intending spouses*.”<sup>66</sup> A similar guarantee is provided in the ICESCR, which in Article 10(1), states that “[m]arriage must be entered into with the free consent of the intending spouses.”<sup>67</sup>

Further, the Consent to Marriage Convention guarantees the right to enter marriage with free and full consent.<sup>68</sup> For example, Article 1 declares that “[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”<sup>69</sup> However, the Consent to Marriage Convention does not deem it necessary for both parties to the marriage to be present if the absent side is satisfied with the circumstances of the marriage.<sup>70</sup>

According to Article 1(1) of the Consent to Marriage Convention, then, child marriage is not a marriage that is legally entered into because it does not involve the “full and free consent of both parties.”<sup>71</sup> This is so because a child is a minor and, by definition, is not capable of and does not have the capacity to grant consent to the marriage.<sup>72</sup> However, research has determined that although “37 of 41 countries in Sub-Saharan Africa (90%) have legislated minimum marriage ages of 18 or older for females,” as many as “12 of the 37 [countries] permit

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65. Office of the U.N. High Commissioner for Human Rights, *supra* note 7, ¶ 7.

66. ICCPR, *supra* note 59, at art. 23(3) (emphasis added).

67. ICESCR, *supra* note 59, at art. 10(1).

68. Consent to Marriage Convention, *supra* note 59, at art. 1(1).

69. *Id.* The Consent to Marriage Convention was a U.N. Treaty that was drafted by the U.N. Commission on the Status of Women and was adopted by the U.N. General Assembly on Nov. 7, 1962. The Convention is based on article 16 of the UDHR, which deals with marriage.

*See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 16 (Dec. 10, 1948).

70. Consent to Marriage Convention, *supra* note 59, at art. 1(2).

71. *Id.* at art. 1(1).

72. Rachel L. Schuman, *State Regulations Are Failing Our Children: An Analysis of Child Marriage Laws in the United States*, 60 WM. & MARY L. REV. 2337, 2346 (2019) (noting that most U.S. States have enacted laws that set the “statutory age of marital consent” at eighteen years).

marriage before age 18 with parental consent.”<sup>73</sup> This parental consent loophole allows parents to violate children’s human rights by forcing them into marriage before they become adults.<sup>74</sup>

The CEDAW imposes an obligation on States Parties to ensure equality between men and women “in all matters relating to marriage and family relations” and to make certain that men and women have:<sup>75</sup> “(a) [t]he same right to enter into marriage; (b) [t]he same right freely to choose a spouse and to enter into marriage only with their free and full consent.”<sup>76</sup>

The CEDAW Committee devoted its General Recommendation No. 21 to equality in marriage and family relations.<sup>77</sup> The CEDAW Committee begins this recommendation by noting that the CEDAW ensures equal human rights for both women and men and called attention to other international human rights instruments, arguing that a woman’s status in a family is of great importance.<sup>78</sup> These include the UDHR, the ICCPR, and the Consent to Marriage Convention.<sup>79</sup>

In its comments on Article 16(1)(a) and (b) of CEDAW, the CEDAW Committee argued that although most countries reported that their national constitutions and laws complied with the provisions of the CEDAW, “custom, tradition and failure to enforce these laws in reality contravene the [CEDAW].”<sup>80</sup> The CEDAW Committee stated that the right of a woman to choose or determine who she should marry

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73. Belinda Maswikwa et al., *Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from sub-Saharan Africa*, 41 INT’L PERSPS. SEXUAL & REPROD. HEALTH 58, 58 (2015).

74. *Id.*

75. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S 13, at art. 16(1) [hereinafter CEDAW].

76. *Id.* at art. 16(1)(a-b).

77. CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations*, U.N. Doc. A/49/38, at 1 (1994). Although strictly speaking, CEDAW Recommendations are not legally binding, they, however, “are considered authoritative statements on the content of legal duties assumed by [S]tates [P]arties.” See *General Recommendations*, LSE CENTRE FOR WOMEN, PEACE + SECURITY, <https://blogs.lse.ac.uk/vaw/int/cedaw/general-recommendations/> (last visited Oct. 28, 2023).

78. CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations*, *supra* note 77, ¶¶ 1 & 2.

79. *Id.* ¶ 2.

80. *Id.* ¶ 15.

is central to her “life and to her dignity and equality as a human being.”<sup>81</sup> After examining the reports that States Parties to the CEDAW are required to submit to the CEDAW Committee, the latter determined that in many countries, the “custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages.”<sup>82</sup> Article 16(2) of the CEDAW provides that “[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”<sup>83</sup>

Another international treaty that addresses various aspects of marriage is the Supplementary Slavery Convention.<sup>84</sup> It imposes an obligation on States Parties<sup>85</sup> to take “all practicable and necessary legislative and other measures” to abolish or abandon “[a]ny institution or practice whereby:”<sup>86</sup>

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81. *Id.* ¶ 16.

82. *Id.*

83. *Id.* at art. 16(2).

84. Supplementary Slavery Convention, *supra* note 59.

85. At least thirty three of these States Parties are African Countries, including many in which CEFMU is quite pervasive. *See e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en) (last visited Oct. 28, 2023). A State Party (plural: States Parties) is any nation that has ratified, accepted, or acceded to a treaty or convention. According to the Office of the U.N. High Commissioner for Human Rights, “A State [P]arty is a State that has expressed its consent to be bound by that treaty by an act of ratification, acceptance, approval or accession, etc., where that treaty has entered into force for that particular State. This means that the State is bound by the treaty under international law.” *Human Rights Treaty Bodies: Glossary of Treaty Body Terminology*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, <https://www2.ohchr.org/english/bodies/treaty/glossary.htm#:~:text=A%20State%20party%20to%20a,the%20treaty%20under%20international%20law> (last visited Oct. 28, 2023). *See also* Vienna Convention on the Law of Treaties, art. 2(1)(g), May 23, 1969, 1155 U.N.T.S. 331.

86. Supplementary Slavery Convention, *supra* note 59, at art. 2(c). The Slavery Convention, which was adopted on September 25, 1926 and entered into force on March 9, 1927, does not deal with marriage. *See* Slavery Convention, Sept. 25, 1926, 60 U.N.T.S. 254.



- i. A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- ii. The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- iii. A woman on the death of her husband is liable to be inherited by another person;
- iv. Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or his labor.<sup>87</sup>

The Supplementary Slavery Convention then instructs States Parties to establish a minimum age for marriage, as well as to “encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.”<sup>88</sup> Pursuant to the Supplementary Slavery Convention, then, all States Parties are required to establish facilities in which both parties to a planned marriage can freely express their consent to the marriage and do so in the presence of a competent civil and/or religious authority.<sup>89</sup> In addition, all States Parties are encouraged to register all marriages in a civil registry and facilitate the public declaration of the consent to marriage.<sup>90</sup> Mandatory registration of marriages can help civil authorities track marriages and fight CEFMU.<sup>91</sup>

The treaty-based bodies regularly issue commentaries and recommendations that are considered authoritative statements on treaty provisions, as well as, on the content of the legal obligations assumed by States Parties.<sup>92</sup> Although not legally binding, the statements issued

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87. Supplementary Slavery Convention, *supra* note 59, at art. 1(c)(i)-(iii).

88. *Id.* at art. 2.

89. *Id.*

90. *Id.*

91. *The Law and Child Marriage*, GIRLS NOT BRIDES, <https://www.girlsnotbrides.org/about-child-marriage/law-and-child-marriage/> (last visited Nov. 2, 2023).

92. Maria Antonia Tigre & Asteropi Illiopoulos, *Climate Litigation and Children’s Rights: Unpacking the CRC’s New General Comment*, CLIMATE LAW: A

by the treaty bodies carry significant moral authority, provide “an authoritative interpretation of human rights treaty provisions,” and “clarify and suggest approaches to implement them.”<sup>93</sup> Thus, this section will make references to the general comments and recommendations of treaty bodies.

In 2019, the CEDAW Committee and the UNCRC Committee (“the Committees”) issued a joint general comment on the elimination of discrimination against women.<sup>94</sup> The joint comment defined child marriage as “any marriage where at least one of the parties is under 18 years of age” and that “[a] child marriage is considered to be a form of forced marriage, given that one of both parties have not expressed full, free and informed consent.”<sup>95</sup>

The Committees indicated that child marriage happens quite often, and in many cases, young girls are forced to marry men who may be decades older.<sup>96</sup> In addition, noted the Committees, girls are often not physically and psychologically ready to make informed decisions about marriage.<sup>97</sup> They were also concerned that guardians who have the legal authority to consent to CEFMU are compelled or influenced by the culture and customs of their communities to act against children’s best interests.<sup>98</sup>

Both Committees define forced marriage as situations “in which one or both parties have not personally expressed their full and free consent to the union.”<sup>99</sup> These types of marriages include child marriage, “exchange or trade-off marriages (e.g., *baad* and *baadal*),

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SABIN CENTER BLOG (Sept. 7, 2023), <https://blogs.law.columbia.edu/climatechange/2023/09/07/climate-litigation-and-childrens-rights-unpacking-the-crcs-new-general-comment/>.

93. *Id.*

94. CEDAW Committee & UNCRC Committee, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices*, U.N. Doc. CEDAW/C/GC/31/Rev. 1-CRC/C/GC/18/Rev. 1 (May 8, 2019) (This joint general recommendation/general comment on harmful practices had been adopted in 2014 and was subsequently revised in 2019.).

95. *Id.* ¶ 20.

96. *Id.* ¶ 21.

97. *Id.*

98. *Id.*

99. *Id.* ¶ at 23.

servile marriages and levirate marriages (coercing a widow to marry a relative of her deceased husband).”<sup>100</sup> In addition, a forced marriage may be made possible in the case where a rapist is allowed to escape justice by marrying the victim with the acquiescence of the girl’s family.<sup>101</sup>

A forced marriage may also arise in situations where terrorist groups, such as Boko Haram, kidnap girls and force them to marry into the group.<sup>102</sup> Finally, marriages in which one of the parties is not allowed to leave the union or to legally file for divorce may be considered forced marriage. Forced marriages usually produce situations where the girls lack any “personal and economic autonomy,” subsequently causing the girls to engage in dangerous behaviors (e.g., suicide, self-immolation, dangerous escape attempts) to free themselves from the marriage and their horrific conditions.<sup>103</sup>

In its General Comment No. 28, the Human Rights Committee, which monitors the implementation of the ICCPR, stated that the minimum age for marriage should “be set by the State on the basis of equal criteria for men and women.”<sup>104</sup> It also noted that girls and women may be deprived of the right to exercise their free choice to consent to marriage because as a result of customary or statutory law,

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100. *Id.* (emphasis in original). *Baad* (also known as *Baadi*), which means “enmity”, is a custom practiced in the Harnai District of Balochistan Province of Pakistan. Through this custom, girls are forced into marriage to compensate for “murders committed by [their] brothers and family members” and is designed to create peace between feuding parties “with the establishment of a blood relationship between them.” Hizbullah Khan, *Baad: A Cruel Tradition in Balochistan*, THE DIPLOMAT (July 21, 2018), <https://thediplomat.com/2018/07/baad-a-cruel-tradition-in-balochistan/>.

101. CEDAW Committee & UNCRC Committee, *supra* note 94, ¶ 23.

102. See Kristopher Carlson & Dyan Mazurana, *Forced Marriage Within the Lord’s Resistance Army, Uganda*, PEACEWOMEN (Sept. 3, 2008) <https://www.peacewomen.org/node/89841> (examining incidence of forced child marriage within the LRA and how “[h]alf of those forced into marriage bore children.”).

103. CEDAW Committee & UNCRC Committee, *supra* note 94, ¶ 23.

104. U.N. Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, CCPR/C/21/Rev. 1/Add. 10 (March 29, 2000), ¶ 23.

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a guardian, who is usually a male, is the one legally allowed to give consent.<sup>105</sup>

The CEDAW instructs States Parties to establish an official registry of marriages and births that can be used to monitor the age at which girls marry, as well as enforce laws against child marriage.<sup>106</sup> The national registry must be set up and managed by the government and must be “free, universal and accessible for the birth registration of all children and to ensure that all marriages are registered by competent authority.”<sup>107</sup>

The CEDAW Committee and the UNCRC Committee both consider child and forced marriage as a “manifestation” of the discrimination against women that disallows a woman/girl to fully enjoy her rights.<sup>108</sup> In addition, both Committees argue that the practice of CEFMU is “perpetuated by entrenched adverse customs and traditional attitudes that discriminate against women or place women in subordinate roles to men, or by women’s stereotyped roles in society.”<sup>109</sup>

One of the most important ways to prevent child marriage is to view the practice as a human rights violation. Rachel Vogelstein argues that “[t]he practice of child marriage is a violation of human rights,” that it is “also a threat to the prosperity and stability of the countries in which it is prevalent,”<sup>110</sup> and that it “perpetuates poverty over generations and is linked to poor health, curtailed education, violence, instability, and disregard for the rule of law.”<sup>111</sup> Child marriage imposes significant costs on girls forced to endure it, as well as “families, communities and economies.”<sup>112</sup>

One way to recognize child marriage as a violation of human rights is for the global community to “determine a universal minimum age for

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105. *Id.*

106. Office of the U.N. High Commissioner for Human Rights, *supra* note 7, ¶ 15.

107. *Id.*

108. Office of the U.N. High Commissioner for Human Rights, *supra* note 7, ¶ 16.

109. *Id.*

110. RACHEL VOGELSTEIN, ENDING CHILD MARRIAGE: HOW ELEVATING THE STATUS OF GIRLS ADVANCES U.S. FOREIGN POLICY OBJECTIVES 1 (Council on Foreign Relations, 2013).

111. *Id.*

112. *Id.*

marriage in accordance with international human rights standards.”<sup>113</sup> Establishing a minimum age for marriage must be accompanied by public policies that ensure that children are able to realize their human rights, including the right not to be subjected to this insidious practice.<sup>114</sup> Once laws against child marriage are standardized, countries must ensure that domestic institutions (e.g., the police and courts) have the capacity, the independence, and the political will to prosecute and bring to justice those who carry out child marriage. However, in such prosecutions, the children who are forced into marriage must be considered victims and, hence, not be subject to criminal sanctions.<sup>115</sup>

Legislation that defines the minimum age for marriage must be seen as part of the effort to internationalize national laws and bring them into conformity with the provisions of international human rights instruments.<sup>116</sup> For example, according to Article 4 of the UNCRC, “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”<sup>117</sup>

Although the CEDAW does not establish a minimum age for marriage, it does prohibit the betrothal and the marriage of a child.<sup>118</sup> However, international human rights bodies have set the minimum age for marriage for both boys and girls at eighteen years.<sup>119</sup> The CEDAW Committee argued that some countries set different ages for marriage for men and women and that such “provisions assume incorrectly that

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113. U.N. WOMEN, *supra* note 2, at 12.

114. *Id.* at 12–13.

115. Arabella Breck, *Children are not to Blame in Child Marriages*, THE COLUMBIA CHRONICLE (Dec. 5, 2016), <https://columbiachronicle.com/79c06340-b8f9-11e6-b3e6-cf75a0fd3dae> (noting that children who are forced into child marriage are “not at fault for entering into [these] marriages at a young age” and “[t]he adults who coerce children into relationships and marriages and take them away from an education, family and a healthy childhood are the ones who need to face jail time or fines”).

116. UNCRC, *supra* note 1, at art. 4.

117. *Id.*

118. CEDAW, *supra* note 75, at art. 16(2).

119. For example, in its General Recommendation No. 21, the CEDAW Committee declares that “the minimum age for marriage should be 18 years for both man and woman.” CEDAW Committee, *General recommendation No. 21: Equality in marriage and family relations*, *supra* note 77, ¶ 36.

women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial.”<sup>120</sup> The CEDAW Committee concluded that these provisions “should be abolished” because they inhibit a woman’s right to freely choose her partner.<sup>121</sup>

The CEDAW Committee and the UNCRC Committee “consider child marriage to be a harmful practice.”<sup>122</sup> The two Committees explained that customary and traditional practices, such as female genital mutilation (FGM), honor crimes, and CEFMU, are all harmful practices that are based on the belief that women are inferior to men.<sup>123</sup> This usually directly leads to various forms of violence committed against girls and women, both inside and outside the home.<sup>124</sup>

In addition, both Committees state that these practices negatively impact a girl’s “dignity, physical, psychosocial and moral integrity and development, participation, health, education and economic and social status.”<sup>125</sup> It is for these reasons that both the CEDAW Committee and UNCRC Committee have taken an interest in ensuring that States take all necessary measures to eradicate these harmful customary and traditional practices.<sup>126</sup>

Some international human rights instruments and their corresponding Committees, particularly the CEDAW and UNCRC, provide more modern legal concepts and principles.<sup>127</sup> These principles represent international standards that States Parties must comply with and that are critical to understanding and properly resolving the problem of CEFMU.<sup>128</sup>

The CEDAW contains principles that can help provide for a more effective and holistic understanding of child marriage and how it violates the human rights of children. These principles are: (1)

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120. *Id.* ¶ 38.

121. *Id.*

122. U.N. WOMEN, *supra* note 2, at 13.

123. CEDAW Committee & UNCRC Committee, *supra* note 94, ¶¶ 19, 25, & 29. *See also* U.N. WOMEN, *supra* note 2, at 13.

124. *Id.*

125. CEDAW Committee & UNCRC Committee, *supra* note 94, ¶ 15.

126. *Id.*

127. U.N. WOMEN, *supra* note 2, at 13.

128. *Id.*

equality; (2) non-discrimination; and (3) the obligations of States Parties.<sup>129</sup> The UNCRC, on the other hand, establishes four principles that apply transversely to all articles and these are (1) non-discrimination; (2) the child's best interests; (3) the child's opinion; and (4) the child's survival and development.<sup>130</sup>

### *B. The Principle of Non-discrimination*

According to the CEDAW:

The term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>131</sup>

The UNCRC prohibits all forms of discrimination against children.<sup>132</sup> Discrimination against girls would result if a country were to set a different minimum age for marriage for boys than girls.<sup>133</sup> That practice would deny girls the right to enjoy or realize the rights guaranteed to them in the UNCRC.<sup>134</sup>

The cultures and customs of many communities in Africa differentiate between boys and girls through sex and gender stereotypes.<sup>135</sup> These gender stereotypes often result in significant

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129. For example, with respect to discrimination against women in all its forms, States Parties are required "[t]o adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting *all* discrimination against women." See CEDAW, *supra* note 75, at art. 2(b).

130. UNCRC, *supra* note 1, at arts. 2, 3(1), 6.

131. CEDAW, *supra* note 75, at art. 1.

132. UNCRC, *supra* note 1, at art. 2.

133. U.N. Women, *supra* note 2, at 13.

134. *Id.*

135. UNESCO, *Cultural Stereotypes and Lack of Support Prevent Eastern African Women from Advancing in Higher Education* (May 19, 2022), <https://www.iesalc.unesco.org/en/2022/05/19/cultural-stereotypes-and-lack-of-support-prevent-eastern-african-women-from-advancing-in-higher-education/> (noting that the prioritization of boy's education, FGM, and CEFMU, negatively affects the ability of women to participate in tertiary education).

levels of discrimination against girls and women in accessing education and health services.<sup>136</sup> For example, a study of gender stereotypes in East Africa determined that discrimination against girls begins at the primary education levels, “where socio-economic and cultural gender iniquities start”<sup>137</sup> and persists even into higher education.<sup>138</sup>

Faced with resource scarcity, many African families that are influenced by culture and tradition, often favor investment in a boy’s education over a girl’s.<sup>139</sup> This type of discrimination is based on cultural and customary beliefs that relegate girls and women to subordinate roles within the family.<sup>140</sup> Girls are expected to grow up to become wives and mothers and not doctors, engineers, economists, lawyers, or financial analysts.<sup>141</sup> Many African countries are States Parties to the CEDAW and UNCRC, which prohibit discrimination based on sex.<sup>142</sup> However, girls and women face continuous

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136. *Id.* See also Oyeronke Oyebanji & Ebere Okereke, *Empowering African women leaders is key for health equity*, 7 NATURE HUM. BEHAVIOUR 839 (2023) (noting discrimination against women and girls in access to education and health care in Africa).

137. Cultural Stereotypes, *supra* note 135.

138. *Id.*

139. Kien Le & My Nguyen, *Son Preference and Health Disparities in Developing Countries*, 17 SSM-POP. HEALTH 101036 (2020) (examining the impact of son preference on disparities in access to health care in developing countries).

140. Kate Hodal, *African Governments Failing Girls on Equality, Report Finds*, THE GUARDIAN (Nov. 21, 2020), <https://www.theguardian.com/global-development/2020/nov/21/african-governments-failing-girls-on-equality-report-finds> (explaining how African girls are denied the opportunity to attend school and forced, instead, to marry too young).

141. See *South Sudan Families Still Forced to Sell Girls into Marriage*, VOA NEWS (June 26, 2022), <https://learningenglish.voanews.com/a/south-sudan-families-still-forced-to-sell-girls-into-marriage/6628657.html#:~:text=One%20of%20the%20ways%20families,is%20a%20cause%20of%20poverty.> (explaining the traditional practice of selling daughters in South Sudan into marriage before they complete their education).

142. Franck Kuwonu, *Millions of Girls Remain out of School*, AFRICAN RENEWAL (Apr. 2015), <https://www.un.org/africarenewal/magazine/april-2015/millions-girls-remain-out-school> (noting that although some progress has been made, the gender gap remains). See also *South Sudan Families Still Forced to Sell Girls into Marriage*, *supra* note 141.



discrimination in their ability to access welfare services, education, and healthcare.<sup>143</sup>

The CEDAW imposes an obligation on States Parties to adopt laws that prohibit all discrimination against women.<sup>144</sup> Similarly, the UNCRC mandates that States Parties take all measures for the protection of children from discrimination by their parents, guardians, and family members.<sup>145</sup> However, discrimination against girls and women remains pervasive throughout these countries.<sup>146</sup>

For example, a recent study by the Institute of Security Studies in Pretoria revealed another form of discrimination that girls and women face. This study determined that “[w]omen are disproportionately impacted by climate change due to gender inequalities and gender roles and responsibilities.”<sup>147</sup> Women are “14 times more likely than men to die in a climate catastrophe and make up 80% of people displaced due to climate change.”<sup>148</sup> Although women make up less than “34% of the COP27 negotiating teams,” they bear “the brunt of climate change effects.”<sup>149</sup> Furthermore, although a “Gender Action Plan” was contemplated at the COP27, the final proposal was not sufficient to adequately protect women and girls.<sup>150</sup> The study concluded that gender inequality makes women and girls and other historically marginalized groups more susceptible to the impacts of climate change.<sup>151</sup>

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143. *Id.*

144. CEDAW, *supra* note 75, at art. 2(b).

145. UNCRC, *supra* note 1, at art. 2(2).

146. *See, e.g.,* Aimée-Noël Mbiyozo, *Gender Inequality is Forcing African Women to Face the Storm*, INSTITUTE FOR SECURITY STUDIES (Dec. 7, 2022), <https://issafrica.org/iss-today/gender-inequality-is-forcing-african-women-to-face-the-storm>.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Mbiyozo, *supra* note 146.

### C. Substantive Equality

The CEDAW goes beyond formal legal equality and talks about substantive equality.<sup>152</sup> The CEDAW speaks of three types of equality.<sup>153</sup> The first is “equality of opportunities.”<sup>154</sup> This offers women and girls equal opportunities to benefit from scholarships and other study grants, to access continuing education programs, to participate in sports and physical education, to obtain equal access to economic opportunities through employment or self-employment, and to exercise legal capacity in civil matters.<sup>155</sup>

The second is “equality of access.”<sup>156</sup> This enhances the ability of girls and women to acquire necessary skills through formal and informal education at educational establishments of all categories, in rural and urban areas, and through on-the-job training.<sup>157</sup> For example, in a study carried out by the U.N. Girls’ Education Initiative (“UNGEI”), it was determined that gender disparity in access to education remains a major problem for many countries in sub-Saharan Africa.<sup>158</sup> It was determined that “of the 18 countries with fewer than 90 girls for every 100 boys enrolled, 13 are in sub-Saharan Africa.”<sup>159</sup>

The third is “equality of results.”<sup>160</sup> States Parties are expected to make sure that women are provided with equal access and opportunity, while also ensuring that women are actually

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152. U.N. WOMEN, *supra* note 2, at 14.

153. *Id.*

154. *Id.*

155. CEDAW, *supra* note 75, at arts. 10 & 15.

156. U.N. WOMEN, *supra* note 2, at 14.

157. CEDAW, *supra* note 75, at arts. 10, 12 & 14.

158. U.N. Girls’ Education Initiative (UNGEI), EFA Global Monitoring Report: *Gender and EFA 2000–2015: Achievements and Challenges; Education for All*, at 9, UNESDOC DIGITAL LIBRARY (2015) <https://unesdoc.unesco.org/ark:/48223/pf0000234809>.

159. *Id.*

160. IRAW Asia Pacific, *Substantive Equality*, <https://cedaw.iwraw-ap.org/cedaw/cedaw-principles/cedaw-principles-overview/substantive-equality/#:~:text=The%20CEDAW%20Convention%20promotes%20the,and%20mechanisms%20for%20their%20operation> (last visited May 24, 2023).

progressing.<sup>161</sup> This means that States Parties are not only expected to develop and implement policies that ensure women have equality with men, but they must also ensure that the results of the policies reflect such equality. In addition to guaranteeing legal equality, States Parties should seek to eliminate those practices that constrain a woman's or girl's ability to realize the rights guaranteed to them in national constitutions and international human rights instruments.<sup>162</sup>

Policies developed by States Parties to promote equality must recognize and consider sex or biological differences (e.g., women and not men bear children) and gender differences created by social norms.<sup>163</sup> Understanding and appreciating these differences can help policymakers design and implement policies that not only provide women and girls with equal access and opportunity, but equality of results.<sup>164</sup>

Finally, establishing a lower marriage age for girls is a harmful practice that perpetuates gender stereotypes of the inferior position of women and girls in comparison to men and boys.<sup>165</sup> All African States should reform their customary laws and have them comply with international human rights law. Through this process, customary and traditional practices, such as FGM, CEFMU, honor-based violence, and son preference, can be modified or eliminated.<sup>166</sup>

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161. *Id.*

162. Colleen Murray et al., *Education: A Powerful Force Against Harmful Practices*, UNICEF (Jan. 23, 2023), <https://data.unicef.org/data-for-action/education-a-powerful-force-against-harmful-practices/> (explaining that traditional practices, such as child marriage and FGM, are major constraints to girls' educational progress).

163. IWRAW Asia Pacific, *supra* note 160.

164. *African Union Gender Policy*, UNITED NATIONS (Feb. 10, 2009), <https://www.un.org/shestandsforpeace/content/african-union-gender-policy-2009> (elaborating African Union gender policy aimed at achieving a society "founded on democracy, gender equality, human rights and dignity").

165. U.N. WOMEN, *supra* note 2, at 14.

166. *See, e.g.*, John Mukum Mbaku, *International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa*, 52 CAL. W. INT'L L.J. 1 (2021) (examining FGM as a harmful traditional practice in Africa).

*D. Obligations of States Parties*

The CEDAW imposes an obligation on States Parties to eliminate all forms of discrimination against women.<sup>167</sup> States Parties must fulfill this obligation with no delay and through all available means.<sup>168</sup> States are to do this by undertaking certain policy initiatives elaborated in the remainder of Article 2 of the CEDAW.<sup>169</sup> For example, States Parties are required to enact legislation and impose penalties for noncompliance.<sup>170</sup> These obligations are further elaborated by Articles 3 and 4 in the CEDAW.<sup>171</sup>

States Parties are required to take all appropriate measures to instill the principle of equality in their legal systems and to eliminate all forms of discrimination against girls and women.<sup>172</sup> In conjunction with these requirements, States Parties must ensure that women and girls can realize and enjoy the rights guaranteed by CEDAW.<sup>173</sup> Additionally, States Parties must ensure that women are granted effective access to the justice system so that they can seek relief for their grievances.<sup>174</sup> Ensuring equality for women and girls must include the “eradication of discriminatory actions and cultural practices.”<sup>175</sup>

Additionally, the UNCRC imposes obligations on States Parties to enact legislation and policy that implements the rights set forth in the

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167. CEDAW, *supra* note 75, at art. 2.

168. *Id.*

169. *Id.*

170. *Id.* at art. 2(f).

171. *Id.*, at arts. 3 & 4.

172. U.N. WOMEN, *supra* note 2, at 14.

173. *Introduction to the Committee: Committee on the Elimination of Discrimination Against Women*, UNITED NATIONS HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/cedaw/introduction-committee> (last visited Dec. 30, 2023).

174. J. Jarpa Duwuni, *Women and Access to Justice in Africa: Women Cannot Wait Another 100 Years*, BROOKINGS INSTITUTION (Aug. 29, 2023), <https://www.brookings.edu/articles/women-and-access-to-justice-in-africa-women-cannot-wait-another-100-years/> (explaining that although women in Africa play an important part in the development of their communities, they still find it difficult to have “equitable access to justice and leadership positions”).

175. U.N. WOMEN, *supra* note 2, at 14.

convention.<sup>176</sup> The UNCRC Committee has laid out general measures that a State Party may take, noted that when a State ratifies the UNCRC it effectively agrees to implement the UNCRC's provisions and that States Parties, through implementation, provide the wherewithal for the realization of the rights defined, elaborated, and guaranteed in the UNCRC for "all the children in their jurisdiction."<sup>177</sup>

States Parties have an obligation to ensure that all children within their jurisdiction realize the rights set forth in the UNCRC.<sup>178</sup> This requires a State Party "to identify individual children and groups of children the recognition and realization of whose rights may demand special measures."<sup>179</sup> In addition, the UNCRC Committee emphasizes the need for States Parties to collect data and present it in a disaggregated manner to identify discrimination against girls.<sup>180</sup>

With respect to CEFMU, the obligations imposed on States Parties by the UNCRC contain three types of duties.<sup>181</sup> First is the obligation to *respect*, which ensures that marriages are only celebrated with the "free and informed consent of both parties."<sup>182</sup> Second, is the obligation to *protect*, which requires States Parties to ensure that children are not abused by either State or non-state parties.<sup>183</sup> Each State Party must protect girls from all harmful customary and traditional practices. For example, if a girl runs away from her family to avoid being forced into an early marriage or subjected to FGM, the State must protect such a girl from being returned to her parents to be victimized.<sup>184</sup>

Lastly, is the obligation to *guarantee*, which requires that States Parties take "legislative, administrative, budgetary, judicial and other types of action to prevent and eliminate harmful practices."<sup>185</sup> Hence,

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176. UNCRC, *supra* note 1, at art. 4.

177. UNCRC Committee, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, U.N. Doc. CRC/GC/2003/5, at pmb. & ¶ 1 (2003).

178. *Id.* ¶ 12.

179. *Id.*

180. U.N. WOMEN, *supra* note 2, at 14.

181. *Id.*

182. *Id.*

183. *Id.*

184. U.N. WOMEN, *supra* note 2, at 14.

185. *Id.*

eliminating these practices is critical to ensuring that girls realize the rights guaranteed by the UNCRC and other international human rights instruments.<sup>186</sup>

### *E. The Best Interests of the Child Standard*

Article 3 of the UNCRC establishes what is referred to as the best interests of the child principle or standard.<sup>187</sup> Article 3 states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.”<sup>188</sup> When a branch of government adopts policies that are likely to affect the rights of children, its primary consideration must be the best interests of the child.<sup>189</sup> The UNCRC has given the best interests of the child “the character of a fundamental standard with a legal role projected in public policies that protect rights and guide the development of a culture that is more equal and also respectful of the rights of all persons.”<sup>190</sup>

In determining measures to eradicate or abolish harmful customary and traditional practices, governments must consider the rights of children in general and their best interests in particular. In debating legislation to abolish child marriage, for example, the legislature may be called upon to consider the importance of such a practice to the culture and customs of the communities in which it is prevalent. However, in doing so, legislators must make the best interests of the child the primary basis for their analysis and determination. Thus, the justification for eradicating child marriage is that its continued existence is not in the best interests of the child.<sup>191</sup>

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186. *Id.*

187. UNCRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, U.N. Doc. CRC/C/GC/14 (May 29, 2013) (elaborating on and explaining the concept of the best interests of the child principle).

188. UNCRC, *supra* note 1, at art. 3.

189. U.N. WOMEN, *supra* note 2, at 14.

190. *Id.*

191. John Mukum Mbaku, *International Law, Corruption and the Rights of Children in Africa*, 23 SAN DIEGO INT’L L.J. 195, 307 (2022) (noting that “in

Where courts must adjudicate cases involving children, the best interests of the child must be a key priority in their proceedings.<sup>192</sup> For example, when courts adjudicate issues that affect children, such as “placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights,”<sup>193</sup> they must “weigh whether the decision will be in the ‘best interests’ of the child.”<sup>194</sup> Similarly, the constitutions and statutory laws of many countries entrench children’s rights and direct their governments to make the best interests of the child a paramount consideration in measures or decisions that affect the child. For example, the Constitution of South Africa makes the best interests of the child part of children’s rights, which are enumerated in the Bill of Rights.<sup>195</sup>

South Africa enacted the Children’s Act 38 in 2005 (“SACA”) “[t]o give effect to certain rights of children as contained in the Constitution” and “to set out principles relating to the care and protection of children.”<sup>196</sup> Section 2 of the SACA defines the objects of the act, and these include: “(b) to give effect to the following constitutional rights of children, namely — ... (iv) that the best interests of a child are of paramount importance in every matter concerning the child.”<sup>197</sup>

Thus, according to the SACA, when the government takes any action regarding children and their rights, “the standard that the child’s best interest is of paramount importance, must be applied.”<sup>198</sup> In terms of participation in decisions affecting them and their rights, the SACA mandates that a child has the right to participate in decisions affecting him or her, and the child’s views “must be given due consideration.”<sup>199</sup> In addition, special consideration must be given to children with

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designing and implementing policies that affect children, the best interests of the child must be the guiding principle”) [hereinafter Mbaku, Rights of Children in Africa].

192. *Id.* at 307 (examining the need to apply the best interests of the child principle to the adjudication of cases involving children).

193. *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (June 30, 2020), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/>.

194. *Id.*

195. CONST. OF THE REPUBLIC OF S. AFR., May 8, 1996, at sect. 28(2) (S. Afr.).

196. Children’s Act 38 of 2005, at pmb (S. Afr.).

197. *Id.* § 2(b)(iv).

198. *Id.* § 9.

199. *Id.* § 10.

disabilities or chronic illnesses.<sup>200</sup> Finally, the SACA guarantees the right of every child not to be subjected to “social, cultural and religious practices which are detrimental to his or her well-being,”<sup>201</sup> and the child’s right “to bring, and to be assisted in bringing, a matter to a court, provided that the matter falls within the jurisdiction of that court.”<sup>202</sup>

South African courts have applied the best interests of the child principle in adjudicating cases involving children and their right to basic education.<sup>203</sup> In *AB and Another v. Pridwin Preparatory School and Others*, the Constitutional Court of South Africa (“CCSA”) was called upon to determine the “constitutional rights of children in the private education system and the constitutional obligations of independent schools towards those children.”<sup>204</sup> Writing for the majority, Theron J held that Pridwin was “obliged to afford one or both of [the parents] an opportunity to make representations on the *best interests of the boys*, the impact this could have on the boys’ right to an education and possible steps that could have been taken to ameliorate any interference with their right to a basic education.”<sup>205</sup> Doing so, continued Theron J, “would have discharged Pridwin’s negative obligation to respect the boys’ rights to a basic education and placed Pridwin in a position to give proper consideration to the *best interests of the children*.”<sup>206</sup>

Finally, Theron J referred to the UNCRC and then held that “Pridwin’s decision to terminate the Parent Contract was unconstitutional due to the failure to afford the applicants an opportunity to be heard on the best interests of the boys, in breach of sections 28(2) and 29(1)(a) of the Constitution [of South Africa].”<sup>207</sup>

African countries must integrate the best interests of the child standard into all national mechanisms used to evaluate or adjudicate issues affecting children or their rights. They must do so in a framework

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200. *Id.* § 11.

201. *Id.* § 12.

202. Children’s Act 38 of 2005, at § 14 (S. Afr.).

203. *AB and Another v. Pridwin Preparatory Sch. and Others*, [2020] ZACC 12, 2020 (9) BCLR 1029, 2020 (5) SA 327 (Const. Court S. Afr., June 17, 2020).

204. *Id.* ¶ 4.

205. *Id.* ¶ 208 (emphasis added).

206. *Id.*

207. *Id.* ¶ 209.



that considers the constitutional rights of all the parties involved, including children. The presumption is that each African constitution has been internationalized to bring its provisions into conformity with international human rights instruments and that customary and traditional practices that are harmful to children have been eradicated.<sup>208</sup> Further, that customary laws have been made to align with national constitutional provisions.<sup>209</sup>

#### *F. Child's Opinion*

The UNCRC establishes and guarantees a child's right to freely express their opinion.<sup>210</sup> This principle enhances and promotes a child's participation in decisions affecting their rights and welfare. First, the child must always be granted the right to freely express those views on all issues and matters that affect him or her.<sup>211</sup> The views so expressed must be given appropriate weight, taking into consideration the child's age and maturity.<sup>212</sup> Depending on the child's age and maturity, she or he can participate directly in person or through his or her authorized representative or "an appropriate body, in a manner consistent with the procedural rules of national law."<sup>213</sup>

When a decision is made that affects children's lives, the application of the best interests of the child principle must safeguard "the rights and responsibilities of their mothers and father[s] regarding the lives of their children."<sup>214</sup> Child marriage usually takes place in communities and circumstances in which the girls involved do not have the freedom or right to have their opinions respected and taken into consideration.<sup>215</sup> Girls who are subjected to these harmful practices do

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208. Mbaku, *Rights of Children in Africa*, *supra* note 191, at 312.

209. *Id.*

210. UNCRC, *supra* note 1, at art. 2(2).

211. *Id.* at art. 12(1).

212. *Id.*

213. *Id.* at art. 12(2).

214. U.N. WOMEN, *supra* note 2, at 14.

215. Human Rights Watch, *Ending Child Marriage in Africa*, *supra* note 44 (noting that girls in many African countries usually do not have a say in the decision for them to marry).

not have the option of saying “yes” or “no” to the practice.<sup>216</sup> The decision is already made for them either by their parents or their legal guardians or some authorized community leader.<sup>217</sup>

Unfortunately, practices such as CEFMU and FGM inflict severe permanent damage on girls and, in some instances, can lead to their death. For example, in the summer of 2021, a thirteen-year-old Somali girl named Fartun Hassan Ahmed died after undergoing FGM.<sup>218</sup> Similarly, in Sierra Leone, a ten-year-old girl died after she was subjected to FGM as part of an initiation into a secret women’s society.<sup>219</sup>

Many girls who are subjected to child marriage contract obstetric fistula, which has been determined to be “a silent death for generations for millions of girls and women in developing countries,” including those in Africa.<sup>220</sup> Obstetric fistula is considered a major “source of public health concern and one of the most devastating maternal morbidities afflicting about two million women, mostly in developing countries.”<sup>221</sup> It is important that all African countries ensure that girls can exercise their right “to freely state [their opinions] based on appropriate information” on the consequences of child marriage and FGM.<sup>222</sup>

While the ultimate solution is for States to enact legislation that eradicates these harmful practices, courts also can use their interpretive powers to declare unconstitutional any customary laws and traditional

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216. *Africa: End Rights Abuse Against Girls*, HUM. RTS. WATCH (June 16, 2022), <https://www.hrw.org/news/2022/06/16/africa-end-rights-abuses-against-girls> (recalling the statements of an 11-year old Nigerian girl who was forced to marry an old man after the death of her mother).

217. U.N. WOMEN, *supra* note 2, at 14.

218. Hassan Abdirahman & Lizzy Davies, *Death of 13-Year-Old Girl Sparks Calls for Action on FGM in Somalia*, THE GUARDIAN (July 21, 2021), <https://www.theguardian.com/global-development/2021/jul/21/death-of-13-year-old-girl-sparks-calls-for-action-on-fgm-in-somalia>.

219. Nellie Peyton, *Girl, 10, Dies After Genital Cutting in Sierra Leone*, REUTERS (Dec. 19, 2018, 5:57 AM), <https://www.reuters.com/article/us-leone-women-fgm/girl-10-dies-after-genital-cutting-in-sierra-leone-idUSKBN1O1C8>.

220. Jenny Vaughan, *Obstetric Fistula; A Silent Death for Millions of Women and Girls*, THOMPSON REUTERS FOUNDATION NEWS (May 23, 2017), <https://news.trust.org/item/20170523104025-9ctkl>.

221. Oluwasomidoyin Olukemi Bello et al., *Nigeria, A High Burden State of Obstetric Fistula: A Contextual Analysis of Key Drivers*, 36 PAN AFR. MED. J. (2020).

222. U.N. WOMEN, *supra* note 2, at 14.

practices that harm children.<sup>223</sup> This was the case in *Mudzuru & Another*, where Malaba Department of Chief Justice (“DCJ”) held a provision of the Zimbabwe Marriage Act that authorizes child marriage to be unconstitutional.<sup>224</sup>

The UNCRC Committee has indicated that practices that are considered culturally acceptable often impose significant levels of harm and suffering on girls, boys, and adolescents.<sup>225</sup> Unfortunately, in many African communities, many children are subjected to violent maltreatment, such as “corporal punishment, genital mutilation or early marriage.”<sup>226</sup> However, these children often do not have the appropriate communication channels to contact the officials who are responsible for enforcing the laws and ensuring that their rights are recognized and protected and that they are not abused or subjected to harmful practices.<sup>227</sup> Therefore, it is important that effective legal mechanisms are provided so that children can be heard and given the opportunity to participate “in decisions that affect them, depending on their age and maturity.”<sup>228</sup>

### G. *The Child’s Right to Life, Survival, and Development*

Article 6 of the UNCRC establishes a child’s right to life.<sup>229</sup> In addition to recognizing “that every child has the inherent right to life,” Article 6 imposes an obligation on States Parties to “ensure to the maximum extent possible the survival and development of the child.”<sup>230</sup>

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223. See *Mudzuru & Another v. Minister of Justice, Legal & Parliamentary Affairs*, Judgment No. CCZ 12/2015, Const. Application No. 79/2014, 54-55 (Zim. 2016).

224. *Id.*

225. U.N. Women, *supra* note 2, at 15. See also Committee on the Rights of the Child, *General Comment No. 8: The Right of The Child to Protection from Corporal Punishment and Other Cruel or Degrading forms of Punishment*, U.N. Doc. CRC/C/GC/8 (2006) (examining the right of the child to protection from corporal punishment and other cruel or degrading form of punishment).

226. U.N. WOMEN, *supra* note 2, at 15.

227. *Id.* See also Committee on the Rights of the Child, *General Comment No. 12: The Right of The Child to be Heard*, U.N. Doc. CRC/C/GC/12 (July 20, 2009) (elaborating on the child’s right to be heard).

228. *Id.*

229. UNCRC, *supra* note 1, at art. 6(1).

230. *Id.* at art. 6(2).

The UNCRC Committee “expects States to interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological, and social development.”<sup>231</sup>

Child marriage threatens the child’s right to life, survival, and development. The CEDAW Committee notes that CEDAW’s definition of discrimination includes “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>232</sup> The CEDAW Committee argues that CEFMU is based on and justified by traditional values that consider women and girls to be inferior and subordinate to men and boys.<sup>233</sup>

These customary and traditional values contribute to violence against young girls in Africa. In some cases, efforts to enforce and uphold these customary and traditional practices can “justify gender-based violence as a form of protection or control of women.”<sup>234</sup> The CEDAW imposes an obligation on States Parties to make every effort to protect boys and girls from “all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”<sup>235</sup>

The UNCRC Committee noted that sexual abuse and exploitation include CEFMU.<sup>236</sup> Furthermore, the Committee established that CEFMU is one of several harmful practices that are imposed on children by many communities around the world, including several in Africa.<sup>237</sup> The UNCRC Committee also instructs States Parties to mainstream certain elements into “national coordinating frameworks.”<sup>238</sup>

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231. UNCRC Committee, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (art. 4, 42 and 44, para. 6), *supra* note 177, at ¶ 12.

232. CEDAW Committee, *CEDAW General Recommendation No. 19: Violence Against Women*, U.N. Doc. A/47/38, at ¶ 6 (1992).

233. U.N. WOMEN, *supra* note 2, at 15.

234. *Id.*

235. UNCRC, *supra* note 1, at art. 19(1).

236. UNCRC Committee, *General Comment No. 13: The Right of The Child to Freedom from all Forms of Violence*, U.N. Doc. CRC/C/GC/13, at ¶ 25 (2011).

237. *Id.* ¶ 29.

238. *Id.* ¶¶ 42 & 72.

Child marriage interferes with and threatens a girl’s right to health and sexual and reproductive integrity.<sup>239</sup> One major way that child marriage threatens a girl’s health is that the girl is subjected to third-party authorization—the husband must grant her permission before she can seek or have access to health care.<sup>240</sup> The CEDAW requires States Parties to eradicate discrimination against women in the “field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”<sup>241</sup>

The UNCRC guarantees the child the right to education and imposes an obligation on States Parties to ensure that every child can realize that right.<sup>242</sup> Most importantly, States Parties are required to make sure that primary education is free and mandatory.<sup>243</sup> In addition, States Parties must implement measures to encourage and ensure children’s attendance at school, as well as prevent them from dropping out of school before they complete their education.<sup>244</sup> The UNCRC Committee stated that “[t]he goal [of education] is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.”<sup>245</sup>

In addition, the UNCRC Committee noted that education “goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.”<sup>246</sup> Each State Party is supposed to adopt a holistic approach to the education of children,

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239. *Female Genital Mutilation Hurts Women and Economies*, WORLD HEALTH ORG. (Feb. 6, 2020), <https://www.who.int/news/item/06-02-2020-female-genital-mutilation-hurts-women-and-economies> (noting that FGM threatens girls’ health).

240. Biplab Datta et al., *Child Marriage and Problems Accessing Healthcare in Adulthood: Evidence from India*, 10 HEALTHCARE 2022 (1994) (noting that child brides “experience more controlling behaviors from their husband and their husband’s family and bear a greater risk of experiencing IPV, which could further exacerbate obstacles accessing health services”).

241. CEDAW, *supra* note 75, at art. 12(1).

242. UNCRC, *supra* note 1, at art. 28.

243. *Id.* at art. 28(1)(a).

244. *Id.* at art. 28(1)(e).

245. UNCRC Committee, *General Comment No. 1: Article 29(1): The Aims of Education*, U.N. Doc. CRC/GC/2001/1, at ¶ 2 (2001).

246. *Id.*

which takes into account all aspects of a child's "well-being, including the physical, psychological, social, and emotional components of children's worlds."<sup>247</sup>

Child marriage interferes with the child's ability to attend or remain in school and learn and develop the skills that he or she needs to evolve into a productive and contributing member of her community.<sup>248</sup> CEFMU deprives children, especially girls, of the opportunity to realize their right to education.<sup>249</sup> Hence, it is crucial for States Parties to ensure that all children can exercise their right to education. States Parties can do so by not only making primary education free and available to all children but also by ensuring that children stay in school and complete their education.<sup>250</sup>

In May 2023, the UNCRC Committee commended São Tomé and Príncipe for "the abrogation of the law prohibiting pregnant girls from attending school."<sup>251</sup> In a report released in 2018, HRW said that it had determined that Equatorial Guinea, Sierra Leone, Tanzania, and Togo all had laws that prevented girls who got pregnant from staying in school and completing their studies.<sup>252</sup> However,

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247. Rachel Roderick, *How To Support Holistic Education for Children*, CAPTERRA (Apr. 25, 2022), <https://www.capterra.com/resources/support-holistic-education-children/>.

248. Mbaku, *Rights of Children in Africa*, *supra* note 191, at 232 (noting that child marriage puts a girl in a position in which she can no longer remain in school to complete her education).

249. *Id.*

250. *Africa: Make Girls' Access to Education a Reality*, HUM. RTS. WATCH (June 16, 2017), <https://www.hrw.org/news/2017/06/16/africa-make-girls-access-education-reality> (noting that "[a]ll African governments have commit[ted] to ... guarantee[ing] gender equality and universal access to free primary and secondary education for all children by 2030.").

251. *Experts of the Committee on the Rights of the Child Praise São Tomé and Príncipe for Measures to Increase School Attendance, Ask About Birth Certificates and Sexual Abuse of Schoolgirls*, U.N. HUM. RTS. (May 12, 2023), <https://www.ohchr.org/en/news/2023/05/experts-committee-rights-child-praise-sao-tome-and-principe-measures-increase-school>.

252. Human Rights Watch, *Across Africa, Many Young Mothers Face Education Barriers*, HUM. RTS. WATCH (Aug. 30, 2022, 12:01 AM), <https://www.hrw.org/news/2022/08/30/across-africa-many-young-mothers-face-education-barriers>.

by the summer of 2022, all these countries, except Equatorial Guinea, had revoked the bans against pregnant girls remaining in school.<sup>253</sup>

Throughout many African countries, young girls get pregnant before they can complete their studies. Unfortunately, many countries are not doing enough to prevent these pregnancies or to ensure that these girls stay in school and complete their studies. Instead, these pregnant girls are being denied the right to complete their education.<sup>254</sup> Although many African countries have adopted universal education programs, some of which include free education at both the primary and secondary levels, many of them still “exclude or expel pregnant girls and young mothers from school.”<sup>255</sup> It is important, then, that African countries ensure that girls, including those who are pregnant, are guaranteed unfettered access to education.<sup>256</sup>

For many years, the government of Tanzania forced girls in all its public schools to take mandatory pregnancy screenings.<sup>257</sup> If a girl was found to be pregnant, she was permanently expelled, effectively denying her the opportunity to complete her formal education.<sup>258</sup> On June 17, 2019, the African Committee of Experts on the Rights and Welfare of the Child (“ACERWC”) received a Communication, which was submitted by the Legal and Human Rights Centre and the Center for Reproductive Rights (on behalf of Tanzanian girls), against Tanzania.<sup>259</sup>

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253. *Id.*

254. Mbaku, Rights of Children, *supra* note 191, at 233.

255. Human Rights Watch, *Africa: Make Girls’ Access to Education a Reality*, *supra* note 250.

256. Sarah Elliot, *African Committee Recommends Tanzania Reform Policies That Barred Pregnant Girls from School*, CTR. FOR REPRODUCTIVE RTS. (Sept. 20, 2022), <https://reproductiverights.org/acerwc-ruling-tanzania-pregnant-schoolgirls/> (discussing the case *Legal and Human Rights Centre for Reproductive Rights v. United Republic of Tanzania*).

257. Ivana Kottasová, *They Failed Mandatory Pregnancy Tests at School. Then they were Expelled*, CNN HEALTH (Oct. 11, 2018), <https://www.cnn.com/2018/10/11/health/tanzania-pregnancy-test-asequals-intl/index.html> (noting Tanzania’s mandatory pregnancy testing policy).

258. Elliot, *supra* note 256.

259. *Legal and Human Rights Centre and Center for Reproductive Rights (on Behalf of Tanzanian Girls) v. the United Republic of Tanzania (ACERWC)*, Communication No. 0012/Com/001/2019/Decision No. 002/2022, [hereinafter *Legal and Human Rights Centre & Another v. Tanzania*] <https://www.acerwc.africa/sites>

The Complainants<sup>260</sup> alleged that primary and secondary school girls in Tanzania “are subjected to forced pregnancy testing and expulsion from schools in events where they are found pregnant or married.”<sup>261</sup> As alleged by the Complainants, since the expulsion of pregnant girls from public schools is a universal practice, girls who determine that they are pregnant, voluntarily drop out of school in order to avoid “the humiliation and stigma they will be subjected to if school administrators find out about their pregnancy during mandatory testing.”<sup>262</sup> With respect to the merits, the Complainants alleged that by expelling pregnant and married girls from school, Tanzania had violated various provisions of the African Child Charter.<sup>263</sup>

In its decision, the ACERWC ruled that Tanzania’s policy of expelling pregnant students from school violated the girls’ human rights.<sup>264</sup> Specifically, the ACERWC held that Tanzania had violated its obligations under Articles 1, 3, 4, 10, 11, 14, 16, and 21 of the African Child Charter.<sup>265</sup> The ACERWC then recommended that Tanzania reform its laws to allow pregnant and married girls to stay in school and complete their studies.<sup>266</sup>

International human rights organizations have argued that one way to ensure that child marriage is recognized as a human rights violation is for the international community to define a universal minimum age for marriage in accordance with international human rights standards.<sup>267</sup> All U.N. Member States can then be encouraged to enact legislation to make this universal minimum age for marriage part of their national law.<sup>268</sup>

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/default/files/2022-10/ACERWC%20Decision%20final%20Communication%20No-%200012Com0012019.Tanzania.pdf.

260. The Complainants were the Legal and Human Rights Centre and the Centre for Reproductive Rights (on behalf of Tanzania girls). *See id.*

261. *Legal and Human Rights Centre & Another v. Tanzania*, *supra* note 259, at ¶ 2.

262. *Id.* ¶ 4.

263. *Id.* ¶¶ 30–104.

264. *Id.* ¶ 109.

265. *Id.*

266. *Legal and Human Rights Centre & Another v. Tanzania*, *supra* note 259, at ¶ 109.

267. U.N. WOMEN, *supra* note 2, at 12.

268. UNCRC, *supra* note 1, at art. 4.



In 2017, the African Commission on Human and Peoples' Rights ("ACHPR") and the ACERWC issued a joint general comment on ending child marriage in the continent.<sup>269</sup> The ACHPR & ACERWC joint general comment starts by noting that "child marriage and its impacts are a major concern on the African continent"<sup>270</sup> and that it interferes with the ability of young girls and women in Africa to enjoy their human rights and fundamental freedoms.<sup>271</sup>

In 2015, the ACHPR & ACERWC noted that the Heads of State and Government of the African Union ("AU") had adopted a common position on child marriage and the campaign to end it.<sup>272</sup> The common position urges Member States of the AU to "[d]evelop, elaborate, and implement national strategies and action plans, including putting in place mechanisms and institutions for the enforcement, monitoring, and reporting, along with financial and human resources, all aimed at ending child marriage."<sup>273</sup>

The ACHPR & ACERWC noted that both the Maputo Protocol and the African Child Charter specify eighteen years as the minimum age for marriage and that, accordingly, all States Parties to these treaties are required to take measures to give effect to the prohibition against child marriage.<sup>274</sup> The Joint General Comment, noted both the ACHPR and the ACERWC, were designed to deal specifically with Article 6(b) of the Maputo Protocol and Article 21(2) of the African Child Charter,<sup>275</sup>

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269. JOINT GENERAL COMMENT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR) AND THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (ACERWC) ON ENDING CHILD MARRIAGE (2017) [hereinafter ACHPR & ACERW JOINT GENERAL COMMENT], [https://www.acerwc.africa/sites/default/files/2022-09/Joint\\_General\\_Comment\\_ACERWC-ACHPR\\_Ending\\_Child\\_Marriage\\_March\\_2018\\_English.pdf](https://www.acerwc.africa/sites/default/files/2022-09/Joint_General_Comment_ACERWC-ACHPR_Ending_Child_Marriage_March_2018_English.pdf) (last visited Oct. 31, 2023).

270. *Id.* ¶ 1.

271. *Id.*

272. *Id.* See also AFRICAN UNION, AFRICAN COMMON POSITION ON THE A.U. CAMPAIGN TO END CHILD MARRIAGE IN AFRICA (2015) [hereinafter AFRICAN COMMON POSITION], [https://au.int/sites/default/files/documents/31010-doc-cap\\_on\\_ending\\_child\\_marriage\\_-english\\_0.pdf](https://au.int/sites/default/files/documents/31010-doc-cap_on_ending_child_marriage_-english_0.pdf) (last visited Oct. 31, 2023).

273. *Id.* ¶ 3(1).

274. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, at ¶ 1.

275. Article 6(b) of the Maputo Protocol sets the minimum age for marriage for women at eighteen years, while Article 21(2) of the African Child Charter prohibits

as well as with children who are already in child marriages, children who are at risk of being forced into child marriage, and women who were forced into marriage before they attained the age of eighteen years.<sup>276</sup>

After noting that African girls are “disproportionately at risk of and affected by child marriage,” the Joint General Comment then addressed some of the factors that render girls “more susceptible to child marriage and its impacts.”<sup>277</sup> These factors include “persistent gender inequality” and discrimination against girls and women.<sup>278</sup> In interpreting the African Child Charter, the ACERWC utilizes the following four principles: (1) the best interests of the child; (2) the right of the child to freedom from discrimination; (3) the child’s right to survival, development, and protection; and (4) the child’s right to participate fully and effectively in matters that affect and concern the child.<sup>279</sup>

The ACHPR and ACERWC noted that child marriage produces “negative physical, psychological, economic and social consequences” and, in addition, deprives children of their ability to realize their human rights and fundamental freedoms.<sup>280</sup> Child marriage is, therefore, not in the best interests of the child.<sup>281</sup> Thus, in all actions taken by States Parties to the two treaties and other stakeholders, who include parents, and traditional and community leaders, the best interests of the child must be the primary consideration.<sup>282</sup>

The Committees speak forcefully that the best interests of the child principle should never be used to justify child marriage.<sup>283</sup> For example, the practice of forcing children into marriage supposedly to save them from the poverty of their families or to avoid out-of-wedlock pregnancies, should never be used to support this insidious practice.<sup>284</sup>

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child marriage and the betrothal of girls and boys. *See* African Child Charter, *supra* note 1, at art. 21(2). *See also* Maputo Protocol, *supra* note 59, at art. 6(b).

276. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, at ¶ 5.

277. *Id.* ¶ 5.

278. *Id.*

279. *Id.* ¶ 7.

280. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, at ¶ 8.

281. *Id.*

282. *Id.*

283. *Id.* ¶ 11.

284. *Id.*

The ACHPR and the ACERWC note that child marriage is “a manifestation of gender inequality and constitutes discrimination based on sex and gender” and in Africa, this is “reflected by the overwhelmingly disproportionate risks and impact [that child marriage] has on girls and women and [child marriage’s] correspondingly disproportionate effect on the enjoyment of their human rights and fundamental freedoms.”<sup>285</sup> States Parties are expected to show their commitment to the principle of non-discrimination by recognizing that child marriage is a discriminatory practice and taking appropriate measures to eliminate it.<sup>286</sup>

As evident by *Mudzuru & Another*, a case in which the Constitutional Court of Zimbabwe (“CCZ”) held that child marriage is unconstitutional, judiciaries in various African countries are using their power to interpret their national constitutions to declare null and void statutory and customary laws that violate national bills of rights and/or provisions of international human rights instruments.<sup>287</sup> Legislators can then enact legislation to abolish the impugned statutory or customary provisions.<sup>288</sup>

Article 5(2) of the African Child Charter enshrines the child’s right to “survival, protection and development.”<sup>289</sup> In addition, the Maputo Protocol condemns “any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls” and instructs States Parties to eliminate them.<sup>290</sup> Child marriage is a major threat to the survival and development of children in Africa, particularly the continent’s girls. Child marriage forces girls to drop out of school and forfeit the opportunity to develop the skills they need to become productive and contributing members of their communities.<sup>291</sup> In addition, child marriage exposes young girls to

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285. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, ¶ 12.

286. *See, e.g., Mudzuru & Another*, the Constitutional Court of Zimbabwe case in which Malaba DCJ held that child marriage violated the constitution.

287. *Mudzuru & Another*, at 54–55.

288. *Id.* at 38.

289. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, ¶ 10.

290. Maputo Protocol, *supra* note 58, at pmb.

291. Mbaku, *International Law and Child Marriage in Africa*, *supra* note 51, at 123. *See also* ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, ¶ 12.

the risk of domestic violence, and other threats to their health and welfare, including obstetric fistula.<sup>292</sup>

Article 4(2) of the African Child Charter grants the child the right to express her own views and be heard, directly or indirectly, in all “judicial or administrative proceedings affecting the child.”<sup>293</sup> The ACHPR & ACERWC Joint General Comment lists situations in which children’s participation rights are violated, and these include, for example, “where laws (whether statutory, customary or religious) regard the consent of legal guardians to be determinative.”<sup>294</sup> With respect to the rights of African girls, the Committees note that when a man who is convicted of raping a girl is given the option to marry the victim as a way to avoid being held accountable for his crime, the girl’s right to participation is violated.<sup>295</sup>

Finally, a young girl’s participation rights are invalidated when she is not allowed to “leave a union or marriage.”<sup>296</sup> Even though Article 7 of the African Child Charter grants the child the right to freely communicate his or her views, such views must not be in contravention of the other rights granted to the child by the Charter.<sup>297</sup> For example, for a variety of reasons (e.g., pressure from parents, community leaders, and siblings), a young girl may express an interest in getting married before she reaches eighteen. Although she has the right to express this view and should be allowed to do so,<sup>298</sup> the best interests of the child principle require that an exception should *not* be made to allow a child to marry, even if she expresses the desire to do so.<sup>299</sup>

In addition to the four principles, the ACHPR & ACERWC Joint General Comment noted that its “authoritative guidance” is “grounded in the principles that [human] rights are interrelated.”<sup>300</sup> The prohibition against child marriage presented in Article 6(b) of the Maputo Protocol

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292. Nour, *supra* note 57.

293. African Child Charter, *supra* note 1, at art. 4(2).

294. ACHPR & ACERWC JOINT GENERAL COMMENT, *supra* note 269, ¶ 13.

295. *Id.*

296. *Id.*

297. *Id.* at art. 14.

298. See African Child Charter, *supra* note 1, at art. 7 (Article 7 of the African Child Charter grants her the right to freely express her views).

299. ACHPR & ACERWC JOINT GENERAL COMMENT, *supra* note 269, ¶ 14.

300. *Id.* ¶ 15.

and Article 21(2) of the African Child Charter is “interdependent and interlinked with a number of other rights” guaranteed by the two human rights instruments.<sup>301</sup> Hence, child marriage can prevent a girl from being able to realize or enjoy other human rights. Thus, it is important that States Parties to these two treaties take measures to abolish child marriage in their respective jurisdictions.

The ACHPR & ACERWC then examine the obligations that have been imposed on States Parties by these two treaties, which include taking all appropriate measures to abolish or eliminate all social, traditional, and cultural practices that harm “the welfare, dignity and normal growth of the child,” and these include child marriage.<sup>302</sup> Article 21(2) of the African Child Charter prohibits child marriage and the betrothal of children.<sup>303</sup> In addition, Article 21(2) directs States Parties to take measures to specify eighteen years as the minimum age for marriage and make compulsory, the registration of all marriages in an official registry.<sup>304</sup> If this article is read with Article 2 of the African Child Charter,<sup>305</sup> this prohibition “precludes any exceptions to the minimum age of 18 for betrothal and marriage.”<sup>306</sup>

The ACHPR & ACERW, in their Joint General Comment, conclude that the prohibition against child marriage and the betrothal of children contained in the African Child Charter and the Maputo Protocol is “without exception and should apply to all forms of marriage.”<sup>307</sup> The governments of all the States Parties are to ensure that no law, whether civil, customary, or religious, is used to permit any of the prohibited activities.<sup>308</sup> Traditional practices that involve the kidnapping of girls by men for the purpose of later marrying them must

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301. *See id.* These other rights include the right to education, health, rest, play, leisure and recreation, prohibition against all forms of sexual exploitation, and so on. *See generally* African Child Charter, *supra* note 1; Maputo Protocol, *supra* note 59.

302. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, ¶ 16.

303. African Child Charter, *supra* note 1, at art. 21 ¶ 2.

304. *Id.* at art. 21 ¶ 2.

305. *Id.* at art. 2 (defining a child as “every human being below the age of eighteen years”).

306. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, ¶ 16.

307. *Id.* ¶ 18.

308. *Id.* ¶ 16.

be abolished.<sup>309</sup> National laws that prohibit child marriage must override customary and religious laws, as well as, the traditional practices of any ethnolinguistic group or community within the country that violate international human rights standards on marriage.<sup>310</sup>

While it is important that each African country enact legislation to abolish child marriage and establish a minimum age for marriage, as well as, prohibit the betrothal of children, it is equally important that each country have a bill of rights that entrenches certain fundamental rights.<sup>311</sup> For example, the ACHPR & ACERW argue that constitutional reforms should ensure that the constitution has “non-derogable clauses that entrench equality within marriage and specify a constitutional minimum age of 18 years for marriage.”<sup>312</sup> There must not be any “[l]imitations, exceptions and derogations from these [constitutional] clauses whether based on tradition, religion, or any other ground.”<sup>313</sup>

The Committees that monitor the implementation of these international human rights treaties, as well as interpret them, provide guiding principles on how to understand and appreciate the harmful impacts of child marriage on children, particularly girls.<sup>314</sup> These principles include equality, non-discrimination, the best interests of the child, and the child’s opinion. This section has examined these

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309. *Id.* ¶ 18. The kidnapping of girls for the purpose of initiating marriage negotiations is quite common among many groups in South Africa. Known as ukuthwala, it takes place primarily in rural South Africa, particularly in the Eastern Cape and KwaZulu Natal. It is defined as “a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations.” Department of Justice and Constitutional Development (South Africa), Ukuthwala: Let’s Stop Stolen Childhoods, <https://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html#:~:text=Ukuthwala%20is%20a%20form%20of,family%20to%20endorse%20marriage%20negotiations> (last visited Nov. 6, 2023).

310. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, ¶ 19.

311. For example, the Constitution of South Africa, 1996 entrenches various fundamental rights in its Chapter 2: Bill of Rights. *See* CONST. OF THE REPUBLIC OF S. AFR., May 8, 1996, at Chapter 2 (S. Afr.).

312. ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269, ¶ 24.

313. *Id.*

314. *See, e.g.*, ACHPR & ACERW JOINT GENERAL COMMENT, *supra* note 269; CEDAW COMMITTEE & UNCRC COMMITTEE, *supra* note 94.

principles and has shown how they interact to affect girls' rights, with particular emphasis on Africa.

Several factors contribute to the pervasiveness of CEFMU in Africa. In the section that follows, this Article will examine the various factors that contribute to the endemic nature of CEFMU, with particular emphasis on African countries.

## II. FACTORS CONTRIBUTING TO CHILD, EARLY AND FORCED MARRIAGE

The extent of CEFMU can vary extensively between countries and regions of the world: “[t]he highest rates are reported in South Asia and sub-Saharan Africa, where 44% and 39% of girls, respectively, were married before the age of 18 years.”<sup>315</sup> A study of the Amhara Region of Ethiopia determined that approximately 80% of girls are married before they are eighteen years old.<sup>316</sup> In this region, twelve years old is the most common age for a girl to marry.<sup>317</sup> Here, among the factors contributing to CEFMU are religious and cultural traditions that claim that subjecting young girls to such practices protects their honor “since sex before marriage is seen as an extremely shameful act.”<sup>318</sup> Thus, a girl’s worth to her family and community is based “on her virginity and her role of being a wife and mother.”<sup>319</sup> Child marriage is seen as significantly enhancing the ability of the girl to perform this important role and ensuring that she does not dishonor the family and community by getting pregnant outside of marriage.<sup>320</sup> The Amhara people’s fear

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315. Tekile et al., *Determinants of Early Marriage Among Female Children in Amhara Region, Ethiopia*, 20 AFR. HEALTH SERV. 1190, 1190 (2020).

316. *Id.* at 1191.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Yes I Do: Baseline Study in Ethiopia: Contextualising child marriage, teenage pregnancy and female genital mutilation/cutting in the Amhara region*, YES I DO ALLIANCE & ROYAL TROPICAL INST. (THE NETHERLANDS) 3, <https://www.kit.nl/wp-content/uploads/2018/10/Baseline-Summary-ETH.pdf> (noting that in Amhara, “[p]regnancies outside marriage are rare” and are “seen as a family dishonor and feared by especially parents”).

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of shame and stigma is an important driver of CEFMU.<sup>321</sup> This is seen throughout many other communities in Africa as well.<sup>322</sup>

In a recent study of adolescent unmarried motherhood in rural Uganda, it was determined that the country's teenage pregnancy rates "are among the highest in sub-Saharan Africa."<sup>323</sup> In addition, this study determined that in Uganda, out-of-wedlock teenage pregnancy often leads to child marriage, which has been recognized by the government of Uganda as a "form of sexual violence and an outcome of inequality."<sup>324</sup> Nevertheless, the researchers determined that in rural and traditional Uganda, motherhood outside marriage "incurs stigma and shame."<sup>325</sup>

In many communities in Africa, virginity is considered an important determinant of "bride wealth cattle or cash" and enhances family and group "pride and dignity."<sup>326</sup> Child and early marriage are seen as a mechanism to safeguard the girl child's virginity and maximize its benefits to her family and the community.<sup>327</sup>

Research in several African countries has determined that poverty is a major driver of CEFMU.<sup>328</sup> In many African communities, families often lack the financial resources to meet their basic needs, which include food and shelter.<sup>329</sup> These families believe that forcing their girls into early marriage will garner the necessary resources for the

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321. *Id.* at 4. See also Kelli Stidham Hall et al., *Bad Girl and Unmet Family Planning Need Among Sub-Saharan African Adolescents: The Role of Sexual and Reproductive Health Stigma*, 2 QUALITATIVE RSCH. & MED. HEALTHCARE 55, 56–59 (2018) (noting that many communities in sub-Saharan Africa consider out-of-marriage pregnancy shameful and immoral).

322. QUALITATIVE RSCH. & MED. HEALTHCARE, *supra* note 321.

323. Lucy Webb et al., *Psychological Health in Adolescent Unmarried Motherhood in Uganda: Implications for Community-Based Collaborative Mental Health Education, and Empowerment Strategies in the Prevention of Depression and Suicide*, 60 TRANSCULTURAL PSYCHIATRY 537, 537 (2023).

324. *Id.*

325. *Id.*

326. *Id.*

327. Webb et al., *supra* note 323, at 537.

328. Human Rights Watch, *Ending Child Marriage in Africa*, *supra* note 44.

329. Jack Donnelly, *Satisfying Basic Needs in Africa: Human Rights and the State*, 32 AFR. TODAY 7 (1985) (noting the failure of most Africans to meet their basic needs).



family's survival.<sup>330</sup> In addition to the resources received from the family their daughter will marry into, which may include livestock and cash, the exit of the young girl means that her family will now have one less mouth to feed and/or educate.<sup>331</sup>

Associated with the poverty argument for CEFMU are beliefs based on culture and customs, that girl children, regardless of their age, will eventually settle and become members of their husbands' families.<sup>332</sup> Therefore, any investment in a girl will only yield benefits to her future husband's family and none to her own family. Hence, it is believed that getting her out of her parents' house as quickly as possible is beneficial to the economic survival of that family.<sup>333</sup> Boys, however, are expected to "remain with, and financially support, their parents."<sup>334</sup>

This belief effectively portrays the girl as an economic burden on her family and the boy as an asset and a potential contributor to the welfare of the family.<sup>335</sup> Thus, investing in the boy's education, nutrition, and health is seen as potentially beneficial to the family.<sup>336</sup>

Another driver of CEFMU is the gap between national laws and their enforcement.<sup>337</sup> A country's legal framework is critical for the recognition and protection of human rights, including those of young girls.<sup>338</sup> A robust legal framework must include (1) regulations and laws that set the minimum age for marriage for boys and girls at eighteen years; (2) a mandated national marriage and birth registry; (3) the

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330. Girls Not Brides, *South Sudan*, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/south-sudan/#:~:text=Poverty%3A%20Child%20marriage%20is%20used,cattle%2C%20from%20future%20husbands>). (noting that in South Sudan, child marriage is used as a mechanism to ensure economic and food security for the family).

331. Human Rights Watch, *Ending Child Marriage in Africa*, *supra* note 44.

332. *Id.*

333. John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT'L L. REV. 535, 576 (2020) (noting the belief by some African parents that getting a husband for their girl child reduces the family's financial burden).

334. Human Rights Watch, *Ending Child Marriage in Africa*, *supra* note 44.

335. *Id.*

336. *Id.*

337. *Id.* Many countries have laws prohibiting child marriage, but these laws are rarely ever enforced. *See id.*

338. Mbaku, *supra* note 333, at 577 (noting that laws and institutions are critical for the protection of the rights of children).

criminalization of sexual and domestic violence; and (4) laws regulating family issues like marriage, divorce, custody, and inheritance.<sup>339</sup> However, for the rights of girls to be protected, including their rights not to be forced into marriage, these laws must be duly and effectively enforced.<sup>340</sup>

Research shows that in many African countries the enforcement of laws against child marriage is either lacking or is extremely weak.<sup>341</sup> For example, the Kingdom of Eswatini enacted two pieces of legislation in 2012 and 2018, which effectively guarantee children a litany of rights; however, violations continue.<sup>342</sup> This is due, *inter alia*, to the failure of the police and the judiciary, respectively, to enforce and prosecute individuals who violate laws protecting the rights of girls.<sup>343</sup> Eswatini's Children Protection and Welfare Act of 2012 ("CPWA") does not specifically mention child marriage.<sup>344</sup> However, it guarantees children the (1) right to registration at birth; (2) right to education and wellbeing; (3) right to refuse harmful and cultural and religious practices; and (4) right to be protected from harmful practices.<sup>345</sup> Even

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339. Human Rights Watch, *Ending Child Marriage in Africa*, *supra* note 44.

340. Rita Nketiah, *Nigerian States Should Protect Girls by Ending Child Marriage*, HUM. RTS. WATCH (Sept. 24, 2021, 9:00 AM), <https://www.hrw.org/news/2021/09/24/nigerian-states-should-protect-girls-ending-child-marriage> (advising Nigerian authorities to "fully adopt and enforce the Child Rights Act"). See also Violet Odala, *How Important is Minimum Age of Marriage Legislation to End Child Marriage in Africa?*, GIRLS NOT BRIDES (June 11, 2013), <https://www.girlsnotbrides.org/articles/how-important-is-minimum-age-of-marriage-legislation-to-end-child-marriage-in-africa/> (stating that many legal systems in Africa "lack effective monitoring and enforcement mechanisms that could prevent or sanction child marriages.").

341. *Q & A: Child Marriage and Violation of Girls' Rights*, HUM. RTS. WATCH (June 14, 2013, 2:19 PM), <https://www.hrw.org/news/2013/06/14/q-child-marriage-and-violations-girls-rights> (explaining that African "authorities often fail to enforce [the] protection [of girls] or prosecute perpetrators [of crimes against girls]").

342. Setsabile Dumsile Shiba, *Enforcing Laws Designed to Protect Eswatini's Children Can End Child Marriage*, WORLD BANK BLOGS, (July 17, 2020), <https://blogs.worldbank.org/youth-transforming-africa/enforcing-laws-designed-protect-eswatinis-children-can-end-child-marriage>.

343. *Id.*

344. Children Protection and Welfare Act of 2012, at Part III (Swaz.).

345. *Id.*

though child marriage is not mentioned in the CPWA, such a marriage will implicate many of the rights guaranteed by the statute.<sup>346</sup>

Furthermore, Eswatini’s Sexual Offences and Domestic Violence Act of 2018 (“SODVA”) criminalizes certain forms of violence, including rape, incest, and sexual assault,<sup>347</sup> prohibits sexual relationships with children, “[s]exual grooming of children” and the “[m]arrying of a child or placing them in a situation akin to a marriage.”<sup>348</sup> Unfortunately, the laws are not being enforced.<sup>349</sup>

Another way in which laws against child marriage are not enforced can be found in the failure to register births in a civil registry, which renders it very difficult or impossible to fully police and prevent underage marriages. Without a state-recognized birth certificate, it would be difficult to determine whether a girl who is being given in marriage by her parents has reached age eighteen or not. For example, HRW determined that corrupt local officials in Tanzania actually forged birth certificates and facilitated child marriages.<sup>350</sup> In addition, “[a] police officer from the Police Gender and Children’s Desk in Moshi, Tanzania, told [HRW] that some of the cases taken to court for prosecution are delayed or are not completed because perpetrators pay money to the magistrates, who then postpone and adjourn cases indefinitely.”<sup>351</sup> Faced with such delays, many victims eventually “give up and stop coming to court,” effectively allowing the perpetrators of child marriage to escape accountability.<sup>352</sup>

Another complication is that most African countries have multiple legal systems, in which “civil, customary, and religious laws overlap

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346. CEFMU will, for example, violate the child’s right to be protected from harmful practices. *See id.* § 16.

347. THE SEXUAL OFFENCES AND DOMESTIC VIOLENCE ACT [hereinafter SODV Act], 2018 (ACT No. 15 OF 2018) (Swaz.), at Part II.

348. *Id.* §§ 36–43.

349. *See, e.g.*, Southern Africa Litigation Centre [hereinafter SALC], *An Opportunity for Law Reform on Child Marriages in Eswatini*, SALC POLICY BRIEF, No. 1 (June 24, 2022), <https://www.southernafricalitigationcentre.org/2022/06/24/policy-brief-an-opportunity-for-law-reform-on-child-marriage-in-eswatini/> [hereinafter SALC] (noting the weaknesses of the legal system as a major contributor to the pervasiveness of child marriage in Eswatini).

350. *Id.*

351. *Id.*

352. *Id.*

and generally contradict one another.”<sup>353</sup> For example, religious and traditional leaders who support child marriage because of customary and religious beliefs may refuse or resist the enforcement of constitutional and statutory laws against this practice. In the predominantly Muslim Jigawa State of Nigeria, some individuals stated that they would defy any laws against CEFMU because “it is better to marry off your daughter and go to jail than to have a grandchild outside marriage.”<sup>354</sup> In fact, efforts by the central government in Abuja to abolish CEFMU and improve children’s rights have been criticized bitterly by Islamic leaders.<sup>355</sup> Parents and legislators from Nigeria’s predominantly Muslim States argue that the Child’s Rights Act violated Muslim cultural norms and religion.<sup>356</sup>

The beliefs of various religious groups can serve as an important driver of CEFMU. For example, among adherents of the Apostolic faith in Zimbabwe, which combines religion with traditional beliefs, girls at a very young age are forced to marry much older men as part of the sect’s practices.<sup>357</sup> During their study of child marriage in Zimbabwe, researchers from HRW were told by a midwife from the Johwane Masowe Shonhiwa Apostolic faith that “her church encourages child marriage: ‘Our church doctrine is that girls must marry when they are between the age of 12 and 16 years old to make sure they do not sin by having sexual relations outside marriage.’”<sup>358</sup> In addition, stated the midwife, “[a]s soon as a girl reaches puberty any man in the church can claim her for a wife.”<sup>359</sup> Finally, church doctrine, which is enforced by

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353. *Id.*

354. See *Early Marriage Adds to Socioeconomic Woes, NGOs say*, THE NEW HUMANITARIAN, (Nov. 26, 2008), <https://www.thenewhumanitarian.org/news/2008/11/26/early-marriage-adds-socioeconomic-woes-ngos-say>.

355. Michelle Faul, *How A Clash of Nigeria’s Secular, Islamic Laws Sparked An Age-of-Consent Debate*, CTV NEWS, (July 23, 2013), <https://www.ctvnews.ca/politics/how-a-clash-of-nigeria-s-secular-islamic-laws-sparked-an-age-of-consent-debate-1.1379522> (noting the opposition of Islamic leaders to Nigeria’s Child Rights Act).

356. *Early Marriage Adds to Socioeconomic Woes, NGO Says*, *supra* note 354.

357. Annerieke Smaak & Nisha Varia, *Ending Child Marriage in Africa: Opening the Door for Girls’ Education, Health, and Freedom from Violence*, Human Rights Watch, (Dec. 9, 2015), <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa>.

358. *Id.*

359. *Id.*

“elders, husbands, and other family members, prohibits married girls from continuing school.”<sup>360</sup>

It has also been argued that child marriage is “rooted in the many gender disparities that are expressed and reproduced through practices, language and symbolic representations that are the cause of discrimination and violence.”<sup>361</sup> Researchers have determined that “[f]orced and child marriage practices exist[] in Africa and other parts of the world due to a range of causes, including poverty, perceived lack of future prospects, and conflict, but most commonly, such practices are driven by social and cultural patterns that reinforce gender inequality.”<sup>362</sup> In fact, CEFMU disproportionately impacts women and girls globally and by 2050, sub-Saharan Africa “will have the largest number and global share of child brides.”<sup>363</sup>

It is important for African governments to implement policies to eliminate all the factors that contribute to the pervasiveness of CEFMU in their jurisdictions. Specifically, they should reform their laws, including their constitutions, and statutory and customary laws, to bring them into conformity with provisions of international human rights instruments. In addition, customary and religious laws, as well as traditional practices, that permit child marriage should be abolished or modified. This is discussed in greater detail in the next section.

### III. REFORMING AFRICAN LEGAL SYSTEMS TO SAFEGUARD AGAINST CHILD MARRIAGE

#### A. Introduction

A country’s legal system is key to determining the prevalence of child marriage and other harmful practices, eradicating them, and protecting the rights of children already in marriage. National laws, including the constitution, can either expressly permit child marriage or do so indirectly (e.g., by failing to set the minimum age for

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360. *Id.*

361. U.N. WOMEN, *supra* note 2, at 8.

362. *Forced and Child Marriage in Africa as a Manifestation of Gender-Based Violence and Inequality*, WALK FREE (May 28, 2019), <https://www.walkfree.org/news/2019/forced-and-child-marriage-in-africa-as-a-manifestation-of-gender-based-violence-and-inequality/>.

363. *Id.*

marriage for both boys and girls at eighteen years).<sup>364</sup> In some countries, such as Nigeria, Sharia<sup>365</sup> plays an important part in the legal system.<sup>366</sup> However, although Sharia does not play any part in Nigeria's judicial system, it applies to personal status issues, which include *marriage*, divorce, inheritance, and child custody.<sup>367</sup>

A study by HRW has determined that “[i]n many Sharia-legislated states in Nigeria, child marriage is justified on religious and traditional grounds, with the age of adulthood based on puberty.”<sup>368</sup> The HRW study also determined that Nigeria has “some of the highest [rates of child marriage] on the African continent.”<sup>369</sup> In 2003, Nigeria enacted the Child's Rights Act (“CRA”), which prohibits marriage for persons who are below eighteen years of age.<sup>370</sup> However, Nigeria's Constitution has provisions that conflict with Article 21 of the CRA—section 29(4)(b) of the Constitution creates a loophole that can be exploited to promote child marriage.<sup>371</sup> Although section 29(4)(a) of the Constitution sets the age of maturity at eighteen years, exceptions apply which state that a girl, regardless of her age, can achieve maturity by getting married, allowing various communities within Nigeria to promote child marriage.<sup>372</sup> Therefore, Nigerian authorities must amend

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364. Human Rights Watch, *Ending Child Marriage in Africa*, *supra* note 44.

365. Sharia is Islam's legal system. It is derived from the Quran, the holy book of Islam, as well as from the Sunnah and Hadith, “the deeds and sayings of the Prophet Muhammad.” See *What is Sharia law? What Does it Mean for Women in Afghanistan?*, BBC NEWS (Aug. 19, 2021), <https://www.bbc.com/news/world-27307249>.

366. *Id.*

367. Vincent O. Nmehielle, *Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality Is the Question*, 26 HUM. RTS. Q. 730, 732 (2004).

368. *Nigeria: Child Marriage Violates Girls' Rights*, HUM. RTS. WATCH (Jan. 17, 2022, 12:01 AM), <https://www.hrw.org/news/2022/01/17/nigeria-child-marriage-violates-girls-rights#:~:text=In%20many%20Sharia%2Dlegislated%20states,%2C%20bodily%20autonomy%2C%20or%20rights.>

369. *Id.*

370. Child's Rights Act (2003) Cap. (A26), § 21 (Nigeria) (prohibiting marriage for persons under the age of 18 years).

371. CONST. OF NIGERIA (1999), § 29(4)(b) (Stating that “any woman who is married shall be deemed to be of full age.”).

372. *Id.* § 29(4)(a).

section 29(4)(b) of the Constitution to reflect provisions of the CRA, the UNCRC, and the African Child Charter, on marriage.<sup>373</sup>

Nigeria, like many other countries in Africa, has statutory and/or constitutional provisions that protect children from various forms of harm, including sexual exploitation.<sup>374</sup> Unfortunately, these provisions are often either in conflict with international human rights instruments or laws on marriage.<sup>375</sup> Therefore, Nigeria and other African countries similarly situated should harmonize their laws for the protection of children with those regulating marriage.<sup>376</sup> Effectively protecting the rights of young girls throughout Africa requires that all laws, including constitutional, statutory, and customary laws, conform with provisions of international human rights instruments and these laws are fully implemented and enforced.<sup>377</sup>

While laws eradicating CEFMU and protecting children who are currently trapped in child marriage may vary by country, such laws must include, at the minimum, the following: (1) a minimum age for marriage for boys and girls at eighteen years; (2) prohibition of the “pledging” or “betrothal” or “marriage” of children; (3) criminalization of child marriage but exempting the child concerned from any criminal charges or consequences; (4) putting in place measures to mitigate and protect children who are already trapped in child marriage, including safeguarding their right to property; and (5) establishing awareness and education programs to help local communities learn about the harmful effects of child marriage so that they can provide the cooperation needed to successfully enforce laws against CEFMU.<sup>378</sup>

Reform should begin with a comprehensive analysis of each African country’s existing legal system and how it deals with marriage in general and specifically, child marriage.<sup>379</sup> Starting with the national constitution, reformers can then move on to statutes governing marriage and, finally, to religious and customary laws or practices regarding

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373. *Id.* § 29(4)(b). *See also* Child’s Rights Act § 21 (Nigeria).

374. CONST. OF NIGERIA (1999), § 32(1)-(2).

375. Mbaku, Rights of Children in Africa, *supra* note 191, at 221.

376. *Id.* at 220.

377. *See, e.g., id.* at 223 (emphasizing the importance of judicial independence to the protection of human rights).

378. *See, e.g.,* SALC, *supra* note 349, at 11.

379. *Id.* at 7.

marriage. The objective is to bring all these laws into conformity with provisions of regional and international human rights instruments regarding marriage in general and child marriage in particular.

*B. Internationalizing Domestic Laws to End Child Marriage*

Reforming the domestic legal system to end child marriage begins with revisiting the constitution and ensuring that all its provisions conform to or align with international and regional human rights instruments. In this section, this Article will examine Eswatini's efforts to end child marriage and draw lessons for other African countries. The Constitution of Eswatini states that "[m]arriage shall be entered into only with the free will and full consent of the intending spouses."<sup>380</sup> Section 29 protects children from various forms of abuse and imposes an obligation on the State to protect children from abuse and exploitation.<sup>381</sup> The right to enter into marriage is granted only to "[m]en and women of marriageable age" and only they can "marry and found a family."<sup>382</sup> However, the Constitution does not define the minimum age for marriage, nor does it expressly define who a child is.<sup>383</sup>

Eswatini's legal system is comprised of a Roman-Dutch-based common law system and a traditional Swazi law and custom-based system.<sup>384</sup> Although Eswatini's Constitution includes provisions on the rights of children, which are included in the Bill of Rights, it does not, however, provide a definition for "child" or "age of majority."<sup>385</sup> This omission is problematic because Eswatini has ages of majority that depend on the purpose. The age of consent for sexual intercourse is sixteen years; for marriage, it is sixteen years but the Minister of Justice must grant permission.<sup>386</sup> At eighteen years, a person can marry with

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380. CONST. OF THE KINGDOM OF ESWATINI, 2005, § 27(2) (Swaz.).

381. *Id.* §§ 29(1), 29(7)(d).

382. *Id.* § 27(1).

383. *See id.*

384. International Commission of Jurists, *Swaziland: Legal Tradition*, (June 16, 2014), <https://www.icj.org/cijl/countryprofiles/swaziland/swaziland-introduction/swaziland-legal-tradition/>.

385. CONST. OF THE KINGDOM OF ESWATINI, § 29.

386. U.N. Off. High Comm'r Hum. Rts. (OHCHR), *Swaziland: Civil Society Contribution to the Universal Periodic Review—Women and LGBTIs Cluster: Joint Periodic Review Submission Swaziland*, <https://www.ohchr.org/sites/default/files/lib->



parental consent; and at twenty-one years, a person can consent to marriage without parental or ministerial approval.<sup>387</sup> In the information provided by the U.N. Commissioner for Human Rights as part of the Universal Periodic Review—Women and LGBTIs Cluster, the Swaziland Positive Living (“SWAPOL”), which was leading a coalition of members of civil society,<sup>388</sup> reported that “in accordance to Swazi law and custom[,] majority for marital purposes is reached upon puberty.”<sup>389</sup> As a consequence, “minor girls as young as 13 years [can] be married under customary law,” which indicates that “there is not enough protection for young girls in [Eswatini].”<sup>390</sup> In Eswatini, high levels of poverty are pushing some parents to literally sell their daughters in marriage to older men for the payment of a bride price (or *lobola*).<sup>391</sup>

CEFMU in Eswatini, as in other African countries, has “been associated with socio-economic circumstances.”<sup>392</sup> According to UNICEF, “when poverty is acute, a young girl may be regarded as an economic burden and her marriage to a much older man can be a family survival strategy.”<sup>393</sup> In a paper presented at the regional child labor conference in Johannesburg in 2006, Miriam and Keregero Keregero revealed that in Swazi culture, marriages relate to two practices known as *kwendzisa* and *kulamuta*.<sup>394</sup> *Kwendzisa* describes an arranged marriage of a young daughter, usually to a man of wealth or high standing.<sup>395</sup> *Kulamuta* is where a married man can have sexual

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docs/HRBodies/UPR/Documents/session12/SZ/JS2-JointSubmission2-eng.pdf (last visited June 3, 2023).

387. *Id.* at 3.

388. The civil society organizations include the Swaziland Young Women’s Network, Women and Law in Southern Africa, and the Foundation for Socio-Economic Justice. *See id.* at 1.

389. *Id.* at 3.

390. *Id.*

391. *Id.*

392. Miriam and Keregero Keregero, *Commercial Sexual Exploitation of Children in Swaziland*, DEP’T OF LAB. (SWAZ.) & PROGRAMME TOWARDS THE ELIMINATION OF THE WORST FORMS OF CHILD LAB. (TECL), INT’L LAB. ORG. [ILO], at 2 (July 4–6, 2006).

393. *Id.*

394. *Id.*

395. *Id.*

intercourse with or get married to his spouse's adolescent sister or niece (commonly referred to as *ihlanti*, especially where the spouse cannot conceive or is perceived to be getting old).<sup>396</sup>

In Eswatini, *kwendizisa*, a customary and traditional practice that involves the marriage of men to underage girls, has been a generally accepted social norm for many centuries.<sup>397</sup> When research revealed “evidence of the relationship between the spread of HIV within child marriages and polygamous unions, the issue of child marriage” became a policy priority for Eswatini.<sup>398</sup> Subsequently, Eswatini's government enacted the Children's Protection and Welfare Act, No. 6 of 2012 (“CPWA”).<sup>399</sup> The CPWA defines a child as “a person under the age of eighteen years.”<sup>400</sup> CPWA sections 14 and 15 protect children from “cultural and degrading punishment” and grant them the right to refuse participation in harmful cultural and religious practices.<sup>401</sup>

Although one may interpret the CPWA's various provisions “as outlawing child marriages in Eswatini,” the act is not entirely comprehensive.<sup>402</sup> The CPWA does not consider that girls are under extreme pressure from their communities to adhere to customs and cultures that mandate child marriage and other harmful practices.<sup>403</sup> Additionally, the provisions of the CPWA do not consider the “prevalent unequal power relations and gender inequalities that [undermine] girls' ability to negotiate or refuse to participate in harmful cultural practices.”<sup>404</sup> Thus, while the CPWA grants girls the right to refuse to participate in harmful practices, their ability to exercise that right is severely restrained by the pressure imposed on them by the

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396. *Id.*

397. *See, e.g., Swaziland: New legislation Outlaws Child Marriage, GIRLS NOT BRIDES* (Sept. 20, 2012), <https://www.girlsnotbrides.org/articles/swaziland-new-legislation-outlaws-child-marriage/> (explaining the customary practice of *kwendizisa* and the Children's Protection and Welfare Act of 2012, which outlawed the practice).

398. SALC, *supra* note 349, at 12.

399. *See generally*, CHILDREN'S PROTECTION AND WELFARE ACT (CPWA), 2012 (ACT NO. 6 OF 2012) (Swaz.).

400. *Id.* S13 at ¶ (a).

401. Children's Protection, *supra* note 399, §§ 14–15.

402. SALC, *supra* note 349, at 13.

403. *Id.*

404. *Id.*

traditions and customs of their communities.<sup>405</sup> Child advocates have faced increased difficulty protecting kids from child marriages as Eswatini's laws fail to prohibit the practice. Additionally, many traditional leaders throughout the kingdom are against eradicating child marriage and insist that it is an acceptable and an integral element of their culture and customs.<sup>406</sup>

In 2018, Eswatini enacted the SODVA, which provides substantial protections for children, especially with respect to the sexual abuse of children<sup>407</sup> Sections 3(c) and 6(e) establish the crime of rape for any person who has sexual intercourse with anyone who is under the age of eighteen years.<sup>408</sup> Section 43 declares that “[a] person shall not marry a child in contravention of the Marriage Act No. 47 of 1964” or its subsequent iterations.<sup>409</sup> Although this section appears to criminalize child marriage, this is only so if the Marriage Act No. 47 of 1964 actually outlawed it.<sup>410</sup>

The Marriage Act No. 47 does not outlaw child marriage but sets the minimum age of marriage for boys at eighteen and for girls at sixteen years.<sup>411</sup> These differences in minimum age limits for marriage between boys and girls discriminate against girls. Additionally, according to Act No. 47, minors below the age of twenty-one but above the ages of sixteen years for girls and eighteen years for boys may marry with the consent of their legal guardians.<sup>412</sup> However, “persons who have previously been married, whether in accordance with Swazi law and custom or civil rights, shall not be regarded as minors.”<sup>413</sup> It is evident from these provisions, then, that the Marriage Act No. 47 does not outlaw child marriage in Eswatini.<sup>414</sup>

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405. *Id.*

406. *Id.*

407. *See generally* SODV Act, *supra* note 347.

408. *Id.* §§ 3(c), 6(e), at S16–17.

409. *Id.* § 43, at S34.

410. THE MARRIAGE ACT, 1964 (ACT NO. 47 OF 1964) (Swaz.).

411. *Id.* § 3(1).

412. *Id.* § 3(2).

413. *Id.*

414. *Id.*

Eswatini is home to 33,100 children who were first married before the age of eighteen.<sup>415</sup> Moreover, it was determined that five percent of girls were married before they reached age eighteen and one percent before they reached age fifteen.<sup>416</sup> Child marriage remains especially prevalent in the Lubombo region, where it was determined that fourteen percent of women ages twenty to forty-nine were married before they reached age eighteen, and in the Hhohho region, where twelve percent of the women ages twenty to forty-nine were also married before they reached the age eighteen.<sup>417</sup>

In an October 2019 report, UNICEF noted that sixteen years remains the minimum age for girls to legally marry in Eswatini, with the consent of both parents and the official approval from the Ministry of Justice.<sup>418</sup> However, traditional and customary laws in Eswatini set the minimum age for marriage at thirteen years.<sup>419</sup> The African Child Charter, which Eswatini ratified on October 5, 2012, outlaws child marriage and sets the minimum age for marriage at eighteen years.<sup>420</sup> Hence, the failure of Eswatini to harmonize or align its constitutional, statutory, and customary/traditional laws with provisions of the African Child Charter creates an environment wherein child marriage can be carried out “with impunity.”<sup>421</sup> After studying marriage practices in Eswatini, the Southern Africa Litigation Centre concluded that “[t]he lack of harmonization of the child protection law and sexual offences law with the marriage law means that the legal reform has not gone far enough to eliminate child marriage” in the country.<sup>422</sup>

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415. U.N. Child’s Fund [UNICEF], *Child Marriage in Eastern and Southern Africa: A Statistical Overview and Reflections on Ending the Practice*, at 32 (2022).

416. *Id.*

417. SALC, *supra* note 349, at 13. The Kingdom of Eswatini, form Swaziland, is divided into four administrative regions, namely Hhohho, Manzini, Lubombo, and Shiselweni. *See, e.g.*, Kingdom of Eswatini, *Eswatini’s Regions*, <https://www.thekingdomofeswatini.com/eswatini-regions/> (last visited Dec. 26, 2023).

418. UNICEF, *Situation of Children and Adolescents in the Kingdom of Eswatini*, UNICEF, at 18 (Oct. 31, 2019), <https://www.unicef.org/eswatini/reports/situation-children-and-adolescents-kingdom-eswatini>. Sixteen years, of course, contradicts the minimum age for marriage set by the African Child Charter. African Child Charter, *supra* note 1, at art. 21(2).

419. UNICEF, *Situation of Children*, *supra* note 418, at 18.

420. *See* African Child Charter, *supra* note 1, at art. 21(2).

421. UNICEF, *Situation of Children*, *supra* note 418, at 18.

422. SALC, *supra* note 349, at 15.

In 2022, Eswatini introduced The Marriages Bill to address “the issue of child marriage directly and indirectly through a number of provisions.”<sup>423</sup> Section 2 defines a child as “a *person* under the age of eighteen (18) years.”<sup>424</sup> To be valid, a civil marriage must be “solemnised by a marriage officer” and customary marriages must fulfill the requirements provided in Part III and Section 24 of The Marriages Bill.<sup>425</sup> The most significant change introduced by the Marriages Bill, especially as it relates to child marriage, is the designation of eighteen years as the minimum age for marriage, without any distinction between boys and girls.<sup>426</sup> At least, with respect to the minimum age for marriage, Eswatini’s laws are gradually aligning themselves with provisions of international and regional human rights instruments.<sup>427</sup>

Section 15 of the Marriages Bill provides severe penalties for marriages solemnized in violation of its provisions, including the provision that such a marriage “shall be null and void.”<sup>428</sup> Furthermore, a person who knowingly enters into a marriage that is null and void under any of the provisions of Part III, shall “be liable to a fine not exceeding five thousand Emalangeni (E5,000) or imprisonment for a term not exceeding two (2) years.”<sup>429</sup> The way this provision is framed, particularly with respect to the marriage of persons under eighteen years, renders it inconsistent with provisions of the SODVA. According to Section 15, children who are married and the adults who marry them are subject to the criminal sanctions imposed by this section. It is important that the laws criminalizing child marriage must not impose criminal penalties on the children who are forced into this practice.<sup>430</sup>

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423. *Id.* at 16. *See also* THE MARRIAGES BILL, 2022 (BILL NO. 8 OF 2022) (Swaz.).

424. THE MARRIAGES BILL, *supra* note 423, § 2(b) (emphasis added).

425. *Id.* §§ 3, 24.

426. *Id.* § 8.

427. *Id.*

428. *Id.* § 15(1).

429. *Id.* § 15(2).

430. *The Law and Child Marriage*, GIRLS NOT BRIDES, <https://www.girlsnotbrides.org/about-child-marriage/law-and-child-marriage/> (last visited June 3, 2023) (noting that laws against child marriage can actually impose penalties on the children who are forced into the practice).

The Marriages Bill is “a significant step forward in addressing the issue of child marriages in Eswatini,” given that it “rightly focuses on bringing the civil and customary marriages within a single legal regime.”<sup>431</sup> Additionally, the Bill sets the minimum age for marriage at eighteen years, outlaws the betrothal of children, and invalidates non-compliant marriages.<sup>432</sup> Furthermore, the bill “goes a long way towards harmonisation with the sexual offences and child protection laws” and brings Eswatini’s laws on marriage closer to the minimum standards established by international and regional human rights instruments.<sup>433</sup>

A critical development in the efforts to eradicate child marriage and protect children who are already trapped in marriage in Eswatini and other SADC member states was the adoption of the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage (“SADC Model Law”).<sup>434</sup> In the next sub-section, this Article will examine that model law and provide lessons for other African countries on how to improve their legal systems, eradicate child marriage, and protect children who are already in marriage.

### C. *The SADC Model Law*

The SADC Model Law was adopted on June 3, 2016, by the 39th Plenary Assembly of the [Southern African Development Community] Parliamentary Forum (“SADC-PF”) meeting in Eswatini.<sup>435</sup> The SADC Model Law is based on the idea that a model law is “a set of legal standards on a specific issue, which are offered for the consideration of,

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431. SALC, *supra* note 349, at 19.

432. *Id.*

433. *Id.*

434. South African Development Community, *Model Law on Eradicating Child Marriage and Protecting Children* (2014), <https://www.girlsnotbrides.org/documents/484/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf> [hereinafter SADC Model Law].

435. The SADC consists of Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Kingdom of, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, United Republic of, Zambia, and Zimbabwe. *Member States*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TOWARDS A COMMON FUTURE, <https://www.sadc.int/member-states#:~:text=The%20Southern%20African%20Development%20Community,Republic%20Tanzania%2C%20Zambia%20and%20Zimbabwe> (last visited June 4, 2023).

and adoption by, national legislators as part of their national law.”<sup>436</sup> These legal standards usually “embod[y] a detailed set of provisions inspired from international, regional or sub-regional standards on a subject.”<sup>437</sup> For African States seeking to draft and adopt legislation to deal with specific issues (e.g., child marriage, FGM, sexual slavery), a model law can help governments draft effective laws, particularly those that reflect international and regional standards.<sup>438</sup> Model laws, however, are “not developed with a specific country in mind.”<sup>439</sup> Instead, model laws are considered an adaptable template which, when applied, accounts for a specific country’s unique characteristics.<sup>440</sup>

At its 35th Assembly in June 2014, the SADC-PF adopted a resolution calling for member states to make “concerted efforts” to eradicate child marriage from all their jurisdictions.<sup>441</sup> The SADC-PF then arranged to partner with several international and regional organizations to develop the model law.<sup>442</sup> The process was participatory and inclusive and involved “a wide range of stakeholders, including parliamentarians, policy-makers, young people, legal experts and legal drafters, judges, civil society organizations, and U.N. agencies from across the SADC region.”<sup>443</sup>

The SADC Model Law’s purpose is to “guide the actions of Member States with regard to legislation, policy and programming to address the problem of child marriage.”<sup>444</sup> It contains certain features that are ideal for crafting legislation to deal with child marriage. First,

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436. SADC, *GIRLS NOT BRIDES AND UNFPA, A GUIDE TO USING THE SADC MODEL LAW ON ERADICATING CHILD MARRIAGE AND PROTECTING CHILDREN ALREADY IN MARRIAGE: FOR PARLIAMENTARIANS, CIVIL SOCIETY ORGANIZATIONS AND YOUTH ADVOCATES 7* (2018) [hereinafter *A Guide to Using the SADC Model Law*]. *See also* SADC Model Law, *supra* note 434.

437. *A Guide to Using the SADC Model Law*, *supra* note 436, at 7.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. These organizations included the U.N. Population Fund (UNFPA), East and Southern Africa Regional Office (UNFPA ESARO), Association of European Parliamentarians with Africa, Plan International, the Southern African Litigation Centre, Girls Not Brides, and the World Young Women’s Christian Association. *See id.*

443. *A Guide to Using the SADC Model Law*, *supra* note 436, at 7.

444. *Id.* at 8.

the model law is “holistic and comprehensive.”<sup>445</sup> The SADC Model Law deals with much more than child marriage and provides “a multi-sectoral framework for prevention, protection and mitigation of the effects of child marriage.”<sup>446</sup> Second, it is relatively accessible and “easy to use as it is drafted in a way that makes it possible to transplant its contents into national legislation without undue effort following simple clear instructions.”<sup>447</sup>

Ideally, each country should be able to use the SADC Model Law to “create a new comprehensive national law on child marriage that encompasses all the areas in the Model Law, while adapting relevant provisions to suit the national context.”<sup>448</sup> Through this process, each country can draft and adopt laws to eradicate child marriage and protect children already in marriage that reflect provisions of international and regional human rights instruments and are sensitive to the specificities of individual SADC countries.<sup>449</sup> The SADC Model Law can represent minimum standards that national legislatures can use to identify deficiencies in their existing laws and make necessary modifications to bring them into conformity with international and regional human rights law.<sup>450</sup>

For example, after using the model law to review its existing laws, a country may determine that its customary laws do not have a minimum age for girls to consent to marriage. Instead, girls are forced into marriage when they reach puberty, which can occur between the ages of eight and thirteen.<sup>451</sup> The country will recognize that its customary law violates the minimum age for marriage set by international and regional human rights instruments.<sup>452</sup> Accordingly, the State can amend relevant domestic laws (e.g., the Marriages Act) to include the SADC Model Law’s provisions on minimum age of

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445. *Id.*

446. *Id.*

447. *Id.*

448. A Guide to Using the SADC Model Law, *supra* note 436, at 9.

449. *Id.* at 8

450. *Id.* at 9.

451. EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, *Puberty and Precocious Puberty*, <https://www.nichd.nih.gov/health/topics/factsheets/puberty> (last visited June 4, 2023).

452. A Guide to Using the SADC Model Law, *supra* note 436, at 11.



marriage, and provide local courts and the police the wherewithal to enforce the new or amended law.<sup>453</sup>

The SADC Model Law can be used to help countries design and implement programs to educate girls and their parents on child marriage and its consequences, address issues like the rehabilitation of girls whose education and childhood were interrupted by child marriage, help Non-governmental organization (NGOs) develop plans to monitor national efforts to eradicate child marriage and protect girls who are trapped in these relationships, determine the government's level of effectiveness, and make suggestions for improvements, where necessary. Thus, the SADC Model Law can provide a mechanism through which various stakeholders can participate in national efforts to eradicate child marriage and protect girls currently trapped in marriage in their communities. Since the SADC Model Law's provisions were inspired by and reflect "international, regional or sub-regional standards" on child marriage, they should help each country develop marriage laws that conform with regional and international human rights law.<sup>454</sup>

The rights that the SADC Model Law provides fit into the following categories: (1) principles and general rights, including the best interests of the child principle;<sup>455</sup> (2) protection from discrimination; (3) right to life, privacy, dignity, and respect; (4) protection from harmful practices; (5) right to parental care; (6) right to education; (7) right to health; (8) right to social protection and access to social services; (9) protection of children from physical and psychological violence or abuse; (10) right to equal pay; and (11) right to registration of birth and marriage.<sup>456</sup>

The SADC Model Law also includes provisions that prohibit child marriages and voids existing marriages that were contracted in violation of child marriage laws. It requires all SADC states to set the minimum age for marriage at eighteen years, provide a national marriage register, ensure that all marriages are registered, and "take effective action, including through legislation, to eradicate child marriage."<sup>457</sup> The SADC

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453. *Id.* at 12.

454. *Id.* at 7.

455. SADC Model Law, *supra* note 434, ¶ 3(1).

456. *Id.* ¶¶ 4–15. *See also* A Guide to Using the SADC Model Law, *supra* note 436, at 11.

457. A Guide to Using the SADC Model Law, *supra* note 436, at 12. *See also* SADC Model Law, *supra* note 434, at 46–50.

Model Law prohibits “the betrothal of a child, marriage between a child and an adult, and marriage between two children.”<sup>458</sup>

Regarding children born of child marriages, the SADC Model Law provides that such offspring are “legitimate children for all legal, judicial or administrative purposes” and granted “the same rights and responsibilities as other legitimate children.”<sup>459</sup> As for property acquired by both parties to a marriage, the SADC Model Law provides that such property should be “distributed equally between [the parties] after voiding the marriage, while the property acquired or inherited by the married child stays with the child.”<sup>460</sup>

The SADC Model Law’s measures for preventing child marriages and the betrothal of children include ensuring that the government provides and maintains a register of all births and each child receives an official birth certificate.<sup>461</sup> Under suspicion that “one party is a child, or both of the parties are children,” the birth certificate issued can be used to verify the child’s age.<sup>462</sup> A court can issue a restraining order against someone it determines has arranged the betrothal or marriage of a child.<sup>463</sup> If the order is violated, the court may hold the offenders “liable, on conviction, to a fine or imprisonment.”<sup>464</sup>

Child marriage is often justified on economic grounds—an impoverished family may force its young daughters into marriage for a bride price, including livestock and real property, to improve the family’s economic position.<sup>465</sup> The SADC Model Law seeks to eradicate this practice by urging each government to establish a system of economic incentives for “families and children to assist in the delay

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458. A Guide to Using the SADC Model Law, *supra* note 436, at 11. *See also* SADC Model Law, *supra* note 434, at 49.

459. A Guide to Using the SADC Model Law, *supra* note 436, at 11. *See also* SADC Model Law, *supra* note 434, at 50.

460. A Guide to Using the SADC Model Law, *supra* note 436, at 11. *See also* SADC Model Law, *supra* note 434, at 51.

461. *See* SADC Model Law, *supra* note 434, at 47.

462. A Guide to Using the SADC Model Law, *supra* note 436, at 12. *See also* SADC Model Law, *supra* note 434, at 53–54.

463. A Guide to Using the SADC Model Law, *supra* note 436, at 12.

464. *Id.*

465. Parmita Das, *The Economics of Child Marriage*, BERKLEY ECO. REV. (Oct. 18, 2018), <https://econreview.berkeley.edu/the-economics-of-child-marriage/>.

of marriage.”<sup>466</sup> For example, the SADC Model Law suggests “providing cash transfers to the family to encourage children to remain single until they reach the minimum age of marriage; providing funds to a girl child, to enable her to complete secondary school education; or giving scholarships and bursaries to a girl child up to tertiary level.”<sup>467</sup>

The underage girls trapped in child marriages suffer many harmful effects, including a significantly higher risk of (1) physical and sexual violence; (2) experiencing dangerous complications in pregnancy and childbirth, including contracting obstetric fistula; (3) being exposed to and catching HIV/AIDS, and other sexually transmitted infections (STIs); and (4) being subjected to domestic violence, from the husband and other members of his family.<sup>468</sup> The SADC Model Law provides States with guidance on how to effectively and fully mitigate the harmful effects of child marriage. Governments can use national legislation to provide meaningful support to children forced into marriage. Specifically, the SADC Model Law states that “[g]overnments must ‘establish public safety homes, public foster homes or any other public facility for the residence, care and maintenance of victims of child marriage and ensure their protection against violence.’”<sup>469</sup>

Moreover, the SADC Model Law also instructs governments “to strengthen community networks” and encourage local communities to establish committees that can watch out for violations of laws against child marriage.<sup>470</sup> These committees must be established through a participatory and inclusive process that adequately uses input from community leaders, especially religious and traditional leaders.<sup>471</sup> Finally, the SADC Model Law directs governments to provide training for all state and non-state actors involved in prohibiting child marriage.<sup>472</sup> These include members of the judiciary; police officers,

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466. A Guide to Using the SADC Model Law, *supra* note 436, at 12. *See also* SADC Model Law, *supra* note 434, at 57.

467. A Guide to Using the SADC Model Law, *supra* note 436, at 12. *See also* SADC Model Law, *supra* note 434, at 57.

468. *See, e.g.*, Nawal M. Nour, *Child Marriage: A Silent Health and Human Rights Issue*, 2 REV. IN OBSTETRICS & GYNECOLOGY 51 (2009) (examining the health effects of child marriage).

469. A Guide to Using the SADC Model Law, *supra* note 436, at 12.

470. *Id.*

471. *Id.*

472. *Id.*

and other individuals responsible for enforcing the laws; traditional and religious leaders; and members of the political branches (e.g., legislators).<sup>473</sup>

The SADC Model Law noted that every child involved in marriage should be granted the right to “refuse sexual acts, including acts that put the child at risk of infection, such as HIV or other sexually transmitted infections.”<sup>474</sup> States must ensure that marriage is not used as a defense for the crime of rape.<sup>475</sup> Children in marriage should be granted certain services free of charge to them and these include, at the minimum, legal services particular to the child’s needs; help in taking care of their children; and adequate access to education for the child in marriage and the offspring of such marriage.<sup>476</sup>

Part VI of the SADC Model Law prioritizes monitoring child marriage and educating communities about the consequences of this practice.<sup>477</sup> Access to information and data regarding child marriage is imperative to human rights organizations and NGOs that advocate on behalf of female children.<sup>478</sup> This information and data allow these organizations to consult policymakers on how to eradicate CEFMU and its harmful consequences to children and their communities. Governments must create and maintain records that can easily be accessed by people and organizations that are involved in the eradication of child marriage and the protection of married children and their offspring.<sup>479</sup>

Furthermore, the government must provide enough funds to defray the costs of regular monitoring and evaluation, particularly on “[c]ustomary, religious and national laws, policies, strategies, measures and interventions relating to the child, child marriage, eradication of child marriage and prevention of child marriage to ensure compliance with this Model Law” and “[t]echnical, human and financial resources to ensure that these are adequate for the implementation of the measures and

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473. *Id.*

474. A Guide to Using the SADC Model Law, *supra* note 436, at 13.

475. *Id.*

476. *Id.* See also SADC Model Law, *supra* note 434, at 54–61.

477. SADC Model Law, *supra* note 434, at 15.

478. *Id.*

479. A Guide to Using the SADC Model Law, *supra* note 436, at 14.

interventions provided in this Model Law.”<sup>480</sup> Data collected must be disaggregated, for example, by the “incidence and prevalence of child marriage” or “nature and magnitude of child marriage.”<sup>481</sup>

Regarding monitoring and evaluation, the SADC Model Law instructs stakeholders, including governments and healthcare providers (at both public and private healthcare centers), to develop and implement “comprehensive nation-wide awareness-raising campaigns” to educate various publics on child marriage and its impact on young girls, their families, and communities.<sup>482</sup> This process allows NGOs to gather evidence which can be used to confront gender-based violence and effectively “challenge dominant, religious or traditional conceptions of masculinity.”<sup>483</sup>

In an effort to end child marriage, the SADC Model Law has created a plan that instructs governments to take actions that are to be measured by enforcement and compliance standards established by the SADC Model Law. First, each government must “[s]ubmit state reports to the SADC-PF and other international and regional bodies, annually or as required under various international and regional human rights instruments.”<sup>484</sup> These reports should provide details on the measures that the state is taking to end child marriage while protecting the human rights of children and their offspring from these marriages.<sup>485</sup> Second, governments should “[p]romptly follow up on the recommendations made by SADC-PF and other international and regional bodies on measures to be taken to eradicate child marriage and protect victims of child marriage.”<sup>486</sup>

Third, each government is required to undertake robust and constructive consultations with all stakeholders, particularly those who are relevant to the eradication of child marriage and the protection of children’s rights. These stakeholders include, inter alia, children, traditional and community leaders, and various civil society

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480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. A Guide to Using the SADC Model Law, *supra* note 436, at 15.

485. *Id.*

486. *Id.*

organizations that advocate on behalf of children.<sup>487</sup> Fourth, governments should create and sustain an enabling institutional and legal environment to enhance the ability of civil society organizations to conduct research on child marriage and its consequences.<sup>488</sup> This environment would contribute to the eradication of child marriage and enhance the recognition and protection of children's rights.<sup>489</sup>

Fifth, each State must provide the wherewithal for important stakeholders to participate fully and effectively in the eradication of child marriage. Such support can include, *inter alia*, financial assistance to build and maintain community centers, as well as educate families and other stakeholders on the negative consequences of child marriage and why eradicating it can significantly improve not only the child's welfare but that of the family and community.<sup>490</sup> Sixth, the executive branch of each country's government is required to send to the legislature, on a bi-annual basis, detailed reports showing the extent to which the country is making progress toward eradicating child marriage and protecting the rights of children.<sup>491</sup> Finally, each government must establish a permanent fund to (i) finance the prevention and eventual eradication of child marriage; (ii) provide assistance to children who are already in marriage; (iii) protect and assist children victimized by child marriage; and (iv) support campaigns to educate various stakeholders about child marriage generally and its impact on children, families, and communities in particular, as well as educate the public as to the importance of eradicating child marriage.<sup>492</sup>

Throughout the continent, many legislative assemblies have gradually begun to design and implement legislation at the national level to eradicate child marriage and protect children who are already in marriage. The SADC Model Law has provided guidelines on how legislators can develop and implement effective measures to eradicate child marriage and deal with the impact that it has on children who are currently trapped in it.<sup>493</sup> First, each country must start by examining

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487. *Id.* at 14.

488. *Id.* at 15.

489. *Id.*

490. A Guide to Using the SADC Model Law, *supra* note 436, at 15.

491. *Id.*

492. *Id.*

493. *Id.* at 10.

existing constitutional, statutory, and customary laws regulating marriage. Using the provisions of the SADC Model Law, the country can determine how to structure its reform process, beginning with the constitution, and then moving on to statutory and customary laws. The objective is to ensure that all laws conform to the provisions of international and regional human rights instruments.<sup>494</sup>

The SADC Model Law provides guidance to civil society organizations on how to directly interact with national legislators and help them effectively incorporate provisions of the SADC Model Law into national legislation.<sup>495</sup> Second, the SADC Model Law instructs countries to make all laws conform to international human rights instruments.<sup>496</sup> This is important because provisions of the SADC Model Law are “non-binding and must be incorporated or domesticated at the national level” before they become binding.<sup>497</sup> Third, the SADC Model Law provides the wherewithal on how to (i) check on the government and hold it accountable to its commitments to eradicate child marriage and enforce laws against the violation of the rights of children; (ii) mobilize public support for legislation to eradicate child marriage, including providing relevant legislators with the technical assistance that they need to design and enact effective anti-child marriage laws; and finally, (iii) develop, with the help of government, education and training programs to help inform citizens on the provisions of the Model Law and how it can help eradicate child marriage and promote the recognition and protection of the rights of children.<sup>498</sup>

#### *D. Importance of the SADC Model Law to the Eradication of Child Marriage in Africa*

According to UNICEF, of the world’s “10 countries with the highest rates of child marriage,” six of them are found in West and Central Africa.<sup>499</sup> Of course, West and Central Africa are not the only

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494. *Id.* at 15.

495. A Guide to Using the SADC Model Law, *supra* note 436, at 19.

496. *Id.* at 17

497. *Id.* at 19.

498. *Id.* at 22–23.

499. UNICEF, *Child Marriage: Key Result for Children*, <https://www.unicef.org/wca/child->

regions of Africa where child marriage is pervasive. According to HRW, a staggering forty percent of girls marry before age eighteen, and African countries account for fifteen of the twenty countries with the highest rates of child marriage.<sup>500</sup>

According to UNICEF, eastern and southern Africa are the regions with over 50 million child brides, with Ethiopia being the country with the largest share.<sup>501</sup> *Inhlanti* is an Eswatini practice in which a wife gives away her younger sister in marriage to her own husband, generally when it is determined that she cannot bear children and *kwendzisa* is another Eswatini practice involving child brides.<sup>502</sup> It is the pervasiveness of practices such as *ukuthwala* (South Africa), *inhlanti*, and *kwendzisa* (Eswatini) that provided the impetus for the design and adoption of the Model Law by SADC.<sup>503</sup>

According to its “rational and objectives,” the SADC Model Law is designed “to trigger policy reforms and development or revision of substantive laws in Member States (MS) of SADC.”<sup>504</sup> It is designed to shift the focus, particularly on child marriage, from a national to a regional perspective, with the expectation of harmonizing laws against or eradicating child marriage and galvanizing efforts already taken at the national level to establish minimum standards at the regional level for the eradication of child marriage. Most importantly, the SADC Model Law was informed by and based on international human rights instruments to which SADC member States are already States Parties.<sup>505</sup>

Since the Model Law creates “a robust and uniform legal framework relating to the prohibition and prevention of child marriage,” it can serve as “a yardstick and an advocacy tool for

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marriage#:~:text=What's%20at%20stake%3F,physical%20risks%2C%20especially%20during%20pregnancy (last visited June 12, 2023).

500. Human Rights Watch, *Ending Child Marriage in Africa*, *supra* note 44.

501. UNICEF, *Child Marriage in Eastern and Southern Africa* (June 16, 2022), <https://data.unicef.org/resources/child-marriage-in-eastern-and-southern-africa-a-statistical-overview-and-reflections-on-ending-the-practice/>.

502. *Swaziland*, GIRLS NOT BRIDES, <https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/swaziland/>. (last visited Dec. 26, 2023).

503. *Id.*

504. SADC Model Law, *supra* note 434, at 2.

505. *Id.*



legislators” in the SADC region and throughout Africa.<sup>506</sup> The SADC Model Law’s importance derives from its heavy reliance on provisions of international human rights instruments related to child marriage and the protection of children’s human rights.<sup>507</sup> At the very least, the SADC Model Law can be used to harmonize national laws to ensure that they conform to the provisions of international human rights instruments.<sup>508</sup>

The SADC Model Law forces governments, civil society organizations, and all other groups or individuals interested in eradicating child marriage, to adopt a human rights approach to eradicating child marriage. It is critical that each country develop and adopt a robust legal and institutional framework that can address all the harmful effects on children that flow directly from “cultural, religious and traditional systems impacting on marriage which exist side by side with statutory laws,” in SADC and other parts of Africa.<sup>509</sup>

The key lesson for other African countries outside the SADC Region is to recognize the SADC Model Law as a legal framework that can be used to modify or reform constitutional, customary, and statutory laws and bring them into conformity with provisions of international human rights instruments. However, each country should also consider making constitutional provisions guaranteeing human rights and fundamental freedoms of children part of the bill of rights.<sup>510</sup>

Before a country enacts legislation to eradicate child marriage and protect children currently in a marriage, it should sign and ratify all the relevant international human rights instruments. Following ratification, the country should enact enabling legislation to domesticate all the international and regional human rights instruments to create rights that are justiciable in domestic courts. The SADC Model Law makes reference to the Vienna Convention on the Law of Treaties (1969), which codifies public international law.<sup>511</sup> According to the Vienna Convention, “[e]very treaty in force is binding upon the parties to it and

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506. *Id.* at 3.

507. Some of these international and regional human rights instruments, include the UNCRC and the African Child Charter. *See* SADC Model Law, *supra* note 434.

508. *Id.* at 3.

509. *Id.* at 4–5.

510. *Id.* at 5–6.

511. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force on Jan. 27, 1980).

must be performed by them in good faith”<sup>512</sup> and “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>513</sup> Consequently, an African country that signs and ratifies the African Child Charter is bound by this treaty and all its provisions and, therefore, cannot use, for example, customary laws or traditional practices that permit the betrothal and marriage of children to justify its unwillingness to perform all provisions of the treaty.<sup>514</sup>

Many African countries, including those in the SADC, are States Parties to the major international and regional human rights treaties. The Preamble to the SADC Model Law is based on provisions of international and regional human rights instruments.<sup>515</sup> The SADC Parliamentary Forum, which drafted the SADC Model Law, was “[c]onscious [of] Article 21(1) of the [African Child Charter],” which imposes an obligation on all States Parties to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child,” as well as prohibit child marriage and the betrothal of girls and boys.<sup>516</sup>

In the section titled “Restatement of Rights and Concepts Relating to the Child and Attendant Policy Initiatives, Measures and Intervention,” the SADC Model Law provides a rubric that can be used by African States to “draft similar provisions with minimum amendments.”<sup>517</sup> The key is for States to use the restated rights to draft and adopt provisions on the eradication of child marriage and the protection of currently married children that conform “with the style and language of legislation in each jurisdiction,” as well as international and regional human rights instruments.<sup>518</sup>

In general, legislation to eradicate child marriage and protect the rights of children already in a marriage must include the following

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512. *Id.* at art. 26.

513. *Id.* at art. 27.

514. African Child Charter, *supra* note 1, at art. 21(2) (Article 21(2) of the African Child Charter prohibits “[c]hild marriage and the betrothal of girls and boys.”).

515. SADC Model Law, *supra* note 434, at 8.

516. *Id.* at art. 21(1) & 21(2).

517. *Id.* at 33.

518. *Id.* at 33. The list of international and African human rights instruments that the Model Law builds on are listed on page twenty-five of the Model Law. *See id.* at 25.

principles and rights: (i) the best interests of the child principle; (ii) protection of children from discrimination; (iii) equality, right to life, privacy, dignity and respect; (iv) protection from exploitation and abuse; (v) protection from harmful practices; (vi) parental care and protection; (vii) right to education; (viii) right to health; (ix) social protection and access to social services; (x) protection from child labor and the right to sustainable livelihood and empowerment; (xi) protection for vulnerable children (e.g., children with disabilities); (xii) right to registration of birth and marriage; and (xiii) special policies and programs for children already in marriage and victims of child marriage.<sup>519</sup>

The SADC Model Law, however, does not deal explicitly with children who are living in situations of “conflict or humanitarian settings.”<sup>520</sup> Unfortunately, in such situations, “child marriage rates increase, with a disproportionate impact on girls” and this is due to the fact that families that have lost their livelihoods, including their homes, land, and livestock in times of war or other conflict, often “consider child marriage as a way to cope with greater economic hardship and to protect girls from increased violence.”<sup>521</sup> The reality, however, is that these female children who are forced into marriage are subjected to a litany of damaging consequences, including obstetric fistula, isolation and depression, increased risk of sexually transmitted infections, cervical cancer, and other health problems.<sup>522</sup> States, thus, must include in their laws to eradicate child marriage and protect children currently in marriage, provisions to protect vulnerable children, particularly those living in situations of armed conflict and/or humanitarian settings.<sup>523</sup>

#### IV. AFRICAN LEGAL SYSTEMS AND CHILD MARRIAGE

Although international and regional institutions are important to the eradication of child marriage and the protection of the rights of children already in marriage, municipal legal systems in African countries are considered equally critical. While international and regional human

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519. SADC Model Law, *supra* note 434, at 33–48.

520. A Guide to Using the SADC Model Law, *supra* note 436, at 11.

521. *Id.*

522. Nour, *supra* note 57 (examining the health effects of child marriage).

523. SADC Model Law, *supra* note 434, at 11.

rights instruments define and set minimum standards for the protection of children and their rights, it is the municipal legal system that can take action to protect the child from marriage. Thus, the quality of a country's legal system is an important factor in any effort to eradicate child marriage and enhance the protection of the rights of children.

For an African legal system to be fully capable of effectively preventing child marriage, protecting the rights of children currently in marriage, and children born from those marriages, it is imperative for the country to sign, ratify, and domesticate the relevant international and regional human rights instruments.

There are several international and regional human rights instruments that deal directly or indirectly with child marriage and the protection of children, including children with special needs (e.g., children with disabilities). These include, for example, the UNCRC and the African Child Charter. Each African country must sign, ratify, and domesticate the provisions of these international human rights instruments and create rights that are justiciable in municipal courts. However, in ratifying these instruments, States Parties must not make declarations that can invalidate the binding effect of the instrument. For example, when the Republic of Sudan ratified the African Child Charter on July 18, 2007, it made a declaration to the effect that it did not consider itself bound by Articles X (protection of privacy), XI(6) (education of children who become pregnant before they complete their education), and XXI(2) (child marriage and the betrothal of girls and boys).<sup>524</sup> By doing so, Sudan effectively rendered these provisions inoperable within its jurisdiction. Families and communities within the country were allowed to continue to carry out the barbaric and insidious practices of child marriage and the betrothal of boys and girls. In addition, Khartoum also made it possible for schools to continue to expel girls who become pregnant while still in school.<sup>525</sup>

In some African countries like Nigeria, domestic religious or traditional groups that consider many of these harmful practices essential to their culture, customs, and identity can derail the domestication of various international human rights instruments. Since Nigeria follows the dualist theory, legislators are required to enact legislation domesticating a treaty before the rights guaranteed or

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524. *African Charter*, *supra* note 1.

525. *Id.* at 12.

enumerated in the treaty can become justiciable.<sup>526</sup> However, the enactment of legislation by the National Assembly is not enough to domesticate treaties dealing with children’s issues. As noted by Professor Daniel Ogunniyi, an expert on constitutional law in Nigeria, “while the federal legislature possesses wide powers to domesticate treaties with diverse subject matters (including for example, environmental, nuclear and trade treaties), state assemblies must be consulted whenever the subject matter of a treaty concerns children’s rights or childhood issues in general.”<sup>527</sup>

However, obtaining the consent of various sub-national units is still not enough. The national government must deal with a few other issues. First, the government must reckon with the fact that the country is highly “fragmented in terms of culture, religion, ethnicity, [and] language,” which makes reaching a consensus, especially on issues dealing with children, extremely difficult.<sup>528</sup> Second, since Nigeria’s population is “roughly split between a majority Muslim north and a largely Christian south,” with diverse perceptions of children’s rights, it has been very difficult for the National Assembly to achieve consensus on legislation dealing with children’s rights (e.g., child marriage).<sup>529</sup>

The National Assembly enacted the Child’s Rights Act (“CRA”) in 2003 to domesticate the UNCRC and the African Child Charter.<sup>530</sup> For the statute to be “effective and become binding on all jurisdictions within the country, it has to be re-enacted by the assemblies of the country’s sub-units—that is, the thirty-six States.”<sup>531</sup> As of 2019, only thirteen of the country’s thirty-six States had passed legislation

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526. Mbaku, *Rights of Children in Africa*, *supra* note 191, at 214.

527. Daniel Ogunniyi, *The Challenge of Domesticating Children’s Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children*, 62 J. AFR. L. 447–48 (2018).

528. *Id.*

529. *Id.* In Nigeria, the National Assembly is a bicameral legislature established pursuant to Section 4 of the Constitution. It consists of a Senate (109 members) and a House of Representatives (360 members). The National Assembly was modeled after the U.S. Congress. See *National Assembly of the Federal Republic of Nigeria*, THE MOTION TRACKER, <https://www.motiontracker.org/organisations/nigeria/national-assembly-federal-republic-nigeria> (last visited Dec. 26, 2023). See also CONST. NIGERIA, 1999, at sect. 4.

530. The Child’s Rights Act, 2003 (Act No. 26) (Nigeria).

531. Mbaku, *Rights of Children in Africa*, *supra* note 191, at 214.

domesticating the UNCRC.<sup>532</sup> By February 2023, Pauline Tallen, Nigeria’s Minister of Women Affairs, informed the public that thirty-four of the country’s thirty-six States had enacted the necessary enabling legislation to domesticate the UNCRC and “expressed confidence that the two remaining States, which she did not name, would soon pass the Bill to domesticate the Act.”<sup>533</sup> The fact that it has taken this long—twenty years and counting—to domesticate the UNCRC in Nigeria does not augur well for the eradication of child marriage and the protection of children who are currently married.

Once the relevant international and regional human rights instruments are signed, ratified, and domesticated, the next issue to examine is the quality of the country’s judiciary. The domestic judiciary must be independent enough and have the capacity to perform its functions effectively, without interference from the political branches. The power to cure any deficiencies in existing laws and raise the minimum standards set by international and regional human rights instruments rests with the legislative branch. However, the judiciary decides whether those laws carry any weight. The judiciary has the power to interpret the laws, declare laws that are in violation of constitutional provisions and/or international and regional human rights instruments null and void, and force the legislature to reform these laws.

For example, in *Mudzuru & Another*, the Constitutional Court of Zimbabwe was called upon to determine the constitutionality of certain provisions in the Marriage Act and the Customary Marriages Act.<sup>534</sup> In this case, two Zimbabwean women who had been forced into marriage as children, brought the constitutional challenge before the CCZ, seeking to have child marriage under both the Marriage Act and the Customary Marriages Act declared in violation of the Constitution of Zimbabwe.<sup>535</sup> Using international law as a tool of interpretation, the CCZ held that “[w]ith effect from 20 January 2016, no person, male or

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532. Steve Aya, *FG: 34 States Have Domesticated Child’s Right Act*, THIS DAY, <https://www.thisdaylive.com/index.php/2022/11/29/fg-34-states-have-domesticated-childs-rights-act> (last visited Dec. 8, 2023).

533. *Id.*

534. John Mukum Mbaku, *African Courts and International Human Rights Law*, 48 BROOKLYN J. INT’L L. 445, 547–48 (2023). See also *Mudzuru & Another v. Minister of Justice, Legal & Parliamentary Affairs & Two Others*, Judgement No. CCZ 12/2015, Const. Application No. 79/2014 (Zim. 2016).

535. Mbaku, *supra* note 51, at 143.

female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years.”<sup>536</sup> The Court then advised the legislative branch to adopt legislation to abolish the offending provisions.<sup>537</sup>

Progressive and independent judiciaries in Botswana,<sup>538</sup> Nigeria,<sup>539</sup> and South Africa,<sup>540</sup> just to name a few, have declared laws unconstitutional if they infringe on or violate the rights of women and girls. After a court declares an existing statutory or customary law unconstitutional, it then encourages the political branches to expeditiously enact legislation to cure the defect. For example, in *Blind SA v. Minister of Trade, Industry and Competition and Others*, the Constitutional Court of South Africa (“CCSA”) was called upon to confirm an order of the High Court of South Africa, Gauteng Division.<sup>541</sup> The High Court had declared South Africa’s Copyright Act (98 of 1978) unconstitutional to the extent that it “limits and/or prevents persons with visual and print disabilities from accessing works under copyright that persons without such disabilities are able to access.”<sup>542</sup> The High Court also declared that the Copyright Act was unconstitutional to the extent

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536. *Mudzuru & Another*, at 55.

537. *See id.* at 37–38.

538. *See Ramantele v. Mmusi* (2013) CACGB-104-12, ¶ 105(1)(b) (Bots.) (declaring that the Ngwaketse Customary law of inheritance does not prohibit the female children from inheriting as intestate heirs to their deceased parents’ family homestead).

539. In two landmark cases—*Ukeje v. Ukeje* and *Anekwe v. Nweke*—whose judgments were delivered on the same day, the Supreme Court of Nigeria held unconstitutional, and hence, null and void, customary law’s prohibition of the girl child’s right to inherit the property of her deceased father’s estate and established the widow’s right to inherit her late husband’s estate, respectively. *See Ukeje v. Ukeje* (2014) 11 NWLR (PT 1418) 384 (Nigeria); *Anekwe v. Nweke* (2014), 9 NWLR (PT 1412) 393 (Nigeria).

540. In *The Government of the Republic of South Africa & Others v. Irene Grootboom & Others*, the CCSA held that South Africa’s housing authorities had violated the constitution by failing to develop and adopt a housing plan that would have met the immediate needs of the people evicted from their informal housing. *See The Government of the Republic of South Africa & Others v. Irene Grootboom & Others* 2000 (1) SA 46 (CC) (S. Afr.).

541. *Blind SA v. Minister of Trade, Industry and Competition* 2021 (No. 14996 /21) (ZAGPPHC) 871, at ¶ 1 (S. Afr.).

542. *Id.* ¶ 31(1).

that it “does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the same manner contemplated by the Marrakesh Treaty.”<sup>543</sup> After confirming the High Court’s order of unconstitutionality, the CCSA ordered Parliament to craft legislation curing the constitutional defect and integrating it into the Copyright Act.<sup>544</sup>

For the judiciary to perform its constitutional functions effectively and without political interference, it must be granted enough independence. Judicial independence is a very important factor in protecting human rights, including those of children.<sup>545</sup> Throughout the world, the judiciary is often called upon “to adjudicate matters or conflicts that bear directly on the protection of human rights, such as conflicts over whether an ethnocultural group should be allowed to undertake child or forced marriage as part of its customs and tradition.”<sup>546</sup> Therefore, judiciary independence must be constitutionally guaranteed in order to minimize political interference.<sup>547</sup>

In *De Lange v. Smuts*, the CCSA declared that “judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.”<sup>548</sup> The Court noted further that “[t]his independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution.”<sup>549</sup>

In *De Lange*, Justice O’Regan cites to the Canadian Supreme Court’s *Valente v. The Queen*,<sup>550</sup> where Le Dain J held as follows:

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal

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543. *Id.* ¶ 12(1.2).

544. *Id.* ¶ 12(2).

545. Mbaku, Rights of Children in Africa, *supra* note 191, at 223.

546. Mbaku, *African Courts & International Human Rights Law*, *supra* note 534, at 479.

547. Mbaku, Rights of Children in Africa, *supra* note 191, at 223.

548. Mbaku, *supra* note 51, at 177.

549. *De Lange v. Smuts NO and Others* 1998 (3) SA 785 (CC) at 50–51 ¶ 59.

550. *Valente v. The Queen*, [1985] 2 S.C.R. 673 (Can.).



over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government . . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.<sup>551</sup>

In *De Lange*, the CCSA endorsed the Canadian Supreme Court's conditions for judicial independence, as detailed in *Valente*.<sup>552</sup> In *Valente*, Justice Le Dain had held that “[s]ecurity of tenure” is the “first of the essential conditions for judicial independence.”<sup>553</sup> According to section 99 of the Constitutional Act, 1867, Justice Le Dain stated, “superior court judges . . . shall hold office during good behaviour until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons.”<sup>554</sup> In Canada, the Judges Act provides that the Judicial Council may recommend that a judge should be removed if he or she “has become incapacitated or disabled from the due execution of the office of judge.”<sup>555</sup>

Justice Le Dain noted, however, that if a judge is recommended for removal, he or she must be granted the benefit of due process and must be allowed to exercise their right to be heard.<sup>556</sup> The learned justice then cited the Deschênes Commission Report, which “recommended that all judges should enjoy a tenure expressly defined as being ‘during good behavior’ and that they should be removable only upon an address of the legislature.”<sup>557</sup> The important lesson from Justice Le Dain’s ruling in *Valente* is that if it becomes necessary to terminate a judge’s tenure, the process through which this is carried out must be transparent, and the judge must be given the opportunity to be heard. As ruled by Justice Le Dain, “[t]he essence of security of tenure . . . is a tenure, whether

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551. *Id.* at 687.

552. *Id.* at 694-712, ¶¶ IV, V, VI (setting out the standard for judicial independence).

553. *Id.* at 694, ¶ IV.

554. *Id.* at 695, ¶ IV.

555. Judges Act, R.S.C. 1985, c. J-1, at Part IV, ¶ 80 (Can.).

556. *Valente*, [1985] 2 S.C.R. 673, 698, ¶ IV (Can.).

557. *Id.* at 696, ¶ IV.

until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.”<sup>558</sup>

The second essential element of judicial independence, according to *Valente*, is “security of salary or other remuneration, and, where appropriate, security of pension.”<sup>559</sup> According to Justice Le Dain, “[t]he essence of such security [to a judicial officer] is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.”<sup>560</sup> The political branches should not be allowed to manipulate judicial officers’ compensation packages to interfere with the ability of the judiciary to function independently and perform its constitutional functions.

The third essential condition for judicial independence, as laid out in *Valente* is “institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function.”<sup>561</sup> In many countries, an important issue that must be dealt with and which often affects judicial independence is “[t]he degree to which the judiciary should ideally have control over the administration of the courts.”<sup>562</sup> Courts in Canada draw a distinction “between adjudicative independence and administrative independence.”<sup>563</sup> In other countries, such as the United States, “the federal judiciary is a separate branch which includes judicial administration.”<sup>564</sup>

Whether the judiciary is granted the power of both adjudication and administration, or whether the two functions are divided between the executive and the judicial branches, the critical point for judicial independence is that the law must adequately constrain the government so that it is not able to “interfere with, or . . . influence the adjudicative function of the judiciary.”<sup>565</sup> Meaning, if the judiciary is not granted full responsibility for administration, judicial officials must work closely

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558. *Id.* at 698, ¶ IV.

559. *Id.* at 704, ¶ V.

560. *Id.*

561. *Id.* at 708, ¶ VI.

562. *Valente*, [1985] 2 S.C.R. 673, 708, ¶ VI (Can.).

563. *Id.*

564. *Id.*

565. *Id.* at 709, ¶ VI.

with the executive branch of government. Under these conditions, care must be taken to make certain that the executive does not capture judicial officials, “effectively placing the judiciary in a position to be unduly and arbitrarily influenced.”<sup>566</sup>

The next step in guaranteeing judicial independence is to ensure that there is a robust and politically active civil society, including independent civil society organizations, such as a free and independent press and political parties. Civil society and its organizations are important for several reasons. First, civil society can check on the exercise of government power in order to minimize corruption and self-dealing.<sup>567</sup> Second, they can bring action in court on behalf of people who are unable to do so or on important broad issues, like general constitutional or human rights issues. Such actions can create an opportunity for the courts to interpret the laws and declare offending provisions of customary and statutory laws unconstitutional, as well as force the legislative branch to cure any defects. Petitions by NGOs can also allow courts to examine statutory (e.g., South Africa’s Copyright Act) and customary laws (e.g., Ngwaketse (Botswana) customary law) and determine their compatibility with provisions of international human rights instruments.<sup>568</sup>

For example, Blind SA, an NGO that advocates on behalf of South Africa’s blind citizens, brought action before the High Court seeking to declare provisions of the Copyright Act unconstitutional for omitting exceptions that would “enable, through the conversion of works, access to such works by persons with visual and print disabilities.”<sup>569</sup>

On December 13, 1998, Burkinabè investigative journalist and director of the weekly magazine, *L’Indépendant*, Norbert Zongo, and two of his colleagues, Abdoulaye Nikiema and Blaise Ilboudo, were brutally assassinated.<sup>570</sup> After the State of Burkina Faso failed to

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566. Mbaku, *African Courts*, *supra* note 534, at 486.

567. Mbaku, *Rights of Children in Africa*, *supra* note 191, at 227.

568. *See, e.g.*, John Mukum Mbaku, *International Law, African Courts, Patriarchal Inheritance Systems and Women’s Rights*, 51 *DENV. J. INT’L L. & POL’Y* 59, 80 (2022) (examining patriarchal inheritance systems in Africa and how they affect women’s rights).

569. *Blind SA v. Minister of Trade, Industry and Competition and Others* 2021 ZAGPPHC 871, at ¶ 28 (S. Afr.).

570. *Zongo v. Burkina Faso*, No. 013/2011, Judgment, African Court on Human and Peoples’ Rights [Af. Ct. H.P.R.], 1 *AfCLR* 219, at 220 ¶ 3 (Mar. 8, 2014),

expeditiously investigate the case and deliver justice to the victims and their families, the Burkinabè Human and Peoples' Rights Movement, a human rights NGO, brought the matter to the African Court on Human and Peoples' Rights ("African Human Rights Court") on behalf of the beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo.<sup>571</sup> The African Human Rights Court held that Burkina Faso had violated Articles 1 and 7 of the Banjul Charter, as well as Article 9(2) of the Banjul Charter, read together with Article 66(2)(c) of the Revised Economic Community of West African States ("ECOWAS") Treaty.<sup>572</sup>

On December 4, 2020, the African Human Rights Court "issued an advisory opinion in response to the Pan African Lawyers Union's (PALU) question on whether vagrancy laws in the African Union member states comport with the African Charter on Human and Peoples' Rights (the Charter), the African Charter on the Rights and Welfare of the Child (the Children's Rights Charter), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the Women's Rights Protocol)."<sup>573</sup> PALU is an NGO, which is located in Arusha, Tanzania, and is recognized by the African Union<sup>574</sup> therefore, it qualifies under Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights to request the Court to provide an advisory opinion "on any legal matter relating to the Charter or any other relevant human rights instruments."<sup>575</sup> The Court held that vagrancy laws are not compatible with Articles 2 and 3 of the Banjul Charter because they "criminalize the

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<https://www.african-court.org/wpafc/wp-content/uploads/2020/04/English-Law-Reports-FF-for-printing.pdf>.

571. *Id.* at 258.

572. *Id.* at 255, ¶¶ 203 (3), (5). The African Charter on Human and Peoples' Rights is also referred to as the Banjul Charter.

573. Fabian Kopp, *The Compatibility of Vagrancy Laws with Human Rights Instruments in Africa*, 25 HUM. RTS. BRIEF 70, 70 (2021).

574. *Request for Advisory Opinion by the Pan African Lawyers Union*, No. 001/2018, Afr. Ct. H.P.R. 4 AfCLR 847, at 875 ¶ 2 (Dec. 4, 2020).

575. See also Protocol to the African Charter, *supra* note 574, ¶ 2.

status of an individual and by doing so, effectively enable discrimination against the underprivileged and marginalized.”<sup>576</sup>

#### SUMMARY AND CONCLUSION

Child marriage remains one of the most salient risks to the health of female children in Africa. In addition to significantly increasing the girl’s risk of contracting sexually transmitted infections and being subjected to gender-based violence,<sup>577</sup> it also increases the girl’s risk of contracting obstetric fistula, which affects “hundreds of thousands of women, sadly 90% of them in Africa.”<sup>578</sup> Despite arguments to the contrary, child marriage does not offer any benefits for the child—it does not improve her economic livelihood or protect her from sexual exploitation, as claimed by many parents and communities that continue to promote and carry out this insidious practice.<sup>579</sup>

Child marriage imposes significant costs on young girls. Children forced into marriage are deprived of the opportunity to stay in school and acquire the skills that they need to function as productive adults.<sup>580</sup> A study of South Africa determined that the “failure [of youth] to complete secondary schooling satisfactorily (with good grades for example) and to advance to further studies is widespread” and that it would affect the youth’s productivity in later years.<sup>581</sup> The lack of education and skills would contribute significantly to low earnings and the probability that the youth will be unable to escape poverty, even into their old age.<sup>582</sup>

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576. John Mukum Mbaku, *The Emerging Jurisprudence of the African Human Rights Court and the Protection of Human Rights in Africa*, 56 VAND. J. TRANSNAT’L L. 367, 383 (2023).

577. *Child marriage and health*, GIRLS NOT BRIDES, [https://www.girlsnotbrides.org/learning-resources/child-marriage-and-health/#:~:text=Impacts%20of%20child%20marriage%20on%20girls%20health&text=C hild%20marriage%20is%20a%20key,%2Dbased%20violence%20\(GBV\)](https://www.girlsnotbrides.org/learning-resources/child-marriage-and-health/#:~:text=Impacts%20of%20child%20marriage%20on%20girls%20health&text=C hild%20marriage%20is%20a%20key,%2Dbased%20violence%20(GBV)) (last visited June 15, 2023).

578. GIRLS NOT BRIDES, *Fistula, A Silent Tragedy for Child Brides*, <https://www.girlsnotbrides.org/articles/fistula-a-silent-tragedy-for-child-brides/> (last visited June 15, 2023).

579. Mbaku, *Int’l L. & Child Marriage*, *supra* note 51, at 123 (examining the costs of child marriage in Africa).

580. *Id.*

581. *Id.*

582. *Id.*

A female child who is forced into marriage is “most likely to be trapped in a life characterized by significantly high health risks, extreme poverty, domestic violence at the hands of her much older husband and his extended family, and increased risk of premature death.”<sup>583</sup> Child marriage produces other life-long negative consequences for girls and these include “completely crippling a girl’s ability to realize a wide range of human rights,” her overall quality of life and well-being, her self-esteem, and her ability to consent to marriage.<sup>584</sup> Child marriage pushes the girl into “a household environment fraught with violence, discrimination and forced servitude.”<sup>585</sup>

For each African country to eradicate child marriage, it must fully reform its legal system and make sure that it reflects or conforms to the provisions of international and regional human rights instruments, particularly as they relate to children’s rights. All laws must be modified to reflect provisions of international human rights instruments (e.g., each country must set the minimum age for marriage at eighteen years; create and maintain a national registry where all births and marriages are registered; provide appropriate penalties for anyone who engages in, supports, and/or promotes child marriage; etc.).

It is important, then, that African countries engage purposefully in efforts to eradicate child marriage. The SADC Model Law developed by the SADC Parliamentary Forum can help these countries undertake necessary policy reforms, develop new laws, and/or revise existing substantive laws to eradicate child marriage and protect children that are currently married. The model, which is based on or informed by various international and regional human rights instruments, can serve as a standard against which States, both in the SADC and in other regions of Africa, can measure their legislative and non-legislative efforts to eradicate child marriage.<sup>586</sup>

In addition to ensuring that all its laws conform to the provisions of international and regional human rights instruments, each African country must sign, ratify, and domesticate all the relevant human rights instruments and then ensure that it has a governing process that, at the

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583. Mbaku, *Int’l L. & Child Marriage*, *supra* note 51, at 123.

584. *Id.* at 126.

585. Mbaku, *Int’l L. & Child Marriage*, *supra* note 51, at 126.

586. SADC Model Law, *supra* note 434, at 3.

minimum, includes a separation of powers with effective checks and balances, “which include an independent judiciary, a bicameral legislature, with each chamber granted absolute veto over legislation enacted by the other, and an independent and competent executive.”<sup>587</sup> Additionally, there must be “a robust and politically active civil society” and “a free press,” which can check on the exercise of government power.<sup>588</sup>

During the last several decades, significant progress has been made in Africa to eradicate child marriage and protect the rights of children in marriage. However, the practice remains pervasive in many countries in the continent.<sup>589</sup> It has been determined that “more than half a billion girls and women alive today [October 2021] were married in childhood.”<sup>590</sup> With respect to prevalence, “[t]he highest rates of child marriage are found in sub-Saharan Africa and South Asia, where [thirty-four percent] and [twenty-eight percent of] young women, respectively, were married in childhood.”<sup>591</sup> Thus, it is imperative that each African country restructure its legal system to ensure the eradication of child marriage and the protection of children already trapped in this insidious practice.

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587. John Mukum Mbaku, *Coups, Constitutional Democracy, and the Rule of Law: Why Africans Must Care*, 4 CARDOZO INT’L & COMP. L. REV. 35, 44 (2020).

588. John Mukum Mbaku, *Constitutionalism and Africa’s Agenda 2063: How to Build ‘The Africa We Want’*, 45 BROOK. J. INT’L L. 537, 641 (2020).

589. UNICEF, *Is End to Child Marriage Within Reach?*, *supra* note 14, at 9.

590. UNICEF, *TOWARDS ENDING CHILD MARRIAGE: GLOBAL TRENDS AND PROFILES OF PROGRESS* 11 (2021).

591. *Id.*

