A Critique Proposal to the government of United Republic of Tanzania on Article of Our Constitution of 1977 as amended from time to time [CAP 2 RE 2002] linked with The Law of Marriage of 1972 if both will be changing.

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The application and operation of the foregoing provision breach certain Articles in the Bill of Rights, which are contained in Part III of the Constitution of United Republic of Tanzania.

Specifically, these provisions contravene the provisions of Article 13(1) which guarantees the right to equality before the law. Article 13(1) of the Constitution of United Republic of Tanzania states that, as per the Swahili version (which is a controlling version[1]):

13 (1); Watu wote ni sawa mbele ya sheria, na wanayo haki, bila ubaguzi wowote, kulindwa na kupata haki sawa mbele ya sheria.

Also this Article has received judicial attention and approval in the number of decisions from our courts in Tanzania. For instance, in the case of *Legal and Human Rights Center and Others v. Attorney General*[2] the High Court of Tanzania (Kimaro, J. (as she then was) Mihayo, J. (as he then was), and Massati, J. (as he then was) held that Article 13(1) of the Constitution guarantee the right of equality before the law by prohibiting discrimination which is defined in Article 13(5) of the Constitution as follows:-

This Constitutional provision is similar to the provisions of section 15 of the Canadian Charter of Rights and Freedom, which guarantees the right to equal protection and benefit of the law without discrimination, to welfare and other social benefits. This section provides that:-

15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefits of the law without discrimination and, in particular, without discrimination based on race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantage individuals or groups including those that are disadvantage because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[1] See DPP V. Daudi Pete [1993] TLR 22.
[2] In the High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Course No. 77 of 2005 (unreported).

This section was given judicial authority in the case of *Louise Gosselin v. the Attorney General of Quebec,*[3] whereby the Canadian Supreme Court held that; the purpose of section 15(1) of the Canadian Charter is to prevent the violation of essential human dignity and freedom through imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human being or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[4]

The provision of section 13 (1) of the Law of Marriage Act contravenes Article 13(1) of the constitution of Tanzania because it discriminates male persons who have not attained the apparent age of eighteen years against female persons who are yet to attain the apparent age of eighteen in respect of contracting a valid marriage.

Both in effect and operation, these provisions have a differential treatment between female and male children. As it was held by Kimaro, J. (as she then was) in the case of *Legal and Human Rights Center and 2 others v. AG*[5] "So long as the law is framed in a way that it can result in a differential treatment between the citizens, there cannot be equality before the law in respect of that law." A similar holding was also taken by the court of Appeal of Tanzania in the Case of *Julius Ishengoma & Francis Ndyanabo v. The Attorney General.*[6]

Similar to this judicial holding, Mwalusanya, J. (as he then was) held in *A. A. Sisya and 35 Others v. The Principle Secretary Ministry of Finance,*[7] … it is irrelevant that the government is arguing that the impugned law did not intend to discriminate against the affected group. What is relevant is the fact that, the impugned law is discriminatory in effect (indirect discrimination). It is my finding that the said law is discriminatory of the affected group on account of their status of life, as the republic has failed to show that the discrimination is on account of any other than on account of the status of life of the affected group.

Basing on the foregoing reading I realize that, there is an error in section 13(1) of the Law of Marriage Act discriminates female children against their male counterparts on account of their status of life (i.e. being female). Therefore, the said provisions contravene Article 13(1) of the Constitution.

Apart from our domestic law, the said discrimination has been attacked by number of international instruments to which Tanzania is a state party. For instance, Article 16 of the Universal Declaration of Human Rights (1948) provides, inter alia, that: men and women of full age, without any limitation due to race to marry and to found family; and as such, they are un

[3] [2002] 4 SCR (429).
[4] Paragraph 20
[5] Supra.
[6] Court of Appeal at Dar es salaam, Civil Appeal No. 64 of 2001 (unreported).
[7] High Court of Tanzania Civil Case No. 5 of 1994 (unreported)

titled to equal rights as to marriage, during marriage and its dissolution. The full age as per this Article is 18 years. Viewed in this context, section 13 of the Law of Marriage Act falls short of this human rights standard.

Further the same instrument under Article 16, states that marriage shall be entered into only with the free and full consent of the intending spouses; and that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. As it can be gathered from the provision of section 13 of the Law of Marriage Act, a female child below 18 years cannot, in law, possess free and full consent to marriage.

Moving on the same note, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW, 1979), inter alia, in Article 2, condemns discrimination against women in all forms; and, as such, urges all States Parties thereto to establish legal protection of the rights of women on an equal basis with men in all matters (including marriage).

Moreover, in Article 16 of CEDAW, State a Parties are obliged to take all appropriate measure to eliminate discrimination against women in all matters relating to marriage and family relations and in particular obliged State Party to ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; and
(c) The same right and responsibilities during marriage and at its dissolution.

In addition to the foregoing, Article 21 of the African Charter on the Rights and Welfare of the Child (1990) obliges States Parties thereto to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) Those customs and practice prejudicial to the health or life of the child;
(b) Those customs and practice discriminatory to the child on the grounds of sex or other status; and
(c) Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Specifically, the provisions of section 13 of the Law of Marriage Act contravene the standard set out herein above.

Moreover, Article 6 (a) of the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (2003) States Parties thereto are obliged to ensure that women and men enjoy equal rights and are regarded as equal patners in marriage; and, as such, they shall enact appropriate national legislative measures to guarantee, inter alia, that no marriage shall take place without the free and full consent of both parties, and (b) the minimum age of marriage for women shall be 18 years. Therefore, both in effect and operation, the provisions section 13 of the Law of Marriage Act are repugnant to these human rights standards.

Further, the application and operation of section 13 of the Law of Marriage Act promotes abuses of female persons who enter into marriage contracts before attaining the apparent age of 18 years. As it was observed by the Law Reform Commission of Tanzania[8] in its report[9] on the laws relating to family relations, this age structure has been criticized and various reasons have been advanced for change. Those reasons are:-

1) Medical Reasons.

It has been argued that it is unhealthy and dangerous for a girl below the age of 20 years to give birth to children. The girl may become deformed and even lose life while giving birth. A child born by such a mother may be deformed and become a weakling. There is ample medical evidence that many mothers of tender age give birth by way of operation which is dangerous for the life of the mother.

2) Legal Reasons.

Marriage contract has far reaching obligation than normal commercial contract. The minimum age under the Law of Marriage Act, 1971 is far too low in comparison with other laws such as the law of Contract or Election Law.

The Law of Contract Act, Cap 445 section 11(1) and (2) provide that every person is competent to contract who is of the age of majority (that is 18 years) any agreement by a person who is minority is declared incomplete contract and is void. According to this provision a girl below the age of 18 is incompetent to enter in to any commercial agreements. She may only contract as an infant for necessaries.

On the other hand a responsible mother under Law of Marriage Act, 1971 who is below the age of 18 years is denied a right to vote or to be voted for under the Election Act, 1985 while her

[8] The Law Reform Commission of Tanzania was established under the Law Reform Commission of Tanzania Act, No. II of 1980.

[9] See LAW REFORM COMMISSION OF TANZANIA, "Report on the Law of Marriage Act (Act No.5 of 1971)," submitted to Hon. Mr. Justice D.Z. Lubuva, M.P. (the then Attorney General and Minister for Justice, Ministry of Justice) on 4th July 1986.

counterpart is free to contract as well as to participate in the electoral process at his community.

It has been argued that a girl below the age of 18 years may easily be coerced into marriage by greedy parents and cause a lot of miseries to the girl in her married life.

3) Social Reasons.

On one hand, it is being argued that, early marriage deprive girls of opportunities to learn a trade of their choice or to continue with other post primary school training. On the other hand there are those who argued in favors of the present minimum age structure (15 years for girls and 18 years for boys), advancing the following reasons:

First, some traditional communities recognize that once a girl attain puberty (kuvunja ungo) is considered as a grown up woman and capable of being married. Most of the girls reach puberty between the ages of 10 to 15 years.

Secondly, the statutory age for primary school is at the age of 7 years he or she will complete primary school education at the age of 14 years. If a girl does not continue with post primary school training she will stay at home with her parents who are argue that it is desirable to get such girl married off at the earliest possible moment so that they can avoid embarrassments of child bearing out of wedlock.

The Law Reform Commission of Tanzania, therefore, recommended, inter alia that;

- The new minimum age for marriage should be 21 years for both males and females. This will entail an amendment to section 13(1) of the Law of Marriage Act, 1971.
- The provisions of section 13(2) also should be amended. In place of 14 years there should be substituted for 18 years as the later conforms to the UN recommendations for minimum age for marriage.
- Section 17 should be deleted.

On this Issue.

Article 13(2) of the constitution prohibits enactment of an Act of Parliament that is discriminatory in nature and effect. In the Kiswahili version, this Article provides that,

“Ni marufuku kwa sheria yeyote iliyotungwa na mamlaka yoyote katika Jamhuri kuweka sharti lolote ambalo ni la kibaguzi ama kwa dhahiri au kwa taathira yake.”

The provision of section 13 of Law of Marriage Act are discriminatory, in nature and effect, between male and female children. This implies that the said provisions breach the right of equality before the law by creating differential treatment between children regarding the

minimum age for marriage. Therefore, in enacting these discriminatory provision Parliament acted in contravene of Article 13(2) of the Constitution as these provisions are not necessary and do not serve any legitimate object, as was held by the court of Appeal in the cases of Daudi Pete (supra) and Julius Ndyanabo (supra) and the High Court in Legal and Human Rights Centre (supra).

Unreasonable or Absurd.

The first set of unreasonableness and absurdity is to the effect that the court can grant leave for a marriage if each party has attained the age of fourteen years. This aspect brings about three practical impediments to children rights. First, according to General Comment No. 4[10] issued by the United Nations Committee on the Rights of the Child, Children who marry at such early age "are often obliged to leave the education system and are marginalized from social activities."

Besides there are other aspects worth of consideration on the issue of early marriage, including the psychosocial incapacity to raise children should they get children before they attain 18 years. In addition, there is also the question of social-economic capacity for them to have ability to maintain their childhood socially and economically.

The second set is the fact that the court should be satisfied that there are special circumstances which make the proposed marriage desirable. However, there is nowhere in the provisions of the Law of Marriage Act and any other providing laws, that provides for the criteria to guide the court on the said special circumstances.

On the same footing, the said section provides for a blanket provision which vests the court with powers, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in subsection (1) of section 13 of the Law of Marriage Act and that the court is satisfied that there are special circumstances, which make the proposed marriage desirable.

The absurdity with this section is its failure to provide for a vividly clear position as to whether it is the children parties to an intended marriage or next friends or guardians who have to apply to the court for the grant of leave. The practical problem, in respect of children, is that the civil practice in Tanzania does not allow minors to initiate court proceedings on their own.

If this is the case, it is only the next friend or guardians who can apply for court's leave for a marriage. But, owing to the harmful traditions prevalent in many Tanzanian societies, against

[10] Para 20 of the General Comment No. 4/ UN CRC Committee/2003,CRC/ GC/2003/4

children (particularly girls) the next friend or guardians can apply for court's leave for the children to enter into marriage for their own (next friend or guardian) interest.

This is coupled with the presence of a discretionary power vested on the court to grant leave on special circumstances whose scope is not properly elaborated. As it has been recently held by Kalegeya, J. (as he then was) in *Baraza la Wanawake Tanzania (BAWATA) and 5 others v. Registrar of Societies and 2 Others*,[11] "It is now a settled law that any legislation which is arbitrary; which does not provide for effective controls against abuse of power, which gives unfettered and uncontrolled subjective discretion, is unconstitutional. This authoritative reasoning was deduced from a Court of Appeal decision in Kukutia Ole Pumbuni and Another v. Ag and Another,[12]

In conclusion, as it was held in the BAWATA (supra) and The Judge i/c High Court, Arusha & A. G v. N.I.N. Munuo,[13] " When it comes to Basic Rights and Freedoms, unlike in normal civil claims which have to be particularly claimed, a mere statement praying for the same suffices."[14]

[11] High Court of Tanzania, at Dar es Salaam, Miscellaneous Civil Course No.27 of 1997 (unreported)
[12] [1993] TLR 159.
[13] Court of Appeal of Tanzania, at Arusha, Civil Appeal No. 45 of 1998 (unreported).
[14] BAWATA case, p. 76