Constitutionality of Section 13 and 17 of Law of Marriage Act [Cap 29 R.E 2002]

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INTRODUCTION

Capacity to marry is one of the most important aspects to be considered before the parties’ contract the marriage. The Law of marriage Act (hereinafter referred to as LMA) specifies the minimum age for marriage which have attracted attention to most constitutional and human rights activists.

Reasons for prescribing minimum age for marriage

Reasons for prescribing minimum age for marriage were clearly appreciated well before the LMA, 1971 was enacted. Minimum age for marriage was one of the issue which the Government put to be canvassed by the members of the public in its paper, Government Paper No. 1 of 1969, para 7 of the paper provided that:

Hence the Government recommends that a man should be allowed to marry when he attains the age of 18 years. In this connection it should be noted that the UN has recommended 15 years as the minimum marriage age for girls so as to protect their health, and the health of their children. One of the effects of prescribing the minimum marriage age would be to prevent the parents from removing their young daughters from school, because they cannot be married until they reach the prescribed minimum age.

Moreover, the girls will be old enough to know how to take care of their children and look after their homes properly. On the other hand a boy of 18 years is allowed to vote, to become a member of TANU AND CAN ALSO ENTER IN ANY Contract. Most of the boys who attain the age of 18 years would be those who have completed their primary school education or if they did not go to school, they have already acquired the necessary skill or knowledge to enable them to help themselves. These aspirations were translated into law under section 13 of the LMA.

Actually the Parliament of Tanzania while enacting the Law of Marriage Act in 1971 also considered the Spry Report. In that report it was recommended that the law prescribes minimum ages for marriage to apply to all communities of 18 for males and 16 for females. Therefore the Parliament of Tanzania found that the Spry Report was reasonable and could fit in Tanzania. Hence the report was considered while setting the minimum age for marriage.

1The Law Reform Commission of Tanzania, 1986 at p. 18
The Gist of Section 13 and 17 of LMA

The LMA provides that:

“No person shall marry who being male, has not attained the apparent age of eighteen years or being female has not attained the apparent age of fifteen years”.

From the wording of this section the minimum age for a male to have capacity to marry is the **apparent age of eighteen years** whereas on the part of female the minimum age is the **apparent age of fifteen years**.

However, subsection (2) of the same section provides that:

“Nowithstanding the provision of subsection (1) the court shall in its discretion have power on application to give leave for a marriage where the parties are, or either of them is below the ages prescribed in subsection (1) if: -(a) each party has attained the age of fourteen years and (b) the court is satisfied that there are special circumstances which make the proposed marriage desirable”.

According to the said subsection its obvious that boys or girls may be married as early as 14 years of age, where the court gives permission. Moreover, **Section 17 of the LMA** provides that in the case of marriage of a girl under 18 years of age, her father must give consent for such marriage, or if her father is dead, her mother. If both parents are dead, the guardian must give consent, unless there is no guardian, in which case no consent is required.

**Brief discussion on the landmark case of Rebeca Gyumi**

For years the above provisions have been condemned by most constitutional and human rights activists as being oppressive against girls but it was not until 2016 when Rebeca Gyumi brought a case on behalf of all children at risk of child marriage.

Thus the landmark case of **Rebeca Gyumi v. Attorney General**, challenged the constitutionality of child marriage in Tanzania. Rebeca Gyumi challenged Section 13 and 17 of the Act on the basis that: They are in breach of Article 12 of the Tanzanian Constitution, which guarantees equality before the law; They in breach of article 13 of the Tanzanian Constitution, which protects against discrimination on the basis of sex; Persons under 18 years

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2The Law of Marriage Act, Cap 29 R.E. 2002, Section 13 (1)
3Ibid Section 13 (2)
5Miscellaneous Civil Case No. 5 of 2016 (HC)
of age are children and do not have the capacity to provide their free and informed consent to marry; They are in breach of article 21(2) of the Constitution in not allowing girls the opportunity to participate fully in decisions which affect their lives; and They deny children the right to education and freedom of expression.

As a result, the High Court declared as discriminatory and unconstitutional sections 13 and 17 of the Law of Marriage Act that set different minimum ages for marriage for boys and girl.

**Constitutionality of Section 13 and 17 of Law of Marriage Act**

The High Court focused mainly on the right to equality before the law and the right to freedom from discrimination which are protected by **Article 12 (1) and 13 (1) & (2) of the Tanzanian Constitution.**

The constitution of the United Republic of Tanzania, which is a supreme law, provides in its Article 12 (1) that:

> “All human beings are born free, and are all equal.”

Under article 13(2) the constitution provides that:

> “No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.”

Thus the Court stated that the provisions in the Act treat men and women differently in two ways. **Firstly,** the age for marriage is different between men and women. **Secondly,** women under 18 years require the consent of their parents to marry, whereas men do not. This difference in treatment means that women and men are not treated equally under sections 13 and 17 of the Law of Marriage Act.

The sections were therefore held to discriminate against women and were in violation of **Article 12 (1) and 13 (1) & (2) of the Constitution.** This is significant in that the Court recognised that the notion of equality between men and women is now universally accepted and was able to utilise national and regional laws to uphold it.

Furthermore, the High Court held that Section 17 is unconstitutional on the basis that it prevents women from exercising their right to fully participate in decisions which affect them under article 21(1) of the Constitution. In order to give effect to both this right and Tanzania’s
international obligations, the Court decided that the minimum age for marriage should be 18 years of age for both boys and girls\(^6\).

It is doubtful that the daughter at the age of 15 years can decide voluntarily to enter into marriage. Where no clear consent has been given by one or other partner, the marriage is clearly forced. Similarly in marriages at around puberty, from roughly ages 10-14 consent cannot be said to be given since at such an early age, a child cannot be expected to understand the implications of accepting a lifetime partner\(^7\).

**The Provisions are no Longer Useful**

The High Court held that the sections of the Law of Marriage Act which allow child marriages are no longer useful. The Court noted that many legislative developments have taken place since the Law of Marriage Act.

These developments were presumably to ensure “that the welfare and protection of the girl child is enhanced and the dignity and integrity of women is generally safeguarded”. For example, the Sexual Offences Special Provisions Act (SOSPA) of 1998 imposes criminal sanctions on people who have sexual relations with children. Allowing child marriage would therefore amount to sanctioning criminal activity.

The Court held that in the light of legislation such as SOSPA and the Law of the Child Act, the government has through such laws passively conceded that children’s right to be protected outweighs any need to maintain child marriages\(^8\).

**Other fundamental reasons that called for the change of Section 13 and 17 of LMA**

This age structure has been criticised and various reasons have been advanced for change. These reasons are:-

**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

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\(^6\)Retrieved from [www.msichana.or.tz](http://www.msichana.or.tz) on 25\(^{th}\) December 2018 at 10:00 HRS

\(^7\)Reproductive Rights (2000) Wall Chart, International Planned Parenthood Foundation (IPPF) and Women’s Rights Action Watch (WRAW), Minnesota.

\(^8\)Retrieved from [www.msichana.or.tz](http://www.msichana.or.tz) on 25\(^{th}\) December 2018 at 10:00 HRS
evidence that many mothers of tender age give birth by way of operation which is dangerous for the life of the mother\textsuperscript{9}.

**Legal Reasons**

Marriage contract has far reaching obligations than normal commercial contracts. The minimum age under the LMA, 1971 is far too low in comparison with other laws such as the Law of Contract or election law. For example the law of **Contract Act, Cap 345 under 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 declared incompetent to contract is void. According to this provision a girl below the age of 18 years is incompetent to enter into any commercial agreements. She may only contract as an infant for necessaries while her counterparts is free to contract\textsuperscript{10}.

**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\textsuperscript{11}.

**Arguments in favour of Section 13 and 17 of LMA**

On the other hand there are those who argued in favour of the minimum age structure under the LMA (15 years for girls and 18 years for boys), advancing the following reasons:

**Firstly**, some traditional communities recognise that once a girl attains 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 compulsory 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 argue that it is desirable to get such girls married off at the earliest possible moment to avoid embarrassments of child bearing out of wedlock\textsuperscript{12}.

However all their arguments have been outweighed by the current socio-economic development which calls for protection of children’s rights and well being and thus their argument holds no water.

\textsuperscript{9}The Law Reform Commission of Tanzania, 1986 at p. 19

\textsuperscript{10}The Law Reform Commission of Tanzania, 1986 at p. 19

\textsuperscript{11}Ibid at p. 20

\textsuperscript{12}Ibid
**Conclusion and Final Analysis**

Despite the fact that the court declared the impugned provisions unconstitutional and ordered the government to review the law in accordance with its obligations under Article 6 of the Maputo Protocol and Article 21 the African Charter on the Rights and Welfare of the Child, with a view to setting the age of marriage at 18, the age of consent, with full consent from the girl, and without exceptions, Interestingly the government through the Attorney General immediately after the ruling of the High Court filled a notice of appeal to challenge the said decision.

If I were to remember the words of Constitutional and Legal Affairs Minister Palamagamba Kabudi in April 25, 2017 who told the Parliament processes for the adjustment of the crucial Act was a matter of legal anthropology which requires ample amount of time. He further pointed out that some section in the LMA allow young boys and girl at age 14 years to enter into marriage something which is tandem with their societal values such section have been introduced to cater the need of certain communities.

This may generally sum up the reason as to why despite the court declared the said provision unconstitutional and outdated but the said provision still thrive in the statute books.
REFERENCE

BOOKS


STATUTE

The Constitution of United Republic of Tanzania [Cap 2 R.E 2002]

Law of Marriage Act [Cap 29 R.E 2002]


REPORTS

The Law Reform Commission of Tanzania Report, 1986


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www.msichana.or.tz Accessed on 25th December 2018 at 10:00 HRS