

**HARMFUL CULTURAL AND TRADITIONAL PRACTICES: A  
ROADBLOCK IN THE IMPLEMENTATION OF THE CONVENTION  
ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN  
AND THE MAPUTO PROTOCOL ON WOMEN'S RIGHTS IN  
TANZANIA**

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## **DEDICATION**

This thesis is dedicated to Clare Nascha, Chloe-Claudia Ndechako,  
and the people of their generation.

## DECLARATION

I, Norah Hashim Msuya declare that 'HARMFUL CULTURAL AND TRADITIONAL PRACTICES: A ROADBLOCK IN THE IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN AND THE MAPUTO PROTOCOL ON WOMEN'S RIGHTS IN TANZANIA' is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.



**Signature:**

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**Date:** 29 August 2017

## ABSTRACT

The focus of this study was largely on the effect of harmful cultural beliefs and practices regarding women's rights as enshrined in international, national and regional legal instruments that apply to the Tanzanian legal framework. The study examined and provided an overview of relevant aspects of existing culture and traditions that were found to be in conflict with the provisions of Tanzania's Constitution and domestic legislation. In light of the findings, there is an urgent need for the reform of various legislations in order to adhere to the resolutions of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Maputo Protocol. A literature review was conducted to analyse the judicial decisions in Tanzania and other African countries in terms of the domestication of international human rights instruments that protect the rights of women through due process of judicial review. This undertaking was underpinned by the prime purpose of this study which was to analyse the impact of culture and traditions on the implementation of CEDAW and the Maputo Protocol in the Tanzanian context.

The study revealed that some cultural beliefs and traditions in Tanzania continue to subordinate, discriminate against and harm women in the context of family, clan and community life. The values that are entrenched in customary law practices are used to justify the violation of women's human rights. Many cultural practices that subject women to abuse continue to prevail despite the existence of appropriate domestic legislation that prohibits such practices. This study discovered that several discriminatory laws that negatively impact women's rights are still enforced in Tanzania and that intentions to amend these laws and to remove discriminatory provisions have been hindered by strong traditional resistance. It was also established that, notwithstanding the provisions of international human rights instruments and the Constitution of the United Republic of Tanzania, which clearly prohibits any form of discrimination through the recognition of the equality of all human beings and guaranteeing equality and protection of all before the law, some judges still do not find it unjust to make decisions based on discriminating legislation. Rather, these judges choose to make decisions based on harmful customary rules without consideration of human rights principles that are enshrined in the country's Constitution. In these circumstances, they persist in presenting divergent views on the interpretation of the rules.

Based on the findings of this study, it is argued that, in order for customary practices to make any meaningful impact of the lives of women in Tanzania and in Africa at large, these practices must be EXERCISED within a human rights framework. Furthermore, full domestication of international human rights instruments that protect women is of paramount importance in the implementation of women's rights to strengthen the hands of law enforcers. However, the application of the law alone is limited in addressing women's rights, as the stereotyped mindset of Tanzanian and many other African societies needs to be CHANGED for a better realisation of women's rights.

**Key terms:** traditional practices, international human rights law, domestic law, discrimination, women's rights, judiciary, law reform, domestication, harmful cultures, court.

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## LIST OF ACRONYMS

ACHPR	African Charter on People’s Rights (The Banjul Charter)
ACmHPR	African Commission of Human and People’s Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfCHPR	African Court on Human and People’s Rights
AG	Attorney General
AIDS	Acquired Immunodeficiency Syndrome
AU	African Union
AWID	Association for Women's Rights in Development
Cap.	Chapter of Tanzania Laws
CBO	Community Based Organisation
CDF	Children’s Dignity Forum
CDP	Child Development Policy
CEDAW	Committee on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CERD	United Nations Committee on the Elimination of Racial Discrimination
CHOGM	Commonwealth Head of Government Meeting
CHRGG	Commission for Human Rights and Good Governance
COMESA	Common Market for Eastern and Southern Africa
CRC	Convention on the Rights of the Child
CSW	Commission on the Status of Women
DANIDA	Danish Development Agency
DAW	United Nations Division for the Advancement of Women
DHS	Demographic Health Survey

DPP	Director of Public Prosecution
DSM	Dar es Salaam
DVA	Domestic Violence Act
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EWM	Economic Community of West African States Protocol on Equal Rights between women and men
FEMACT	Feminists Activities
Femnet	African Women's Development and Communication Network
FGM	Female Genital Mutilation
FOWARD	Foundation for Women's Health Research and Development
GIMAC	Gender is my agenda
GMS	Gender Management System
GMSP	Gender Mainstreaming Strategic Plan
GMWG – MP	Gender Mainstreaming Working Group – Macro Policy
GN	Government Notes
HCD	High Court Digest
HIV	Human Immunodeficiency Virus
Hon.	Honourable
ICCPR	International Covenant on Civil and Political Rights
ICECSR	International Covenant on Economic Cultural and Social Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda



IGAD	Intergovernmental Authority on Development
IGNs	Intermediate Gender Networks
ILO	International Labor Organization
INSTRAW	United Nations Training Institute for the Advancement of Women
INSTRAW	International Research and Training Institute for the Advancement of Women
INTERIGHTS	International Centre for the Legal Protection of Human Rights
IWRAW	International Women's Rights Action Watch Asia Pacific
JALO	Judicature and Application of Law Ordinance
LEAT	Lawyers' Environmental Action Team
LHRC	Legal and Human Rights Centre
LMA	Law of Marriage Act
LRC	Law Reform Commission
LRC	Law Reports of Commonwealth
M&E	Monitoring and Evaluation
MDGs	Millennium Development Goals
NGO	Non-Governmental Organization
NOLA	National Organization for Legal Assistance
NSGD	National Strategy for Gender Development
NSGRP	National Strategy for Growth and Reduction of Poverty
OAU	Organization of African Union
OSAGI	United Nations Office of the Special Adviser on Gender Issues and Advancement of Women
R	Republic
RECs	Regional Economic Communities
SADC	Southern African Development Community

SAHRiNGON	Southern African Human Rights NGO-Network
SDGEA	Solemn Declaration on Gender Equality in Africa
SOAWR	Solidarity for African Women’s Rights
SOSPA	Sexual Offences Special Provision Act
TAMWA	Tanzania Media Women’s Association
TAWLA	Tanzania Women Lawyers Association
TGNP	The Tanzania Gender Networking Programme
TGNP	Tanzania Gender Networking Program
TLR	Tanzania Law Report
TLS	Tanganyika Law Society
TPFNET	Tanzania Police Female Network
TWPG	Tanzania Women Parliamentary Group
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization’s
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNICEF	United Nations Children Education Fund
UNIFEM	United Nations Development Fund for Women
UNSCR	United Nations Security Council Resolution
V	versus
VEO	Village Education Officer
WGDD	Women and Gender Development Directorate
WHO	World Health Organization

WILDAF	Women in Law and Development in Africa
WLAC	Women's Legal Aid Centre
STIs	Sexually transmitted infections

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## CHAPTER ONE

### BACKGROUND

#### 1.1 Introduction

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW)<sup>1</sup> is the major international human rights treaty that protects the rights of women at international level.<sup>2</sup> Moreover, African countries have also adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa at regional level.<sup>3</sup> To date, 36 member states of the AU ratified the Protocol and 48 member states signed it.<sup>4</sup> The Protocol was adopted to supplement the African Charter on Human and People's Rights (ACHPR) to safeguard the rights of women in Africa in line with the traditions and customs of Africa.<sup>5</sup> Though it has borrowed greatly from CEDAW, the Maputo Protocol has also articulated additional women's rights that had not been clearly provided for within CEDAW.<sup>6</sup>

Tanzania is among the countries that have ratified CEDAW and the Maputo Protocol without any reservation,<sup>7</sup> but these two treaties have not been incorporated into Tanzanian domestic law to date.<sup>8</sup> The basis of law in Tanzania is customary law, common law and legislation, which are both colonial and post-independence.<sup>9</sup> Most national legislative provisions that deals with

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<sup>1</sup>It is a United Nations (UN) document which entered into force on 03 September 1981 United Nation Entity for Gender Equality and the Employment of Women, available at <http://www.un.org/woemnw/daw/cedaw/cedaw.htm> accessed on 8<sup>th</sup> February 2015.

<sup>2</sup>Bond J E 'CEDAW in Sub-Saharan Africa: Lessons in implementation' (2014) *Michigan State Law Review* 241-262 at 244.

<sup>3</sup>The Optional Protocol was adopted by the African Union (AU) on 11 July 2003 in Maputo, Mozambique, and became better known as the Maputo Protocol. It was entered into force on 25 November 2005 after being ratified by 15 member states of the AU, thus being the instrument which has been ratified by most countries in Africa.

<sup>4</sup>Ibid.

<sup>5</sup>Make Every Woman Count 'African Women Decade 2014 Annual Review' (2014) *Make Every Woman Count Annual Review*. Available at <http://www.makeeverywomancount.org/index.php?option> accessed on 2 March 2015.

<sup>6</sup>Ibid.

<sup>7</sup>Tanzania ratified CEDAW on 20 August 1985 and the Maputo Protocol was ratified on 3 March 2007.

<sup>8</sup>Mapunda B T 'Treaty making and incorporation in Tanzania' (2003) 28-30 *East Africa Law Review* at 156 and Tanzania Human Rights Report: Country Reports on Human Rights Practices (2013); United States Department of Bureau of Democracy, Human Rights and Labor: Country Report on Human Rights Practices for 2014. Available at [www.state.gov/j/drt/rls/hrrpt/humanrightsreports/#wrapper](http://www.state.gov/j/drt/rls/hrrpt/humanrightsreports/#wrapper) accessed on 15 February 2015.

<sup>9</sup>Kamanga K 'International human rights law as reflected in Tanzania's treaty and court practice' in Binchy W and Finnegan C *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives* (2006) 53-70 at 54.

women's rights in Tanzania have been enacted since colonialism and are based on the cultural practices that were prevalent at that time.<sup>10</sup> Since then, civil codes such as the Tanzania Law of Marriage Act of 1971, the Local Customary Law (Declaration no. 4) Order of 1963, and the Indian Law of Succession Act of 1865 have not been adequately reviewed to repeal provisions that are discriminatory to women.<sup>11</sup>

In Tanzania, which is a typical African country, the majority of people conduct their personal activities in accordance with cultural and traditional practices. However, many cultural and traditional practices in Tanzania subordinate women within the family and clan and also within the community at large. Women have been overwhelmed by the burden of upholding cultural norms and values<sup>12</sup> as the values that are entrenched in customary law practices are used to justify the violation of women's human rights.<sup>13</sup> Paradoxically, the Constitution of the United Republic of Tanzania of 1977 guarantees the right of equality for all human beings; yet culture and tradition override this right.<sup>14</sup> Many practices that subject women to abuse continue to manifest themselves despite the existence of other domestic legislation such as the Penal Code of Tanzania, Cap 16 R.E. 2002, which prohibits discriminatory practices. Reports show that Tanzania is among the African countries that are criticized for not respecting women's rights as guaranteed by international instruments. This occurs because of countries' failure to effect reforms to some of their domestic laws that promote traditional and cultural practices that are prejudicial to women and that compromise the right to gender equality.<sup>15</sup>

## 1.2 Statement of the Problem

Women in Tanzania continue to be victims of both discrimination and marginalization. This has resulted in a continual social and economic war, which in turn places women in a vulnerable position compared to men. Customary law practices have impacted greatly on matters such as

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<sup>10</sup>Legal and Human Rights Centre *Tanzania Human Rights Report 2012* LHRC (2013) 107.

<sup>11</sup>Mapunda (note 8) above.

<sup>12</sup>Make Every Woman Count (note 5) above.

<sup>13</sup>Musalo K 'When rights and cultures collide: The case of a woman seeking refuge in the United States from her tribe's ritual of female genital mutilation raises the question: Are human rights universal?' Available at <http://www.scu.edu/ethics> accessed on 10 February 2015.

<sup>14</sup>Constitution of the United Republic of Tanzania of 1977 (as amended fourteen times until 2005), hereinafter referred to as the Constitution of 1977. Articles 12(1) & (2) of this Constitution stipulate that all human beings are born free and equal and every person is entitled to recognition and respect for his dignity.

<sup>15</sup>Africa for Women's Rights Ratify and Respect *Report of Women's rights protection instruments ratified by Tanzania*. Available at <http://www.africanforwomensrights.org> accessed on 11 February 2015. Also Tanzania Human Rights Report (note 10) above.



marriage, inheritance and traditional authority. Some of the key factors that contribute to the violation of women's rights and the discrimination against them as a result of harmful cultural and traditional practices in Tanzania will be discussed below.

### *1.2.1 Shortcomings in law reform*

Several laws which have a negative impact on women's rights are still enforced in Tanzania. Intentions to amend these laws and to remove discriminatory provisions have been met with strong resistance, thereby hindering any reforms.<sup>16</sup> There are several examples of discriminatory laws in Tanzania. For instance, family law (Law of Marriage Act, of 1971 CAP 29 [R.E. 2012]) expressly provides a different legal minimum age of marriage for males and females. Section 13 of this Act stipulates that the legal minimum age for marriage is 15 years for girls while it is 18 years for boys. In addition, the Tanzanian Penal Code also allows marriage of girls under 15, provided that the marriage is not consummated before the age of 15.<sup>17</sup> Moreover, the Law of Marriage Act of 1971 allows a marriage contract to be concluded without the consent of the bride on the basis of an arrangement reached between the father of the bride and the groom.<sup>18</sup>

Another discriminatory law is the Law of Persons Act of Tanzania<sup>19</sup> which allows for payment of a bride price upon which the husband and his family feel that they own the wife. Therefore, when the husband dies, the wife is 'inherited' by another relative within the husband's family. Payment of a bride price also makes it very difficult for a woman to seek a divorce if she is living in unhappy or unsafe circumstances for fear that her parents would be required to pay back the bride price which they would have spent long ago. Further examples of discriminatory domestic legislation include the Citizen Act of 2012 which is a law that limits women's right to transfer their nationality to their children and husbands of foreign nationality.<sup>20</sup>

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<sup>16</sup>Africa for Women's Rights Ratify and Respect (note 15) above.

<sup>17</sup>Penal Code of Tanzania [CAP16 R.E. 2002] section 13A.

<sup>18</sup>Section 17.

<sup>19</sup>GN 279 of 1963.

<sup>20</sup>The Citizenship Act R.E. of 2012 sections 7(5), 10, and 11.

### 1.2.2 *Domestic violence and cultural practices*

Domestic and sexual violence is highly prevalent in Tanzania.<sup>21</sup> Customs and traditional practices excuse the harassment and abuse of women and a culture of exemption exists.<sup>22</sup> Most cases of violence are under reported and the few which are reported are regularly settled out of court.<sup>23</sup> There is no domestic legislation that specifically protects women from domestic violence in Tanzania.<sup>24</sup> Furthermore, marital rape is not recognized as domestic violence or as a criminal offence.<sup>25</sup> Different provisions of various statutes offer fruitless protection against gender-based violence.<sup>26</sup> Cultural, family and social pressures often prevent women from reporting abuses and authorities rarely take action against persons who abuse women.<sup>27</sup> The government has declared its intention to amend legislation that upholds gender violence since 2008, but no such reform has been introduced to date.<sup>28</sup>

Another abusive traditional practice that impacts women in Tanzania is female genital mutilation (FGM). This practice is criminalized by law, yet it is still widely practised in regions like Kilimanjaro, Arusha, Manyara, Kigoma Dodoma, Mara and Morogoro. Moreover, domestic law has criminalized FGM only for girls who are under 18 years, thus leaving women above 18 years unprotected and extremely vulnerable.<sup>29</sup>

### 1.2.3 *Customary law of succession*

The customary law of succession in Tanzania denies women access to land and property upon divorce or death of the husband.<sup>30</sup> There are three different laws applicable to inheritance in

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<sup>21</sup>Mtambalike M 'Domestic violence in Tanzania: The never-ending story' (2013) *We Write for Rights*, Sauti Human Rights Center Reports. Available at <https://wewriteforrights.wordpress.com/2013/08/11/2> accessed on 10 February 2015.

<sup>22</sup>Muna N 'African customary law, customs, and women's rights' *Cornell Law Faculty Publications* (2011) 187.

<sup>23</sup>Sheik L 'Tanzania: Violence against women is a violation of human rights' *Tanzania Daily News*, 21 March 2003.

<sup>24</sup>United States Human Rights Committee of CEDAW 'Conclusive observations after considering Tanzania's 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Periodic Report under CEDAW, July 2007. Available at <http://www.un.org/womenwatch/da/cedaw/reports.htm> accessed on 10 February 2015.

<sup>25</sup>Ibid.

<sup>26</sup>Penal Code of Tanzania does not contain any specific provision on domestic violence and does not criminalize marital rape.

<sup>27</sup>Legal and Human Rights Center (note 10) above.

<sup>28</sup>Sheik (note 23) above.

<sup>29</sup>Section 169A of Tanzania Penal Code, Cap 16 R.E. 2002 (Ordinance No. 11 of 1930).

<sup>30</sup>The Local Customary Law (Declaration No. 4) Order [CAP 35 R.E. 2002], (GN No. 436 of 20 September 1963).

Tanzania.<sup>31</sup> The first is the Indian Law of Succession Act of 1865, which provides for one-third of the estate to pass to the widow and two-thirds to the children. If there are no children, then the widow is entitled to half of the estate and the other half is passed to the deceased's parents or other blood relatives. Another law of inheritance is Islamic law, which provides for widows to receive one-eighth of the deceased husband's property if there are children, and one-fourth if there are no children. The third law of inheritance is customary law under which a widow cannot inherit any property of her deceased husband.<sup>32</sup> These laws of succession limit women's inheritance on the basis of their gender. This discriminatory legislation impoverishes women by limiting their access to economic resources and leaving their survival at the mercy of men. Women have been kept in a state of perpetual dependence by these laws.

#### *1.2.4 Traditional beliefs*

Traditional faith healing and witchcraft are among the cultural beliefs that infringe on women's rights in Tanzania. These beliefs have led to intimidation, psychological isolation, abuse, violence and, in extreme cases, the killing of older women simply because they were accused of witchcraft when a disaster happened in the community.<sup>33</sup> Some of these elderly women were burnt to death inside their houses along with other members of their families.<sup>34</sup>

Similarly, traditional faith healing and witchcraft are now associated with the killing and violence against albinos in Tanzania, primarily in the Lake Zone areas. Practitioners of witchcraft search for albino body organs in the belief that they can be used to create power and wealth, especially in business and politics.<sup>35</sup> Data have shown that most of the albinos who are attacked or killed or who end up losing their body organs are women and young girls who are too weak to fight back.<sup>36</sup>

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<sup>31</sup>This is according to the Judicature and Application of Laws Act of 1920.

<sup>32</sup>The Statement of Islamic Law Order No. 121 of 1962 (GN No. 222).

<sup>33</sup>HelpAge International Tanzania 'NGO thematic shadow report on older women's rights in Tanzania' Report Submitted to the 41st Session of the Committee on CEDAW in relation to Tanzania's Combined fourth, fifth and sixth periodic report of state parties, 16 April 2007 (CEDAW/C/TZA/6) April 2008.

<sup>34</sup>Ibid.

<sup>35</sup>Marcom V *Albinism in Tanzania: A Human Rights Issue, an Experience of Monitoring a White Black* (2013) Univerita Delis StudiDipadova 2. Available at [http://www.academia.edu/9140081/Albinism\\_in\\_Tanzania](http://www.academia.edu/9140081/Albinism_in_Tanzania) accessed on 27 April 2015.

<sup>36</sup>Marcom (note 35) above.

### *1.2.5 Enforcement mechanisms of international human rights law in Tanzania*

Women's rights, as with any other human rights, are mainly enforced through the judiciary system in Tanzania. However, there are extra-judicial institutions that are directly involved in the promotion and protection of human rights at domestic level. Some of these extra-judicial institutions were established by the government while others are non-state actors who involve themselves directly in the promotion and protection of women's human rights within the country, as will be discussed below.

#### *1.2.5.1 Institutional framework for the promotion and protection of human rights in Tanzania*

The government of Tanzania established the Commission for Human Rights and Good Governance (CHRGG) in 2001 through Articles 129–131 of the 1977 Constitution as well as the Commission for Human Rights and Good Governance Act, chapter 391 of 2001. The CHRGG plays the dual role of an ombudsman and a human rights commission. Since its creation, the Commission has been active in a number of protective functions. First, it receives and investigates allegations and complaints of human rights violations and contraventions of principles of administrative justice. It also conducts public hearings on these matters and proposes compensation where appropriate. Secondly, it initiates proceedings on its own and handles individual complaints concerning the violation of human rights generally, with vested rights to investigate, conduct hearings and settle disputes. Thirdly, it promotes and advises by educating the public about human rights and good governance issues, carrying out research on human rights and good governance, and monitoring compliance with human rights standards and principles of good governance. It also advises the government and other public organs and private sector institutions on specific issues relating to human rights and administrative justice. Fourthly, it offers mediation and conciliation through alternative conflict resolution.

However, this Commission has weaknesses. One weakness is that it violates the Paris principles of the independence of national human rights institutions.<sup>37</sup> First, the CHRGG is barred from investigating the President. Secondly, the President can direct the Commission to discontinue an investigation, although he must provide a reason "if he considers that there is a real and

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<sup>37</sup>Relief L *The Ombudsman, Good Governance and the International Human Rights System* Nijhoff Publishers (2004) 37.

substantial risk that the investigation would prejudice matters of national defense or security".<sup>38</sup> Thirdly, the Commission has not yet developed its capacity to serve the whole country. It operates through other government related organs, such as the Good Governance Coordination Unit in the President's Office, the Prevention of Corruption Bureau, the police and civil society.<sup>39</sup>

This Commission scored a 'weak' rating on the 2006 Global Integrity Index on several counts.<sup>40</sup> However, there have been too few cases since its establishment to conclude whether the government did act on the findings of the Agency. Generally, the Agency did not respond to citizens' complaints within a reasonable time period, but the response period depended on the importance of the case and the status of the complaint. The law does not spell out whether reports of the Agency should be accessible, but in practice they are reasonably accessible.<sup>41</sup> However, the reports have to be tabled before the National Assembly before the public can access them.

The Law Reform Commission of Tanzania is another government institution. It was established under the Law Reform Commission Act No. 11 of 1980. It is charged with several statutory responsibilities, including keeping all the laws of the United Republic of Tanzania under review with a view to their systematic development and reform. The Commission can review any law or branch of law and may recommend ways and measures through which that law or branch of the law can be improved or made simpler and updated in line with human rights and the current circumstances within Tanzania. In addition, the Law Reform Commission revises and simplifies complex laws for public consumption. It has researched, reviewed and prepared a number of reports related to the protection of women's human rights, for example the report on criminal law as a vehicle for the protection of the right to personal integrity, dignity and liberty of women; the report on laws relating to the Sexual Offenses Special Provisions Act of 2009, the report on laws relating to succession and inheritances of 1995, and the report on the Law of Marriage Act of 1995. However, the government has been reluctant to work on the recommendations of the Commission. For example, it was as far back as twenty years ago that the Commission suggested amendments to the Law of Marriage Act and laws relating to

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<sup>38</sup>Section 16(4) of Commission for Human Right and Good Governance Act No. 7 of 2001, chap 391.

<sup>39</sup>Tanzania Human Rights Report of 2013 (note 8) above.

<sup>40</sup>Global Integrity Tanzania Scorecard Report: IN Global Integrity Report 2006. Available at [www.http://www.globalintegrity.org/reports/2006/Tanzania/index.cfm](http://www.globalintegrity.org/reports/2006/Tanzania/index.cfm) accessed 5 August 2015.

<sup>41</sup>Transparency International, National Integrity Systems Country Study Report - Tanzania (2003).

succession and inheritance which undermine and discriminate against women, but to date the government has not considered any of these recommendations.<sup>42</sup>

Apart from various government institutions, there are non-state actors in Tanzania that are involved in the promotion and protection of women's rights. These actors include civil society representatives, the media, trade unions and political parties. They complement the work of the government by promoting human rights through various activities. For example, civil society conducts and broadcasts public awareness programmes to the government and the public on human rights issues; they monitor and publicize human rights violations; and they conduct strategic litigation and provide legal aid in various cases. The media is the vehicle for the promotion of freedom of opinion and expression through various programmes. The media is also a means of imparting knowledge and disseminating information to the public.

These organizations have succeeded in the promotion of women's human rights in the country, but the protection of women has been a difficult task, because when they institute cases before a court of law that involve breaches of international human rights, the court of law usually dismisses them due to a lack of the domestication of applicable laws.<sup>43</sup> The hands of the courts are tied with regards to either invoking or interpreting provisions of international human rights instruments without express and clear recognition of the covenant and the transformation of such instruments into domestic laws in Tanzania.<sup>44</sup> Although some of the provisions of the covenants are embodied in the Constitution, the enforcement mechanism is not satisfactory due

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<sup>42</sup>SAHRiNGON, TLS, LHRC and NOLA, NGO Report on the Implementation of the International Covenant on Civil and Political Rights in Tanzania. Available at [http://www.univie.ac.at/bimtor/dateien/Tanzan\\_ccpr\\_2009\\_NGO\\_\\_info.pdf](http://www.univie.ac.at/bimtor/dateien/Tanzan_ccpr_2009_NGO__info.pdf) accessed on 5 August 2015.

<sup>43</sup>Ibid.

<sup>44</sup>See generally: *Mbushuu alias Dominic Mnyaroje and Kalai Sangula v the Republic, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 142 of 1994, reported in [1995] LRC 216; Republic v Mbushuu alias Dominic Mnyaroje and Another, [1994] TLR 146; Legal and Human Rights, Lawyers' Environment Action Team (LEAT) and National Organization for Legal Assistance v the Attorney General, High Court of Tanzania, at Dar es Salaam (Main Registry), Misc. Civil Cause No. 77 of 2005 (Kimaro, J, Massati J and Mihayo J), (unreported) at 39 of the Judgment; Baraza la Wanawake, Tanzania (BAWATA) and 5 Others (Petitioners) v the Registrar of Societies and 2 Others (Respondents), in the High Court of Tanzania, at Dar es Salaam, Misc. Civil Cause No. 27 of 1997, Ruling of Kalegeya, J; John Byombalirwa v Regional Commissioner, Kagera and Regional Police Commander, Bukoba, [1986] TLR 73; Paschal Makombanya Rufutu v the Director of Public Prosecutions, High Court of Tanzania, at Mwanza, Miscellaneous Civil Cause No. 3 of 1990 (unreported); Khasim Hamis iManywele v the Republic, High Court of Tanzania, at Dodoma, Criminal Appeal No.39 of 1990, (unreported), p.15; Thomas Mjengi v the Republic, [1992] TLR 157; Christopher Mtikila and Others v the Republic, High Court of Tanzania at Dodoma, Criminal Appeal No. 90 of 1990 (unreported); Christopher Mtikila v the Attorney-General, in the High Court of Tanzania, at Dar es Salaam Main Registry, Miscellaneous Civil Cause No. 10 of 2005 (Manento, J K, Massati J, and Mihayo J), Judgment of 5 May 2006 (unreported); Peter Ng'omango v Gerson M K Mwangwa and the Attorney-General [1993] TLR 77.*

to the fact that even the law that allows enforcement of the basic rights and duties under the Constitution does not seek to guarantee maximum enjoyment of the fundamental rights and freedoms of everyone.<sup>45</sup>

The Basic Rights and Duties Enforcement Act [CAP. 3, R.E 2002] only complicates matters regarding the enforcement of basic rights and duties in that it requires three judges to preside over, hear and determine a petition on the violation of any of the provisions on the basic rights and duties as provided for in the Constitution. This is even more difficult, complicated and cumbersome for High Court registries in regions other than Dar es Salaam where there are fewer than three judges per High Court centre. This inevitably leads to unnecessary delays in hearing constitutional petitions, thereby adversely affecting recourse for the victims of human rights violations.<sup>46</sup>

Moreover, despite the fact that there were many human rights cases before the enactment of the Basic Rights and Duties Enforcement Act of 1994, after the coming into force of the Act, only a few cases have been instituted and decided.<sup>47</sup> One example of delay is the case of *Baraza La Wanawake Tanzania (Bawata) v the Registrar of Societies, Minister for Home Affairs and the Attorney General Miscellaneous Civil Cause No. 27 of 2007, High Court of Tanzania at Dar es Salaam (unreported)*. This constitutional case was brought under Articles 13(6),<sup>48</sup> 15,<sup>49</sup> 18<sup>50</sup>, 20(1),<sup>51</sup> 24,<sup>52</sup> 26(2)<sup>53</sup> and 30(4)<sup>54</sup> of the Constitution, and sections 4 and 5 of the Basic

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<sup>45</sup>SAHRiNGON, TLS, LHRC and NOLA (note 42) above.

<sup>46</sup>Ibid.

<sup>47</sup>Ibid.

<sup>48</sup>Article 13(6) provides for the right to equality.

<sup>49</sup>Article 15(1) states: "Every person has the right to freedom and to live as a free person".

Article 15(2) states: "... no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only in accordance with procedures prescribed by law; or in the execution of a judgment, order or a sentence..."

<sup>50</sup>Article 18 provides for freedom of expression.

<sup>51</sup>Article 20(1) states: "...electing and being elected or for appointing and being appointed to take part in matters related to governance of the country, every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law."

<sup>52</sup>Article 24(1) provides: "Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law." Article 24(2) also states: "Subject to the provisions of sub-article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation."

<sup>53</sup>Article 26(2) states: "Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land."

<sup>54</sup>Article 30(4) provides: "Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article... ."

Rights and Duties Enforcement Act of 1994. The case was filed in 1997 and the judgment was only given in 2009, more than ten years later.

#### *1.2.5.2 Judicial enforcement mechanism for the application of international human rights law*

Despite the positive provisions available in international legal instruments, law enforcers in Tanzania keep on relying on customary discriminatory provisions in their decision making. A good example is the case of *Elizabeth Steven and Another v the Attorney General*,<sup>55</sup> in which the petitioners filed a petition under Article 30(3) of the Constitution of the United Republic of Tanzania of 1977 for an order declaring paragraphs 1 to 51 of the second schedule of the local customary law unconstitutional.<sup>56</sup> This section denies women the right to inherit land and gives males preference over females. Through the services of their advocates, the petitioners referred the court to a litany of international treaties that Tanzania had ratified, such as CEDAW of 1979, ACHPR of 1981, the Convention on the Rights of the Child of 1989 (CRC), and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICECSR), which among other matters all provide for the elimination of discrimination against women. The petitioners invited the court to find international treaties as an additional obligation to the law of the country and to acknowledge that their ratification was not merely a formality. The court could not decide based on these international instruments, claiming that the court of law should not be the place to eliminate customary laws and that such laws should be left to dissolve with time.<sup>57</sup>

The High Court's decision also ignored the precedent created by the Court of Appeals decision in the case of *Transport Equipment Ltd and Reginald John Noland v Devran P. Valambhia*,<sup>58</sup> in which international law was interpreted and applied. The issue in *Valambhia's* case was the detention of a judgment debtor as a civil prisoner. There was a conflict between the ICCPR of 1966 which Tanzania had signed and ratified, and the Constitution. Comparing the two instruments, the former Chief Justice of Tanzania, Judge Agustino Ramadhani, noted:

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<sup>55</sup>High Court of Tanzania at Dar es Salaam: Miscellaneous Civil Cause No. 82 of 2005 (unreported).

<sup>56</sup>[CAP 358 R.E. 2002].

<sup>57</sup>*Elisabeth Stephen & Another v the Attorney General* (note 55) above.

<sup>58</sup>*Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 19 of 1993 (unreported)*.



“Our Constitutional protection falls short of that which is provided by the International Covenant on Civil and Political Rights. But since we are a party to that Covenant, then it is my conviction that we have at least to interpret and apply our derogation law extremely strictly.”

This case demonstrated that some bold judges interpret international laws strictly, while others ignore them as, according to the Tanzanian system, they are not self-executing.<sup>59</sup>

The cases cited above and arguments from various studies thus demonstrated that, despite the provisions of international human rights instruments and the Constitution of the United Republic of Tanzania that clearly prohibit any form of discrimination through the recognition of the equality of all human beings and guaranteeing equality and protection of all before the law, some judges still do not find it unjust to make decisions based on discriminating legislation. Most judges and magistrates seem to accept stereotypes and are not gender sensitive; they choose to make decisions based on harmful customary rules without even considering other human rights principles that are enshrined in the country’s Constitution. In these circumstances, they present divergent views on the interpretation of the rules.

### **1.3 The Aims and Objectives of the Study**

The purpose of this study was to analyze the impact of culture and traditions on the implementation of CEDAW and the Maputo Protocol in the Tanzanian context. The objectives were:

- to explore aspects of existing culture and traditions in terms of the provisions of Tanzania’s Constitution and domestic legislation that need to be reformed in line with provisions in CEDAW and the Maputo Protocol;
- to analyze and evaluate judicial decisions in Tanzania in terms of the domestication of international human rights instruments that protect the rights of women through the process of judicial review.

This research therefore focused on answering the following research questions:

- What is the impact of culture and traditions on the rights of women in Tanzania?

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<sup>59</sup>Judge Agustino Ramathan in the case of *Transport Equipment Ltd and Reginald John Noland v Devran P. Valambhia* (note 58) above.

- What legal reforms are required in Tanzania's domestic legislations in order to be consistent with CEDAW and the Maputo Protocol?
- What is the approach of domestic courts in dealing with international human rights instruments that were ratified by Tanzania?
- What comparative lessons can be learned from other African countries in relation to the protection of women's rights?

#### **1.4 Research Hypotheses**

This study was conducted in consideration of the following hypotheses:

- Culture and traditions are used as a basis for denying women's rights in Tanzania.
- Most international human rights treaties that focus primarily on women have not been adequately incorporated into national legislation in Tanzania, hence the rights of women in Tanzania are violated because of the non-domestication of international treaties.
- Some of the provisions that protect women's rights and that are enshrined in some domestic legislation are not effectively enforced due to derogatory clauses, other pieces of domestic legislation, or the ignorance and stereotyped mind-sets among law enforcers in particular and society in general.

#### **1.5 Methodological Approach**

The study adopted a qualitative desktop research approach. A critical analysis of international instruments which expound the protection of women's rights was conducted. The study identified Tanzanian legislation and policies which are both in conformity and non-conformity with international human rights instruments that protect the rights of women. The Constitution of the United Republic of Tanzania was also examined in order to establish the extent to which it safeguards women's rights.

Case laws which addressed issues of women's rights were also examined. The study employed secondary data from academic, scholarly writing that comprised both theoretical and practical information. The sources that were consulted included published and unpublished materials in

the form of law review articles, general comments, textbooks, journals as well as newspapers related to the subject under study.

The choice of using a qualitative approach was prompted by the legal nature of the study. This approach allowed the researcher to describe the body of relevant laws and to examine how these laws were implemented. It helped the researcher to uncover the realities of enforcement and compliance with women's rights because this study attempted to answer the research questions and test the hypotheses. In this approach the researcher thus engaged in documentary review relating to harmful cultural beliefs and traditional practices that negatively impact women's rights.

## **1.6 Research Framework**

This study thesis comprises five chapters, the first of which prefaces this study.

Chapter two introduces and provides a general overview of the concept of culture and tradition from a human rights perspective. It also explores international, regional, sub-regional and national instruments that safeguard and enhance the development of women's rights. The purpose of this chapter is to provide a theoretical framework for the development of women's rights and to examine important legal instruments that guarantee women's rights. The objective of this examination was to highlight the gaps that exist in this framework which this study intended to cover.

Chapter three reviews aspects of traditions and culture in Tanzania that hinder the full implementation of CEDAW and the Maputo Protocol. This chapter also focuses on Tanzania's legislation with the aim of ascertaining the gaps in law reform that need to be considered for the total protection of women's rights.

Chapter four undertakes an evaluation and a critical analysis of the jurisprudence of Tanzania's domestic court in the application of CEDAW and the Maputo Protocol in order to establish their influence for the interpretation and application of women's rights as guaranteed therein at the domestic level. The analysis in this chapter is preceded by exploring the case law from other jurisdictions which relate to the study at hand as well as other extra-judicial efforts for

the promotion and protection of women's rights in Tanzania. The objective of this chapter is to demonstrate whether the enforcement of women's rights is achieved at domestic level or not. Practical legal challenges and aspects to be considered for the better enforcement of CEDAW and the Maputo Protocol are also provided.

Chapter five is the concluding chapter. It presents the conclusions that were reached with reference to the findings that were presented in all the chapters. This chapter also proposes the way forward by attempting to deal with the problems that were identified in the previous chapters. Recommendations and offered and areas for further studies are also pinpointed.

## CHAPTER TWO

### CONCEPTS OF CULTURE AND THE DEVELOPMENT OF WOMEN'S RIGHTS

#### 2.1 Introduction

The purpose of this chapter is to provide an analysis of the concepts of culture and tradition within the human rights framework. It focuses on the theoretical framework in relation to the development of the protection and promotion of women's rights, with particular reference to CEDAW and the Maputo Protocol. The importance of this focus is borne out by the fact that these instruments do not only provide a frame of reference for the protection of women's rights, but they go beyond by obliging state parties to provide for the protection of those rights in their jurisdictions through different legal measures and instruments.

This chapter is divided into two parts. The first part provides an analysis of the human rights perspective on culture and tradition. This part also focuses on the development of international, regional and sub-regional instruments that protect women's rights such as CEDAW and the Maputo Protocol and discusses the rights that are guaranteed in these instruments. The second part of this chapter presents an analysis of the actual protection of women's rights at sub-regional, regional and national levels. International instruments not only provide a frame of reference for ensuring the fundamental rights and freedom of all persons, including women, but also oblige state parties to adhere to provisions in these instruments. This part therefore focuses on Tanzania's national and domestic legislation to ascertain whether these instruments comply with international provisions for the protection of women's rights.

#### 2.2 The Concepts of Culture and Tradition under International Human Rights Law

Culture is critical to almost every area of society, but most especially the law.<sup>1</sup> From a legal perspective, it becomes essential to examine the conception of culture and its place within the

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<sup>1</sup> Irina D 'A culture of human rights and the right to culture' *Journal for Communication and Culture* 1, No. 2 (2011) 31-48.

domain of human rights law. An encompassing definition of culture is provided in the Universal Declaration on Cultural Diversity of 2001, which was developed by the United Nations Educational, Scientific and Cultural Organization's (UNESCO) governing body.<sup>2</sup> It defines the term culture to cover those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which person or groups express their humanity and the meaning they give to their existence and to their development.<sup>3</sup> This Declaration, which was the first of its kind within the international community, elevates cultural diversity to the rank of the common heritage of humanity. The definition of culture in the UNESCO Declaration aims to preserve cultural diversity as a living and thus renewable treasure that must not be perceived as being an unchanging heritage, but as a process that guarantees the survival of humanity.<sup>4</sup> It also aims to prevent segregation and fundamentalism which, in the name of cultural differences, would sanctify those differences and so counter the message of the Universal Declaration of Human Rights.<sup>5</sup>

It is clear from the UNESCO definition that culture is no longer regarded as a mere commodity; rather, it entails the 'doing' of human beings by virtue of being members of the community.<sup>6</sup> The Declaration construes culture as an expression of a person's or a group's identity. The definition demonstrates two dimensions of culture. The first dimension relates to the physical characteristics of a person or a group which can be observed externally, for example religion, language and custom. The second dimension is more subjective, as it relates to the way of thinking and acting by a group.<sup>7</sup> The Declaration makes it clear that each individual must acknowledge both 'otherness' in all its forms as well as the 'plurality' of men's or women's own identities within communities that are themselves plural.<sup>8</sup> It has paved the way for the preservation of cultural diversity as a capacity for expression, creation and innovation and as an adaptive process. The Declaration has brought two approaches together and covers the debate between those countries which would like to defend cultural goods and services as

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<sup>2</sup> It was adopted on 2 November 2001 in Paris.

<sup>3</sup> Article 2(a) of UNESCO Universal Declaration on Cultural Diversity of September 2001. It was made official by the large definition of culture that was adopted in Mexico in 1982 and by the Convention on the Protection and Promotion of Diversity of Cultural Expression of 2005.

<sup>4</sup> Foblets M *Cultural Diversity and the Law: State Responses from around the World* Bruilant Bruxelles (2010) 74.

<sup>5</sup> Matsuura K, Director-General of UNESCO in Cultural Diversity 'A vision: the cultural wealth of the world is its diversity in dialogue?' Cultural Diversity Series No. 1, Document for the World Summit on Sustainable Development, Johannesburg, 26 August – 4 September 2002.

<sup>6</sup> Ibid.

<sup>7</sup> Irina (note 1) above.

<sup>8</sup> Article 2 of UNESCO Universal Declaration on Cultural Diversity of September 2001.

courses of identity, values and meaning and those which would hope to promote cultural rights.<sup>9</sup> It thus highlights the causal link and unites both balancing attitudes by clarifying that one cannot exist without the other.

The UNESCO Declaration also provides the main lines of an action plan which is an outstanding tool for development that is capable of humanizing globalization.<sup>10</sup> Rather than giving instructions,<sup>11</sup> it provides general guidelines to be turned into ground breaking policies by member states in their specific contexts, in partnership with the private sector and civil society. The Declaration also emphasizes the understanding of moving from cultural diversity to cultural pluralism under Article 2, which states the following:

“In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society, and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. [As it is] dissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.”<sup>12</sup>

In addition, Article 3 of the Declaration delineates cultural diversity as a factor in development:

“Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.”<sup>13</sup>

Article 4 of the Declaration insists that cultural diversity should presuppose respect for human rights:

“[t]he defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”

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<sup>9</sup> Berman H ‘Introductory Note: United Nations Commission on Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities: Draft United Nations Declaration on the Rights of Indigenous Peoples’ in *International Legal Materials* 34, *Journal of Philosophy* (1995) 541.

<sup>10</sup> *Ibid.*

<sup>11</sup> Matsuura K (note 5) above.

<sup>12</sup> Foblets (note 4) above.

<sup>13</sup> Article 3 of UNESCO’s Universal Declaration on Cultural Diversity of September 2001.

The approach of UNESCO through all of its cultural conventions is firmly grounded on the principle of the universal nature of human rights, which was established as international law in the UN Charter for all without distinction.<sup>14</sup> Of importance is the understanding, acknowledgement and tolerance of other cultures on the foundation of a binding global ethic that originates from universal values and mutual respect across cultural boundaries.<sup>15</sup> Many important cultural rights are included in human rights, such as the right to participate in cultural life and the enjoyment of one's culture, which should be given equal attention. Yet, in accordance with international law, those cultural rights are not unlimited,<sup>16</sup> as they are limited at the point where they infringe on another's human rights.<sup>17</sup> Thus international treaties are universal; they are supposed to be applicable in all countries which have signed those treaties and for that reason they must prevail even when they are in conflict with cultural and religious practices.<sup>18</sup> A clarification of the definition of cultural rights within the human rights system and an elucidation of the nature and consequences of their violation constitute the best methods for preventing the use of cultural rights in favour of cultural relativism, something which is contrary to the universality of all human rights.<sup>19</sup> It also prevents the use of cultural rights as a pretext for setting communities, or even entire populations, against one another.<sup>20</sup> Often, cultural rights lie outside of or in opposition to human rights when they essentially, according to the principle of indivisibility, form an integral part of these rights.<sup>21</sup>

The existence of the coherence of cultural rights is present, as such rights exist on the boundary between economic, civil, political, social and cultural rights and the rights of minorities, and their definitions remain incomplete.<sup>22</sup> This condition constitutes a dangerous gap in the protection of all human rights, especially at a time when respect for cultural diversity takes the front stage as an important issue in globalization and as a challenge for the universality of

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<sup>14</sup>Berman H (note 9) above.

<sup>15</sup>Ibid.

<sup>16</sup>Article 4 of the of UNESCO Universal Declaration on Cultural Diversity of September 2001.

<sup>17</sup>Ibid.

<sup>18</sup>NGO Platform on Diversity and Cultural Rights 'The situation of cultural rights proposed argumentation' version of 2 May 2005.

<sup>19</sup>UNESCO *World Report Investing in Cultural Diversity and Intercultural Dialogue* ' UNESCO (2009) 40.

<sup>20</sup>Palombella G 'From human rights to fundamental rights: Consequences of a conceptual distinction' European University Institute Department of Law, Working Paper LAW No. 2006/34 (2007).

<sup>21</sup>It was also reaffirmed by the Human Rights Council in Resolution A/HRC/6/L.3/Rev.1 that cultural rights are an integral part of human rights which are universal, indivisible, interrelated and interdependent.

<sup>22</sup>Bisch M 'Defining cultural rights: issues at stake' *Concrete Universality* (2013) 49.



human rights.<sup>23</sup> Universality is the common challenge which needs to be taken on, because it is not the smallest common denominator as it consists of cultivating a human condition through permanently working out our ambiguities. It is the place where it is collected and made intelligible and is not against diversity.<sup>24</sup> Sustaining cultural diversity and cultural rights is a highly sophisticated process. Cultural diversity is not just a matter of stitching together differences of culture, language, and so on, but it is a proactive attitude that has to be promoted in terms of principles, standards and practices.<sup>25</sup> When cultural diversity is only considered passively as a mere piecemeal of colours, it will slowly decrease as if those colours were melting into one another; but when it is conceived in active terms as a process that needs to be exercised, then it will flourish, as if the chromatic spectrum were opening up like a fan.<sup>26</sup> However, it has been argued that this definition has the inconvenience that it is not operational in a human rights context. According to this perspective, a cultural activity relates both to the intimacy of each person and to social relations.<sup>27</sup> The Declaration thus elevates cultural diversity to the rank of the common heritage of humanity and promotes the following principle:

“Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.”<sup>28</sup>

From a legal perspective, culture is generally considered as a quality possessed by the individual that directly influences the ability to enjoy the rights and freedoms as recognized in international human rights law in effective and meaningful ways.<sup>29</sup> The cultural dimension of the individual in human rights, culture, and the rule of law is represented by skills as cultural equipment, cultural norms as an adiaphora, and ideology as a comprehensive doctrine, as noted by Jessica Almqvist.<sup>30</sup> She further explains that the notion of cultural equipment consists of for example skills, know-how and tools, while the category of adiaphora refers to cultural norms and rules regulating human activities that are viewed as ultimately indifferent from the

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<sup>23</sup>Nabudere D W ‘Human rights and cultural diversity in Africa’ Paper written for the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA), Conference on the Fusion of Legal Systems and Concepts in Africa, 4–8 September 2005, at the Imperial Resort Beach Hotel, Entebbe.

<sup>24</sup>Ibid.

<sup>25</sup>Gbakwa S C ‘Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights’ *Yale Human Rights and Development Law Journal*, 5 (2002) 177.

<sup>26</sup>Geertz C *The Interpretation of Cultures: Selected Essays* Basic Books Inc. Publishers (1973) 57.

<sup>27</sup>Bisch M (note 22) above.

<sup>28</sup>Article 1 of the UNESCO Declaration.

<sup>29</sup>Almqvist J *Human Rights, Culture, and the Rule of Law* Oxford and Portland: Hart Publishing (2005) 40.

<sup>30</sup>Ibid.

standpoint of cosmopolitan law.<sup>31</sup> In her opinion, such activities include ways of dress, marriage, death, divorce, caring for the elderly and sick, disposing of the dead, and so on. She explains that the final aspect of culture captures political convictions of right and justice having their source in ethical, religious, and philosophical comprehensive doctrines.<sup>32</sup> She adds that all facets of culture such as skills, norms, and ideology have relevance and fundamental implications in advancing respect for human action. Together they constitute the cultural dimension of the individual and are generally understood as the product of membership in society. Edward Tylor also provides a classic definition of culture:

“Culture is that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.”<sup>33</sup>

Apart from being acquired and learned, culture is also generally understood as fabricated and therefore not ‘natural’.<sup>34</sup> It is a quality possessed by individuals and organisations such as public, private, political, social, and legal cultural dimensions.<sup>35</sup> However, the cultural dimensions of organizations might not always accord with individual dimension. It might be that people are able to make effective use of their rights in a significant way, but it depends a great deal upon the character of the social environment as well as the culture in use by public institutions where people function in their places of residence, work, and life.<sup>36</sup> The notions of public culture and social culture capture two main types of culture that the individual is related to apart from his own culture. Social culture is also called the background culture of civil society which is the culture of daily life and its many associations such as universities, churches, learned scientific societies and clubs.<sup>37</sup> Thus the term ‘public political culture’ comprises the political institutions of a constitutional regime and the public traditions of their interpretation which include those of the judiciary and historic texts as well as documents of common knowledge.<sup>38</sup> It is important to note that the individual’s culture may relate to social and public cultures, but the different cultures may also depart in the sense that the individual

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<sup>31</sup>Almqvist (note 29) above.

<sup>32</sup>Tylor E *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom* London: Gordon Press (1974) 1.

<sup>33</sup>Ibid.

<sup>34</sup>Kant I *Lectures on Ethics* Cambridge University Press (2001) 262–263.

<sup>35</sup>Ibid.

<sup>36</sup>Irina (note 1) above.

<sup>37</sup>Kant I (note 34) above.

<sup>38</sup>Merryman J H *Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* Stanford: Stanford University Press (1985) 2.

does not possess the skills, observes the cultural norms, or affirms the ideological outlook that dominates public and social institutions in society at present.

Culture can also be described as a set of attitudes, beliefs, morals, customs, values and practices that are commonly shared by a certain group which may be defined in terms of their geographical, political or regional ethnicity.<sup>39</sup> There is also another form of culture that has to do with activities undertaken by people and the product of those activities. These activities reveal the intellectual, moral and artistic aspects of human life and are protected by THE UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. Moreover, from a lawful viewpoint, various culture-related interests and concerns have been progressively brought forward and attached to the fabric of human rights law. For instance, the idea of a right to culture as an individual right to take part in social life, which was perceived for the first time in the UDHR, has been reaffirmed various times in global instruments as the right to take part in cultural life, as the right of children to participate freely in cultural life and the arts, or as the right to equal enjoyment and participation in cultural activities.<sup>40</sup>

However, slight interest has been afforded to the connotation of the right to cultural participation in comparison with other cultural rights, given its historical significance and its multiple affirmations in international human rights law.<sup>41</sup> For instance, in its comments on Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Economic, Social and Cultural Committee notes that the term ‘culture’ should be given a wide reading, but refrains from any definition.<sup>42</sup> It provides that even if culture may not seem to be a matter of human rights, it is essential to the principle of equality of treatment, the right to receive and impart information, the right to freedom of expression,

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<sup>39</sup>Merryman (note 38) above.

<sup>40</sup>International Convention on Economic, Social and Cultural Rights, 16 December 1966, Art 1, GA Res 2200A (XXI); 21 UN GAOR 21st Sess, Supp No. 16, UN Doc. A/6316 (1966); International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, opened for signature 7 March 1966, 660 UNTS 195 (entered into force on 4 January 1969); Convention on the Rights of the Child, 20 November 1989, Art. 31, 1577 UNTS 44, 49 entered into force on 2 September 1990.

<sup>41</sup>From the American Declaration of the Rights and Duties of Man (1948) and the Additional Protocol to the American Convention on Human Rights (1994), the African Charter on Human and People’s Rights (1981) or the Protocol to the African Charter on the Rights of Women in Africa (2000).

<sup>42</sup>Irina (note 1) above.

and the right to the full development of human personality.<sup>43</sup> Nevertheless, the ICESCR avoids engaging in any explanation of how the right to cultural participation is related to any of these rights. It is also noted that hardly any attention is given to the impact of globalization processes on the right to culture.<sup>44</sup> The uncertain attention paid to the right to culture as a right to cultural participation should be distinguished from the right to enjoy one's own culture.<sup>45</sup> The right to enjoy one's culture has been intensively discussed from the angle of a diversity of different groups such as national, linguistic, ethnic, and religious minorities that include migrant workers, children, and indigenous people.<sup>46</sup> Furthermore, since its confirmation in international human rights law, the right to enjoy one's culture has come to comprise a diversity of more specific rights, such as the right to cultural development, the right to cultural integrity, and the right to cultural identity.<sup>47</sup> For the first time, the idea of a human right to culture as connoting something like a right of a community to enjoy its own culture in the context of self-determination rights and minority rights was launched in 1966.<sup>48</sup> This right is fundamentally understood as a right of peoples to develop their cultures in the context of self-determination.<sup>49</sup> Accordingly, Article 1(1) of ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide the following:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

The UNESCO definition of culture wants to endow the right to cultural development with meaning and significance by providing that culture not only has an instrumental function in development, but is also a desirable end in itself, insofar as it gives sense to our existence.<sup>50</sup> Yet, given its comprehensive directive to reconnoitre the relationship between culture and development, it miscarries to advance any meaningful definition of the right to cultural

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<sup>43</sup>United Nations *Fact Sheet No. 16 (Rev 1)* The Committee on Economic, Social and Cultural Rights. See also O' Keefe R 'The right to take part in cultural life' under Article 15 of the ICESCR, *International and Comparative Law Quarterly* 47(4) (1998) 904.

<sup>44</sup>Almqvis (note 29) above. She notes that while addressing the challenges posed by globalization on the advancement of human rights, the contributions of the Committee centre on the impact of these challenges on the protection of economic and social rights.

<sup>45</sup>Irina (note 1) above.

<sup>46</sup>Almqvis (note 29) above.

<sup>47</sup>*Ibid.*

<sup>48</sup>Irina (note 1) above.

<sup>49</sup>*Ibid.*

<sup>50</sup> UNESCO *Our Creative Diversity. Report on the World Commission on Culture and Development*, Paris, UNESCO (1995) 23–24.

development as such.<sup>51</sup> In short, culture is described not merely as something that everybody has a right to partake in, but also as hindering and devastating, possibly violating the right to enjoy the rights and freedoms guaranteed in international human rights law. However, to the degree that culture has received consideration in the human rights context, it mainly seems as referring to the community and as meriting the strengthening of the right to enjoy one's own culture or community by recognizing a right to cultural identity.<sup>52</sup> The fact that there are so many diverse possible descriptions of the nature of culture demonstrates the difficulty in attempting to pin down a single general meaning of the term. For that purpose, it is for the human rights agenda on culture to reaffirm and seek to rebalance the present agenda dominated by a right to cultural identity with an urgent emphasis on the fundamental value of cultural equipment and cultural infrastructure to individual freedom, as well as the need to address and specify the absolute limits of cultural differences. All persons have therefore the right to participate in the cultural life of their choice and to conduct their own cultural practices, subject to respect for human rights and fundamental freedoms. The UNESCO declaration of culture specifically makes it clear that the flourishing of the creative diversity of culture requires the full implementation of cultural rights as defined in Article 27 of the UDHR and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights.<sup>53</sup>

Some scholars who are proponents of cultural relativism hold that permitting international norms to override the dictates of culture is to violate sovereignty.<sup>54</sup> These scholars interpret efforts to reform customary law as imposing Western values on African societies. The idea signifies that such rights would be based on universally recognized and accepted principles that transcend cultural or religious diversity boundaries. One of those scholars is Cobbah who, in defense of customary law, argues that to correct injustices within different cultural systems of the world does not necessarily turn all people into Westerners.<sup>55</sup> He further emphasizes that Western liberalism, with its prescription of human rights, has had a worthwhile effect not only

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<sup>51</sup> United Nations Development Programme, Human Development Report 2004. Cultural Liberty in Today's Diverse World (New York: United Nations Development Program, 2004).

<sup>52</sup> Ibid.

<sup>53</sup> Article 5 of UNESCO Universal Declaration on Cultural Diversity of September 2001.

<sup>54</sup> Musalo K 'The case of a woman seeking refuge in the United States from her tribe's ritual of female genital mutilation raises the question: are human rights universal?' *Issues in Ethics v 8, N. 3 Summer* (1997) 16; Cobbah J 'African values and the human rights debates: An Africa perspective' *Human Rights Quarterly*, 9(3) (1987) 309–33; Won Kan Sen, former Minister of Singapore in UN conference at Vienna in 1993, in Mullerson R *Human Rights Diplomacy* Network Routledge (1997) 79. Also, Fielder L *Transnational Legal Processes and Human Rights* Ashgate (2013) 30.

<sup>55</sup> Cobbah J (note 54) above.

on Westerners, but on many peoples of this world and that it is not the only rational way of living a human life.<sup>56</sup> He maintains that instead of imposing the Western philosophy of human rights on all cultures, one's efforts should be directed to searching out homeomorphic equivalents in different cultures.<sup>57</sup> These views were once tabled at a UN Conference by a former minister of Singapore in the following words:

“Universal recognition of the idea of human rights can be harmful if Universalism is used to deny or mask the reality of diversity.”<sup>58</sup>

Consequently, the universality approach to human rights was underplayed in the conference when China, Iran, Syria, Malaysia, Singapore, Indonesia and Syria clamorously assumed a culture relativist position by assailing the UDHR standards; thus their final document included a clause stating that global human rights standards should be tempered with “regional peculiarities and various historical, cultural and religious backgrounds.”<sup>59</sup>

When considering the relation between culture and international human rights, two contrasting views appear.<sup>60</sup> The first view is the view of universality which does not recognize that there is any connection between the two, as it maintains a view that internationally recognized human rights only flow from international legal instruments and can be perceived regardless of cultural variation according to existing international jurisprudence.<sup>61</sup> On the other hand, the second view is promoted by cultural relativists who discard international human rights as ‘asteroid theory’ that is imposed on the population of the south.<sup>62</sup> Cultural relativists provide that rights and moral values cannot be established universally and that human rights are not necessarily universal.<sup>63</sup> They further maintain that the concept of universal human rights is inconceivable as human rights movements have been driven by powerful and wealthy western nations who have defined human rights in terms of the cultural tenets that are relevant to their own

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<sup>56</sup>Cobbah J (note 54) above.

<sup>57</sup>Won Kan Sen (note 54) above; Also Filder (note 55) above.

<sup>58</sup>Ibid.

<sup>59</sup>Iriye A Goedde P & Hitchcock W *The Human Rights Revolution: An International History* Oxford Press (2012). Also Henkin L ‘That “S” word: Sovereignty, globalization, and human rights et cetera’ 68 *Fordham L. Rev. J* (1999) 112.

<sup>60</sup>Filder L (note 54) above.

<sup>61</sup>Ibid.

<sup>62</sup>Renteln A D *International Human Rights: Universalism versus Relativism* Newbury Park CA: Sage (1990) 178.

<sup>63</sup>Campbell, W K Miller J D & Buffardi L E ‘The United States and the culture of narcissism: An examination of perceptions of national character’ *Social Psychological and Personality Science* 1 (2010) 222–229.

societies.<sup>64</sup> Relativists continue to argue that cultural norms vary from one place to another, so western standards should not be applied to non-western cultures.<sup>65</sup>

Conversely, the zealots of international human rights make a case that does not presuppose uniformity, as they argue that such rights would be based on universally recognized principles that transcend cultural or religious diversity boundaries.<sup>66</sup> Universalism is at the root of modern international law, holding that there is an underlined human unity that entitles all individuals, irrespective of their cultural or religious antecedent, to certain basic minimal rights and that individual human beings have specific rights simply by virtue of being human.<sup>67</sup> The proponents of universalism argue that human rights have been guaranteed in international treaties and human rights conventions and that they are universally applicable to all countries. They should therefore prevail even when they are incoherent with religious or cultural practices.<sup>68</sup> Therefore, it is clear that, from the universalism perspective, an individual is a social unity who possesses inalienable rights that are determined by the pursuit of self-interest. However, in the culture relativist model, community is considered as the basis of social unity and concepts such as individualism, freedom of choice and equality are absent in the community. Some academics maintain that neither universalism nor the relativist position is correct as no culture has a monopoly on human rights.<sup>69</sup> They argue that the notion of human rights is so extensive that it cannot be situated entirely within a single cultural tradition at a single or particular moment of history.

In resolving the claims of relativism and universalism, Reichert concludes that, notwithstanding outstanding and thoughtful international differences in ideology, levels and styles of economic development, and outlines of political development, virtually all states today have embraced in speech if not in practice the human rights standards articulated in the

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<sup>64</sup>Campbell (note 63) above.

<sup>65</sup>Renteln A D 'The unanswered challenge of cultural relativism and the consequences for human rights' 7 *Human Rights Quarterly* (1985) 514–540.

<sup>66</sup>Donnelly J 'Human rights and human dignity: An analytic critique of non-western conceptions of human rights' *American Political Science Review* 76 (1982) 303–316.

<sup>67</sup>Zecheater E M 'In the name of culture: Cultural relativism and the abuse of the individual' *Journal of Anthropological Research* 53(3); *Universal Human Rights versus Cultural Relativity* (1997) 319–347.

<sup>68</sup>Compare R & Vincent J 'Human rights and cultural relativism' Paper presented at the 25th Annual Convention of the International Studies Association, Atlanta, Georgia, March 1984.

<sup>69</sup>Reichert E 'Human rights: An examination of universalism and cultural relativism' *Journal of Comparative Social Welfare*, 22(1) (2006) 23–36. Also Obaid E L & Rehman A (2002). 'Universality of human rights and cultural relativism' *Journal of Human Rights* 1(4) (2002) 587–605; and Fielder L (note 53) above.

UDHR and other international human rights covenants.<sup>70</sup> This agreement presents a strong prima facie case for a comparatively strong universalism against the weaker theory of cultural relativism.<sup>71</sup> He further explains that even if this consensus is largely the complement of vice to virtue, still it reveals widely shared notions of virtue. An underlying universal moral position that is compelling is that it carries at least the appearance of assent of even the cynical and corrupt. Therefore, even though the inalienable entitlement of individuals in relation to national and societal norms has not been a part of most cultures and traditions, so far there is a striking similarity in many of the basic values that we seek to protect through human rights.

This is true when these standards are expressed in relatively general terms. Social order, life, protection from arbitrary rule of inhuman and degrading treatment, access to an equitable share of the means of subsistence and the guarantee of a place in the life of the community are central moral aspirations in nearly all cultures.<sup>72</sup> This essential unity in the midst of otherwise baffling diversity suggests a certain core of human nature for all its indisputable variability, and persists despite our incapability to express that core in the language of science.<sup>73</sup> Basically, if human nature is relatively universal, then basic human rights must at least initially be assumed to be similarly universal. Rights, especially human rights, are particularly suitable mechanisms for protecting this basic, relatively universal core of human nature and dignity in the conditions of modern society.<sup>74</sup> The contemporary state, the modern economy, and associated modern standards tend to create societies of relatively autonomous individuals who lack the place and protections provided by traditional communities.<sup>75</sup>

Additionally, irrespective of the relative grade of individual autonomy, individuals today face the particularly threatening modern state, especially in light of the violent buffeting of the ever changing modern economy.<sup>76</sup> Rights that are held equally by all against the state, limiting its legitimate range of actions and demanding positive protections against definite predictable

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<sup>70</sup>Donnelly J 'Cultural relativism and universal human rights' *Human Rights Quarterly* 6(4) (1984) 400-419; Campbell (note 63) above.

<sup>71</sup>Ibid.

<sup>72</sup>Hafner-Burton E & Tsutsui K 'Human rights in a globalizing world: The paradox of empty promises' *American Journal of Sociology*, 110(5) (2005) 373-411.

<sup>73</sup> Ibid.

<sup>74</sup>Chayes A & Chayes A H *The new sovereignty: Compliance with international regulatory agreements* Harvard University press (1995) 4.

<sup>75</sup>Shaffer G 'Transnational legal process and state change: Opportunities and constraints' Legal Studies Research Paper Series, Research Paper No. 10-28, University of Minnesota Law School (2011) 3.

<sup>76</sup>Donnelly C 'Natural law and right in Aquinas' political thought' *Western Political Quarterly* 33 (1980) 520-535.



economic, political and social contingencies, are an apparently natural and essential response to typically modern intimidations to human dignity, basic human values, traditions, and other similar modern conventions.<sup>77</sup>

This analysis seems to be confirmed by an examination of the UDHR, which is a set of rights that was formulated to protect basic human rights and not merely cultural values against the special threats posed by modern institutions.<sup>78</sup> The emphasis on equality and non-discrimination, particularly in Articles 1, 2 and 7 of UDHR, reflects a fundamentally individualistic modern view of man, state and society, and in this context independent individuals are easily viewed as equal.<sup>79</sup> Yet, equality is likely to be a confusing or incomprehensible notion as people are defined as they usually were in traditional societies by inscriptive characteristics such as birth, age, or gender.<sup>80</sup> Also, Articles 4 and 6 of UDHR guarantee an individual's fundamental status as a person and as a full member of the community by outlawing slavery and assuring equal recognition of all people before the law. Most of Articles 3 and 5 also guarantee the life, liberty and security of persons and disallow torture and cruel, inhuman, or degrading treatment or punishment. These rights reflect basic shared values that are expressed in a modern form of rights held against the state.<sup>81</sup> They signify a minimal modern consensus on certain virtually universal guarantees against the state. Fundamental legal guarantees such as access to legal remedies and impartial judges, protection against arbitrary arrest and detention, and the presumption of innocence until proven guilty are provided by Articles 8 to 11 of the UDHR. These rights can be seen as specifications of seemingly universal ideas of fairness, again formulated with a special eye to the threat to individual dignity posed by the modern state, especially in the absence of the constraining web of customary practices that are characteristic of traditional society.<sup>82</sup>

Privacy is of great value to the relatively autonomous individual because it helps to protect his individuality and it is well recognized by Article 12 of the UDHR. Articles 13, 14 and 15 of UDHR also recognize the right to asylum, freedom of movement, and nationality. These

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<sup>77</sup>Donnelly (note 76) above.

<sup>78</sup>Reichert (note 69) above.

<sup>79</sup>Ibid.

<sup>80</sup>Weisfelder R F 'The decline of human rights in Lesotho: An evaluation of domestic and external determinants' *African Issues Vol. 6:4* (1976) 23–32.

<sup>81</sup>Koh H 'International law as part of our law' *98 American Journal of International Law 1*, (2004) 43–57.

<sup>82</sup>LeVine T V 'African patrimonial regimes in comparative perspective' *Journal of Modern African Studies 18* (1980) 672.

provisions are likewise basic in the relatively fluid, distinctive modern world, but probably would seem odd, at least as basic rights, in many traditional societies. Article 16 of the UDHR, which focuses on the right to marry and found a family, is in part universally applicable, but the condition of free and full consent of the intending spouses reflects a peculiar modern view of marriage as a union of individuals rather than a linking of lineages.<sup>83</sup> The right to private property that is pronounced in Article 17 is also virtually universal as all societies permit individual ownership of at least some goods, although in the modern sense of the right to individual ownership it is clearly appropriate only in economies with a large capitalist sector.<sup>84</sup>

The rights to freedom of thought, religion, conscience, opinion and expression, assembly and association, and participation in government, as articulated in Articles 18 to 21, are clearly based on modern individualistic formations of man and society. For instance, traditionally most societies did not distinguish clearly between the religious and the political, and thus they required conformity of thought and belief, restricted association, and enforced deference and were denied popular political participation, all of which are incompatible with human rights.<sup>85</sup> The former limitations represent minimum guarantees of basic personal dignity within the modern framework, as they lack essential guarantees of individual autonomy.<sup>86</sup> Lastly, Articles 22 to 27 guarantee the economic and social rights of individuals, whereas such basic protections were usually provided by the family or the community in traditional societies. Social security, rest, work, leisure, education, subsistence, and participation in the cultural life of the community are also addressed.<sup>87</sup> These rights are not only directed against the modern state, but are also held by individuals simply by virtue as human beings, and thus correspond to the individualization of the person in modern society. Article 28 of the UDHR articulates social and international order in which the previously listed rights can be realized. This is something which reflects a peculiarly modern notion of international responsibility for the protection and provision of basic rights.

Although the above review of rights as provided for in the UDHR was fairly comprehensive, it must be borne in mind that the UDHR represents a minimal response to the cultural relativism

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<sup>83</sup>Stevens C J 'Hunting a dictator as a transnational legal process: The internalization problem and the Hissène Habré Case' *Pace International Law Review* 24(1) (2002) 190 – 212.

<sup>84</sup>Fielder (note 54) above.

<sup>85</sup>Reichert E (note 69) above.

<sup>86</sup>Ibid.

<sup>87</sup>Fielder (note 54) above.

convergence of basic cross cultural human values and the special threats to human dignity posed by modern institutions. These sets of rights have a very strong claim to relative universality. Consequently, the presumption must be that these rights apply universally, although that presumption can be overcome by particular cultural arguments, which is a position that is termed 'weak cultural relativism.'<sup>88</sup>

### 2.3 The Concept of Culture and Women's Rights

Because many women's rights infringements occur in the private circle of family life and are justified by appeals to cultural or religious norms, both families and cultures have come under critical scrutiny.<sup>89</sup> In recent years, advocates for women's human rights from a broad spectrum of countries, religions, ethnicities and social sectors have worked to emphasize the indivisibility of human rights and to reassert the interrelationships between cultural rights and women's human rights.<sup>90</sup> In almost every country, women are now working to demonstrate that cultural rights and women's rights can be mutually reinforcing.<sup>91</sup> They are trying to highlight and build cultural practices and traditions that are supportive of the human rights framework.<sup>92</sup> Likewise, indigenous women from around the world are linking cultural rights to the protection of women's rights.<sup>93</sup> They are articulating the centrality of cultural rights to the exercise of the collective rights of indigenous peoples such as the right to territory, education, language, natural resources, religious expression, and self-determination.<sup>94</sup> They argue that only the protection of those rights enables indigenous women and their families to enjoy the full range of their human rights as women, including their right to a life free of violence.<sup>95</sup>

The social change which has been experienced by people around the world in recent decades due to accelerated economic globalization has intensified the tensions between cultural rights

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<sup>88</sup>Reichert E (note 69) above.

<sup>89</sup>Okin S 'Feminism, women's human rights and cultural differences. *Hypatia* 13(2) (1998) 32–52.

<sup>90</sup>Talpade M 'Under western eyes: Feminist scholarship and colonial discourses' In Talpade M Russo A & Torres L *Third World Women and the Politics of Feminism*. Bloomington: Indiana University Press (1991) 57.

<sup>91</sup>Ibid.

<sup>92</sup>Ibid.

<sup>93</sup>United Nations Office of the Special Adviser on Gender Issues and Advancement of Women, and the Secretariat of the United Nations Permanent Forum on Indigenous Issues Gender and Indigenous People's Culture Briefing Note No. 4, Gender and Indigenous People's Culture February 2010.

<sup>94</sup>Okin (note 89) above.

<sup>95</sup>Ibid.

and women's human rights.<sup>96</sup> People have responded to experiences of economic dislocation, loss of livelihoods, migration, and armed conflict by invoking a rigid and monolithic conception of culture that is intended to reassert traditional power relations and to garner a sense of stability and continuity in the face of rapid social transformations in many contexts.<sup>97</sup> The normative political theory tends to employ culture in a more restive way because political theorists are consumed by the question of justice, equity, and autonomy from a human rights perspective.<sup>98</sup> They have been preoccupied with what rights, if any, can be claimed by minority groups.<sup>99</sup> They take a cultural group as more unified and homogeneous than it really is.<sup>100</sup> However, the theories of multiculturalism focus on conflicts between majority and minority groups, but do not sufficiently consider conflicts within each group such as age, gender or class. They take these groups as entities as they are and play down the internal tensions that exist within. This stance has recently been widely criticized, notably in feminism critiques on multiculturalism debates.<sup>101</sup> A familiar critique of gender essentials to make similar changes against culture essentials has been extended by feminist literature. Feminist scholars question the particular use of natural or cultural distinctions, arguing that they falsely present the body as a perceived recipient of cultural meanings. They also argue that seemingly biological distinctions between female and male are socially constructed as a gender distinction between men and women.<sup>102</sup>

Perceptions about the characteristics and behaviours appropriate for women or men and about the relationships between women and men are shaped by culture.<sup>103</sup> Among the critical aspects of culture are gender identities and gender relations because they shape the way not only how daily life is lived in the family, but also in the broader community and at the workplace. Gender, as similar to race or ethnicity, functions as an establishing principle for society because of the cultural connotations given to being male or female.<sup>104</sup> This is apparent in the division of labour according to gender, as in many communities there are clear patterns of women's duties and

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<sup>96</sup>Namazie M 'Racism, cultural relativism and women's rights' Speech presented at a panel discussion organised by the Action Committee on Women's Rights in Iran and Amnesty International's Women's Action Network 14 August 2001, Toronto, Canada.

<sup>97</sup>Ibid.

<sup>98</sup>Phillips A *Gender and Culture* Polity Press (2010) 58.

<sup>99</sup>Ibid.

<sup>100</sup>Talpade M (note 90) above.

<sup>101</sup>Ibid.

<sup>102</sup>Volpp L 'Feminism versus Multiculturalism' *101 Colum. L. Rev.* (2001) 1181–218. Available at: <http://scholarship.law.berkeley.edu/facpubs/9> accessed on 27 November 2015.

<sup>103</sup>Otnes C & Tuncay-Zayer L *Gender, Culture, and Consumer Behavior* Routledge (2012) 23.

<sup>104</sup>Ibid.

men's duties both in the household and in the wider community.<sup>105</sup> There are also cultural reasons why those divisions of labour should be so. The patterns and the explanations vary among communities and change from time to time.<sup>106</sup> Though the specific nature of gender relations differs among societies, the general pattern is that women have less personal independence, fewer resources at their disposal, and limited influence over the decision making processes that shape their communities and their own lives. This pattern of difference based on gender is a human rights as well as a development issue.<sup>107</sup>

The focus of the women and culture debate in the UN has largely been on women in the family and the effect of culture on the enjoyment of their rights.<sup>108</sup> Various issues related to culture have continued to feature as impediments of enjoyment of women's rights, even after the adoption of CEDAW.<sup>109</sup> For example, several general recommendations made by the Women's Committee have identified culture, among others, as being an impediment to the enjoyment of women's rights.<sup>110</sup> The debate about the tensions between cultural diversity and gender equality has been covered by stereotypes of culture and hierarchy of traditional and modern.<sup>111</sup> Those who interpret culture from the perspective of a narrow, unrepresentative elite make it dangerous to invoke culture as a justification for harming women, whereas it is a problem to involve the rights of women against the claim of culture groups.<sup>112</sup> Women have been left with the unpleasant situation of choosing between their rights or their culture and seem to ignore the inequalities between minority and majority.<sup>113</sup> The feminist scholar Philips contemplates that few people are driven by culture and argues that bad behaviour is mostly what constitutes the threat to women's rights.<sup>114</sup> She further provides that careful attention is needed to balance participation between men and women to ensure that cultural disadvantage is identified and remedied. She also argues that the pre-assumption that people's actions, values and attributes

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<sup>105</sup>Zimmerman T S *Integrating Gender and Culture in Parenting* Routledge (2002) 48.

<sup>106</sup>Ibid.

<sup>107</sup>Volpp L (note 102) above.

<sup>108</sup>UN *United Nations and the Advancement of Women 1945–1996* New York, United Nations (1996) 7.

<sup>109</sup>This matter has been voiced on different platforms and in various resolutions and conferences such as: Forward Looking Strategies for the Advancement of Women in the year 2000 in Nairobi (1985) UN Doc. A/CONF. 116/28 REV. 93–121; the International Conference on Population and Development (ICPD) in Cairo (1994), 4.4 (c); Vienna Declaration on the Programme for Action (1993) (II), 38–49; Beijing Platform Critical Area of Concern (1995), 42; Beijing Platform+5 outcome document (2000) UN doc A/S -23/10/ Rev.1 92(1); Johannesburg Declaration on Sustainable Development (2002), 20; Copenhagen Declaration on Sustainable Development (2002) 20.

<sup>110</sup>Banda F *Women, Law and Human Rights: African Perspective* Hart Publishing (2005) 248.

<sup>111</sup>Zimmerman (note 105) above.

<sup>112</sup>Otnes C (note 103) above.

<sup>113</sup>Ibid.

<sup>114</sup>Phillips (note 98) above.

are determined by membership of culture or a group should be rooted out. Women's rights are rights, just like any other rights of human beings. Thus women need to be protected by all states regardless of the political, economic and cultural system in which they live.

On establishing feminist arguments about recognizing women as agents and not victims and applying it to the multicultural debate, Farida Shaheed, a UN expert in the field of cultural rights, proposes that the paradigm that views culture merely as an obstacle to women's rights should be shifted to the right of women to seek equal enjoyment of cultural rights.<sup>115</sup> Traditions and culture should not be obstacles to the realization of women's rights, but they should rather be a means of paving the way for the right of women as a right to take part in cultural and traditional life. This right should include the right not to participate in particular traditions and customs that infringe on human dignity and rights.<sup>116</sup> Women's rights under international conventions are universal norms to which all countries must adhere and women, like men, are entitled to exercise their human rights, which include fundamental rights and freedoms within the family and society at large.<sup>117</sup> Cultural relativism has been condemned for ignoring violations of women's rights and for actually legitimizing them.<sup>118</sup> This fact not only makes it necessary to oppose any violations of women's rights, but it also makes it racist and against the maxim of freedom of choice.<sup>119</sup> It is for this reason that some human rights theorists and practitioners perceive cultural rights to be in tension with the human rights of women.<sup>120</sup>

In many societies, people are concerned that the promotion of gender equality would interfere with local culture, and they therefore feel that gender equality should not be promoted for ethical reasons.<sup>121</sup> In other cases, the cultural values of a particular area are described as a major constraint on efforts for gender equality, and therefore action against this is considered to be difficult for practical reasons.<sup>122</sup> Women are the ones who have been tasked with the main responsibility for transmitting cultural practices and group identity to succeeding generations

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<sup>115</sup> UN Human Rights Office of the High Commissioner 'Women's cultural rights: empowering and transformative' 8 November 2012. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/WomenCulturalRights.aspx#sthash.d3inVgWW.dpuf> accessed on 26 November 2015.

<sup>116</sup>Ibid.

<sup>117</sup>Okin (note 89) above.

<sup>118</sup>Namazie M (note 96) above.

<sup>119</sup>Sweetman C 'Women and Culture' *Gender & Development* (3)1 (1995) 45–55.

<sup>120</sup>Ibid.

<sup>121</sup>Schalkwyk J 'Culture, gender equality and development cooperation' (paper prepared for the Canadian International Development Agency [CIDA] (June 2000).

<sup>122</sup>Sweetman (note 119) above.

in many communities.<sup>123</sup> This is because culture exists through, and is generated by, the lived experiences of people.<sup>124</sup> The role of women in transmitting culture also situates them as creators and custodians of culture; consequently many communities view women's adherence to and promulgation of cultural norms as essential to cultural survival.<sup>125</sup> However, in many communities the rights of individual women are subordinated to upholding women's role as the carriers of group identity. So, women are often denied the right to make autonomous decisions regarding their own sexuality, marriage, childbearing, and even their children's religion, nationality, and citizenship.<sup>126</sup> Then again, women's primary role in transmitting and creating culture serves as a basis for protecting and enhancing women's status within their families and society at large.

The ongoing efforts to attain women's rights have been undermined by the articulation that positions culture as static, sacred, monolithic and outside of history.<sup>127</sup> Therefore, the theory that culture and traditions are not static but ever changing in response to changing realities is assumed in this study. Cultural change happens as societies and households respond to social and economic shifts associated with globalization, environment, new technologies, pressures, armed conflict, development projects, and so on.<sup>128</sup> Therefore customary laws, like any other living law, are not supposed to be static; they are dynamic aspects of the life of a country and its social fabric and therefore have to change.<sup>129</sup> Negotiations between traditional law and custom and new forms of legal protection have occurred through international advocacy.<sup>130</sup> Most people advocating for women's rights view those kinds of rights as interdependent and mutually constitutive.<sup>131</sup> What was considered a culture yesterday may not be so tomorrow, and today's innovation may turn up to be a tradition in future days.<sup>132</sup> They are formed and reformed through daily practices and exchanges in social, political and cultural arenas. Culture

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<sup>123</sup>Schalkwyk (note 121) above.

<sup>124</sup>Ibid.

<sup>125</sup>Babb F 'Theorizing gender, race, and cultural tourism in Latin America: A view from Peru and Mexico' *Latin American Perspectives* issue 187 (39)(6) (2012) 36–50.

<sup>126</sup>Ibid.

<sup>127</sup>Speed S, Hernández R A & Stephen L *Dissident Women: Gender and Cultural Politics in Chiapas* University of Texas Press (2006) 48.

<sup>128</sup>Bourque S C & Warren B *Women of the Andes: Patriarchy and Social Change in Two Peruvian Towns*. University of Michigan Press (1981) 103.

<sup>129</sup>Ibid.

<sup>130</sup>Allison S *Using International Law to Advance Women's Tenure Rights* Rights and Resources Initiative and Centre for International Environmental Law (2015) 18.

<sup>131</sup>Bringing Indigenous Perspectives to the International Arena: An Indigenous Women's Conference, International Indigenous Women's Forum Declaration, New York (2005) para 13.

<sup>132</sup>Ibid.

and tradition must be therefore reviewed so that they do not to violate the fundamental rights and freedom of women. There can never be a culture that is not mediated by multiple axes of inequality which must themselves be mapped against the larger economic, political and social conditions of a state.<sup>133</sup> From this perspective, respect for cultural differences exists simultaneously with the belief that cultural practices and beliefs can and do change over time.

Those who defend any human rights violations in the name of culture have a habit of putting the framework of human rights in opposition to culture. This thinking assumes that it is culture that subordinates women and that modernism, in the form of universal human rights, constitutes the legal protection that liberates them. This suggests that beliefs that underpin a human rights framework do not their find origin in other value systems. In fact, a wide range of cultures puts forward notions of rights and human dignity upon which to condemn violence and oppression.<sup>134</sup> Women who are experiencing human rights violations on the basis of both gender and culture explain that it is not culture that lies at the root of women's oppression, but practices and norms that deny women education, gender equity, resources, and political and social power.<sup>135</sup> In this context the UN Special Rapporteur on Violence against Women 3 (1996) declares:

“It is important to emphasize that not all customs and traditions are not protective of human rights... However, those practices that constitute definite forms of violence against women cannot be overlooked nor justified on the grounds of tradition, culture or social conformity.”<sup>136</sup>

It is therefore true that some aspects of culture may be used to violate women's human rights, whereas other aspects of culture may be used to promote a human rights framework. For instance, before colonialism many indigenous communities practised relatively democratic gender relations and reproduced world views that defined gender roles as complementary rather than hierarchical.<sup>137</sup> Therefore, for indigenous women, cultural preservation as an element of

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<sup>133</sup>Ewelukwa U 'Post-colonialism, gender, customary injustice: Widows in African societies' *Human Rights Quarterly* 24(2) (2002) 424–486.

<sup>134</sup>United Nations *Report of the Special Rapporteur on Violence against Women* E/CN.4/1999/68/Add.2 para 5.

<sup>135</sup>United Nations *Fifth Session Report of the Permanent Forum on Indigenous Issues* E/C.19/2006/11 paras 47 and 55.

<sup>136</sup>*Ibid.*

<sup>137</sup>'Bringing Indigenous Perspectives to the International Arena: An Indigenous Women's Conference' International Indigenous Women's Forum Declaration, New York (2005). See para 5. The Final Report on the 49<sup>th</sup> Session of the Commission on the Status of Women E/CN.6/2005/11.



cultural rights may be a strategy for transmitting values that support women's human rights.<sup>138</sup> Some generally recognized cultures have specific gender-related forms of abuse that were not recognized as typical human rights abuses in the past. Such an abuse is for instance slavery which is generally recognized as a fundamental violation of human rights, but the practice of parents giving their daughter in marriage in exchange for money has not typically been seen as an instance of slavery. If a husband marries his wife without her adult consent or if he beats her for disobedience or misfortune, or if he confines her to their home, forbids her to work for pay, or appropriates her wages, these manifestations of slavery may not be recognized as violations of human rights in many cultures. In some societies, these acts are regarded as normal, appropriate behaviour in parents or husbands.<sup>139</sup> Until recently there has been little acknowledgement of women's particular vulnerability to poverty and the need for basic social services such as health care, because their biological reproductive capacity and their greater responsibility for children are recognised in virtually all societies.<sup>140</sup> Even some human rights activists, until recently, have been unwilling to recognize the many culturally sanctioned abuses and instances of neglect of women as serious violations of human rights.<sup>141</sup> All in all, cultural values are supposed to be continually reinterpreted in response to new needs and conditions. Some values will be reaffirmed in this process, whereas others will be challenged as no longer appropriate.<sup>142</sup>

## 2.4 Developments in the Protection of Women's Rights

In the recent quarter century, it has been increasingly perceived that taking women seriously as equal human rights claimants with men requires considerable reconsideration of the concept of human rights.<sup>143</sup> Before the formation of the UN in the mid-twentieth century, many women were educated, employed outside the home, and had obtained enough legal and social freedom to participate in public life, even at international level.<sup>144</sup> Numerous international women's

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<sup>138</sup>UN Human Rights Office of the High Commissioner *Women's Rights are Human Rights* United Nations Publication (2014) 67.

<sup>139</sup>Ibid.

<sup>140</sup>Tripp A M 'Women's movements, customary law, and land rights in Africa: The case of Uganda' *African Studies Quarterly*. Available at <http://www.africa.ufl.edu/asq/v7/v7i4a1.htm> accessed on. 25 November 2015.

<sup>141</sup>Human Rights Watch *World Report 2013: Event of 2012* Human Rights Watch (2013) 77.

<sup>142</sup>Speed (note 127) above.

<sup>143</sup>Friedman A 'Women rights: The emergence of movement' In Peters J & Wolper A *Women's Rights, Human Rights: International Feminist Perspectives* Psychology Press (1995) 18–35.

<sup>144</sup>Banda F (note 110) above.

organizations had fifty years' of experience behind them.<sup>145</sup> As a result of lobbying by these organizations, and with support from female delegates, the phrase 'equal rights of men and women' was inserted in the UN Charter.<sup>146</sup> In drafting UDHR, the term 'everyone' rather than the gendered pronoun 'his' was used in most, but not all, of its articles.<sup>147</sup> However, the UDHR did not so clearly repudiate distinctions of gender, because there was no country in the world at that time whose laws did not routinely make distinctions of gender, especially in matters of basic rights.<sup>148</sup> For example, France and Italy had only just enfranchised women and the Swiss only did so in their national elections of 1973.<sup>149</sup> Gender discrimination shone in most countries at the time, especially in terms of employment, family law, and many other areas of life. In general, this early universal human rights document claimed women's rights on the basis of equality with men by using gender neutral language.<sup>150</sup>

Moreover, both the concept of the rights of man in the seventeenth century and the original conception of international human rights in the mid-twentieth century were formulated with male household heads in mind.<sup>151</sup> These rights were conceived as the rights of individuals against each other and, especially, against the governments under which they lived.<sup>152</sup> The sphere of privacy that was protected by rights against outside intrusion existed, but it was not necessarily governed internally in accordance with the rights of citizens. There is no doubt that Locke and his contemporaries, as well as the framers of the UDHR, had male household heads in mind when thinking about those who were to hold the natural and the human rights they respectively argued for and proclaimed. They considered women's rights as a private matter,<sup>153</sup> as Locke argued that a father's decision about who his daughter ought to wed was a private matter that nobody should meddle with.<sup>154</sup>

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<sup>145</sup>Banda F (note 110) above.

<sup>146</sup>Lockwood B 'Women's Rights' *A Human Rights Quarterly Reader* John Hopkins University Press (2006) 215.

<sup>147</sup>Fraser A S 'Becoming human: The origins and development of women's human rights' *21 Human Rights Quarterly* (1999) 853.

<sup>148</sup>*Ibid.*

<sup>149</sup>Gerda L *The Creation of Feminist Consciousness: From The Middle Ages To Eighteen-Seventy* Oxford University Press (1993) 12.

<sup>150</sup>Okin (note 89) above.

<sup>151</sup>Gerda (note 149) above.

<sup>152</sup>Banda (note 110) above.

<sup>153</sup>*Ibid.*

<sup>154</sup>*Ibid.*

When the Human Rights Commission failed to adequately recognize women's aspirations, women delegates and NGOs supporting them were politically powerful and astute enough to initiate a freestanding Commission on the Status of Women.<sup>155</sup> The Commission on the Status of Women (CSW) initially met at Lake Success, New York, in February 1947, not long after the establishment of the UN. The Commission comprised fifteen government representatives who were all women.<sup>156</sup> From its inception, the Commission was bolstered by a unit of the UN, which later turned into the Division for the Advancement of Women (DAW) in the UN Secretariat.<sup>157</sup> The CSW fashioned a cozy association with non-administrative associations, and those in consultative status with the UN Economic and Social Council (ECOSOC) were welcomed to take an interest as eyewitnesses.<sup>158</sup> From 1947 to 1962, the Commission concentrated on setting guidelines and detailing worldwide traditions to change oppressive enactments and foster worldwide attention on women's issues.<sup>159</sup> It became imperative to rethink human rights because both the early conception of the rights of man in the seventeenth century and the original conception of international human rights in the mid-twentieth century were formulated with male household heads in mind.<sup>160</sup> The codification of the legal rights of women needed to be supported by data and analysis, so the Commission set out on a worldwide appraisal of the status of women. Broad research delivered a definite, nation-by-nation photo of their political and legitimate standing, which after some time turned into a premise for drafting human rights instruments.<sup>161</sup>

The CSW drafted the early international instruments on women's rights, for example the 1953 Convention on the Political Rights of Women which was the earliest international law treaty to recognize and protect the political rights of women.<sup>162</sup> The Commission further drafted the Convention on the Political Rights of Women which was adopted by the UN General Assembly,<sup>163</sup> the Convention on Consent to Marriage, the Recommendation on Consent to Marriage, the Minimum Age for Marriage, and Registration of Marriages.<sup>164</sup> The Convention

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<sup>155</sup>Fraser *A Looking to the Future: Equal Partnership between Men and Women in the 21 Century* Minnesota (1983) 310.

<sup>156</sup>*Ibid.*

<sup>157</sup>Tong *R Feminist Thought* Accessible Publishing Systems (2010) 27.

<sup>158</sup>*Ibid.*

<sup>159</sup>Fraser (note 155) above.

<sup>160</sup>Gerda (note 149) above.

<sup>161</sup>Banda (note 110) above.

<sup>162</sup>Fraser (note 147) above.

<sup>163</sup>It was adopted on 20 December 1952.

<sup>164</sup>The Convention was adopted on 1 November 1965.

on the Nationality of Married Women was also adopted by the General Assembly.<sup>165</sup> These were the first international instruments on women's rights in terms of marriage.<sup>166</sup> The CSW also contributed to the UN office work, including the International Labor Organization Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951, which appreciated the rule of equivalent pay for equivalent work.<sup>167</sup> All these conventions referred to protected and promoted the rights of women in the areas which were conceded by the Commission as the most vulnerable. It was believed at the time that, except in those areas, women's rights would be better protected and promoted by general human rights treaties.<sup>168</sup> However, the approaches which those conventions adopted in terms of women's rights were considered fragmentary despite the fact that they reflected the sophistication of the UN system. This is because they did not deal with discrimination against women in a comprehensive way, which raised great concern that the general human rights regime was not working very well to protect and promote the rights of women.<sup>169</sup>

The first UN Conference on Women was held in Mexico City.<sup>170</sup> Women throughout the world assembled to talk about how to enhance the nature of women's lives in their particular nations and in general.<sup>171</sup> The UN General Assembly requested the CSW to draft a Declaration on the Elimination of Discrimination against Women in 1963 in an effort to put standards on women's rights.<sup>172</sup> A draft of the CEDAW was ultimately adopted in 1967 by the General Assembly and CEDAW became legally binding in 1979.<sup>173</sup> In 1999, the Optional Protocol to the Convention introduced the right of women to petition against discrimination. The work of the Commission centred mostly on women's needs in community and rural development, family planning, agricultural work, and scientific and technological advances, as evidence had begun to accumulate since the 1960s that showed that women were highly affected by poverty.<sup>174</sup> The Commission urged the UN framework to extend its specialized help to further the advancement

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<sup>165</sup>It was adopted on 29 January 1957.

<sup>166</sup>Gerda (note 149) above.

<sup>167</sup>Fraser (note (147) above.

<sup>168</sup>Ibid.

<sup>169</sup>Bond J E 'Constitutional exclusion and gender in Commonwealth Africa' *Fordham International Law Journal* 31(2) (2007) 286–342.

<sup>170</sup>Fraser (note 148) above.

<sup>171</sup>The Conference took place in 1975. See Friedman (note 142) above.

<sup>172</sup>UN Women 'World Conferences on Women'. Available at <http://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women> accessed on 27 November 2015.

<sup>173</sup>Economic Commission for Africa, A Fifteen-Year Review of the Implementation of the Beijing Platform for Action in Africa (BPfA) +15 Main Report from 1995–2009, February 2010.

<sup>174</sup>Ibid.

of women, especially in developing countries.<sup>175</sup> While the CSW was marking its 25<sup>th</sup> Anniversary in 1972, it recommended that the year 1975 be designated as International Women's Year. The idea was endorsed by the General Assembly to draw attention to women's equality with men and to their contributions to development and peace.<sup>176</sup> The year was set apart by holding the First World Conference on Women in Mexico City, which was trailed by the 1976–1985 UN Decade for Women: Equality, Development and Peace. More world conferences were held in Copenhagen in 1980 and Nairobi in 1985.<sup>177</sup> The UN established two women offices, namely the UN Development Fund for Women (UNIFEM) and the International Research and Training Institute for the Advancement of Women (INSTRAW). The CSW took the lead in coordinating and promoting the UN system's work on economic and social issues for women's empowerment in 1987 as part of the follow-up to the Third World Conference on Women in Nairobi.<sup>178</sup>

The Commission's efforts moved to promote women's issues as crosscutting and part of the mainstream, rather than as separate concerns. It was particularly during the preparations for the 1993 UN World Conference on Human Rights, which was held in Vienna, that a major worldwide petition drive was launched. This initiative was well accepted.<sup>179</sup> The request urged that the conference should comprehensively address women's human rights at every level of its proceedings and recognize gender-based violence as a violation of human rights which required immediate action.<sup>180</sup> As a result of this and a large deliberate planning meeting bringing together women from many countries, women's human rights groups were by far the most organized of the NGO partakers, and they had considerable influence on the Vienna Declaration and Program of Action.<sup>181</sup> For the first time, during the same period, the CSW assisted in bringing violence against women to the forefront of international debates. This effort resulted in the adoption of the Declaration on the Elimination of Violence against Women by the General Assembly.<sup>182</sup> The UN Commission on Human Rights also appointed a UN Special

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<sup>175</sup> Economic Commission for Africa (note 173) above.

<sup>176</sup> UN WOMEN *A Transformative Stand-Alone Goal on Achieving Gender Equality, Women's Rights and Women's Empowerment: Imperatives and Key Components: In the Context of the Post-2015 Development Framework and Sustainable Development Goals*, UN WOMEN (June 2013) 141.

<sup>177</sup> UN Women (note 171) above.

<sup>178</sup> Blanchfield L *New United Nations Entity for Women: Issues for Congress*, Congressional Research Services (2010) 67.

<sup>179</sup> Fraser (note 147) above.

<sup>180</sup> Blanchfield (note 178) above.

<sup>181</sup> *Ibid.*

<sup>182</sup> The Convention was adopted on 20 December 1993.

Rapporteur on Violence against Women: its Causes and Consequences in 1994.<sup>183</sup> The Special Rapporteur had a mandate to investigate and report on all aspects of violence against women. Furthermore, the Commission served as the preparatory body for the Fourth World Conference on Women of 1995 that approved the Beijing Declaration and the Platform for Action.<sup>184</sup> The opening speech at the United Nations Fourth World Conference on Women: Equality, Peace, Development was delivered by the then First Lady of the United States of America, Hillary Rodham Clinton. Her address resulted in a powerful, emerging movement in the international human rights arena.<sup>185</sup> Her apparently revolutionary concept urged the recognition and acknowledgement of women's rights as human rights. She spoke of women's poverty, children, education, economic participation, health, and political participation in the following words:

“If there is one message that echoes forth from this conference, it is that human rights are women's rights and women's rights are human rights.... It is a violation of human rights when babies are denied food, or drowned, or suffocated, or their spines broken, simply because they are born girls.... It is a violation of human rights when women and girls are subject to violence, even in their own homes; female genital mutilation; bride burning; girl killing; rape, sometimes as a tactic or prize of war; forced abortion; forced sterilization and the usual litany of abuses that are, regrettably, all too common and all too well known.”<sup>186</sup>

She made the remarkable declaration that ‘human rights are women's rights and women's rights are human rights’. The UN Human Development Report of 1995 also plainly provided that there was no society by then where women enjoyed the same opportunities as men.<sup>187</sup> Subsequent to the conference, the CSW was authorized by the General Assembly to play a central role in monitoring the implementation of the Beijing Declaration and the Platform for Action and in advising the Economic and Social Council accordingly.<sup>188</sup> An additional UN office for the promotion of gender equality was also established as called for by the Platform for Action, namely the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI). Later on, four parts of the UN system merged, namely the Division for the

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<sup>183</sup>Albrow M & Seckinelgin H *Global Civil Society 2011: Globality and the Absence of Justice* Palgrave MacMillan (2011) 19.

<sup>184</sup>Ibid.

<sup>185</sup>The conference took place in Beijing, China, on Tuesday 5 September 1995 at Beijing International Conference Center (BICC).

<sup>186</sup>Hernández-Truyol B ‘Women's rights as human rights – rules, realities and the role of culture: A formula for reform’ 21 *Brook. J. International Law* (1996) 605.

<sup>187</sup>United Nations Development Programme, Human Development Report 1995 Article 1 (1995).

<sup>188</sup>Implementation of the Beijing Declaration and Platform for Action (1995) and the outcomes of the twenty-third special session of the General Assembly (2000), in the context of the twentieth anniversary of the Fourth World Conference on Women and the adoption of the Beijing Declaration and Platform for Action 2015. Guidance note for the preparation of national reviews.

Advancement of Women (DAW), the International Research and Training Institute for the Advancement of Women (INSTRAW), the Office of the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women (OSAGI), and the United Nations Development Fund for Women (UNIFEM). These bodies amalgamated to become UN Women, now called the Secretariat of the Commission on the Status of Women.<sup>189</sup> This report recognizes that a widespread pattern of inequality exists between women and men in their access to education, health and nutrition, and even in their participation in the economic and political spheres. Despite the obstacles in law and life, women have refused to accept, and indeed have fought strongly against, their imposed invisibility and silence.<sup>190</sup> They have made unlimited efforts to urge their perspectives, raise their voices, and demand that their needs be met. They have been presenting their separate authenticities and maintaining that issues affecting them because of their gender be considered an integral part of the human rights construct.<sup>191</sup> It is only now that women have gained access to domestic and international arenas both formally and informally, that the gender dimensions of human rights norms are being explored, and that a feminist critique of international law is emerging.<sup>192</sup>

However, there are some who have already begun to dispute the need for any focus on the international 'Women's rights are human rights' movement.<sup>193</sup> These opponents suggest that such discourse is inappropriate and unnecessary because international human rights norms cover women as human beings and the female gender as a protected class.<sup>194</sup> They further insist that the proper emphasis on human rights is on all human beings, not just on women. It is probable that critics of the feminist methodology take the formalistic, simplistic approach that a focus on women's human rights is misplaced because international, regional, and domestic instruments facially mandate gender equality.<sup>195</sup> The essential issue here is that the supposition that rights are generally covering the specific birthplaces of rights proposes that they can be connected without watchful thoughtfulness regarding social and verifiable settings.<sup>196</sup> This analysis is therefore imperfect as it is incomprehensible to challenge a concern about the rights

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<sup>189</sup>Office of the High Commissioner for Human Rights, United Nations Staff College Project *Human Rights: A Basic Handbook for UN Staff*, UN.

<sup>190</sup>Hernández-Truyol (note 186) above.

<sup>191</sup>Banda (note 110) above.

<sup>192</sup>Kaplan T *Crazy for Democracy: Women in Grassroots Movements* Routledge (1995) 140.

<sup>193</sup>Teson F R 'Feminism and international law: A reply' 33 *Virginia Journal of International Law* (1993) 647.

Also Bunch C 'Transforming human rights from a feminist perspective' In Peters J & Wolper A *Women's Rights, Human Rights: International Feminist Perspectives* New York, Routledge (1995) 11–17.

<sup>194</sup>*Ibid.*

<sup>195</sup>McLaren M 'Women's rights in a global context' *Journal of Developing Societies* 23 (2007) 159–173.

<sup>196</sup>*Ibid.*

of people.<sup>197</sup> In addition, such oppositions are tricky as a reality check on women's regular lives reveals their historic invisibility, the silencing of women's voices, and the present worldwide status of women as second class citizens in numerous societies.<sup>198</sup>

Concentrating on women's rights as human rights in the worldwide gathering is legitimate and basic. In essence, assuming that women have rights without tending to these worries can really serve to undermine women's activist and different causes that depend on an alternate worldview for political activity and social change. In any case, numerous women's activists guarantee that rights remain greatly valued in the universal connection.<sup>199</sup> A growing body of feminist human rights literature argues that the male bias of human rights thinking and its priorities have to change before women's rights will be fully recognized as human rights.<sup>200</sup> The problem is not so much that men's claims on human rights, including women's rights, have been recognized, but that women's claims to these exact same rights have not, which is not to say that this never happens. The problem is that existing theories, compilations and prioritizations of human rights have been constructed based on a masculine model.<sup>201</sup> Promoting women's human rights clearly comprises making variations in areas of life usually considered to be private, and calls for governments' accountability in these areas need a considerable reorientation of human rights law. As is well noted by Charlotte Bunch, the violation of men's civil and political rights in the public sphere has been privileged in human rights work, but not violations in the private sphere of the home because men have been considered the masters of that territory.<sup>202</sup> She further questions the way things happen in the private realm of the household, including how decisions are made and how responsibilities and work are allocated, arguing that such practices have a significant impact on who can participate fully and effectively in the public spheres of politics, civil society, and markets.<sup>203</sup>

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<sup>197</sup>Bulbeck C *Re-Orienting Western Feminisms: Women's Diversity in a Postcolonial World*. Cambridge: Cambridge University Press (1998) 73.

<sup>198</sup>Parpart P Connelly M & Barriteau V *Theoretical Perspectives on Gender and Development* International Development Research (2000) 19.

<sup>199</sup>Franke K M 'The central mistake of sex discrimination law: The disaggregation of sex from gender' 144 *University of Pennsylvania Law Review* 1 (1995) 70.

<sup>200</sup>Bunch C *Passionate Politics: Feminist Theories in Action* St Martin's Press (1995) 305.

<sup>201</sup>*Ibid.*

<sup>202</sup>Bunch C & Reilly N 'Demanding Accountability: The Global Campaign and the Vienna Tribunal for Women's Human Rights' New Brunswick, Centre for Women's Global Leadership (1994) 15.

<sup>203</sup>*Ibid.*



## **2.5 The Protection of Women's Rights at International Level**

Women's rights under international law are protected through different United Nations international conventions. Though global endeavours to recognize women's rights started in the nineteenth century, such movements picked up an intelligible centre under the sponsorship of the United Nations after World War II. The United Nations has played a dynamic and critical part in this transformative procedure of the affirmation and improvement of women's human rights, and the equality of rights for women has become a basic principle of the UN. The preamble to the Charter of the United Nations sets as one of the organization's central goals the reaffirmation of faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women. Article 1 proclaims that one of the purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction. The terms of the Charter, which was the first international instrument to refer specifically to human rights and to the equal rights of men and women, declare that all members of the United Nations are legally bound to strive towards the full realization of human rights and fundamental freedoms for all. The status of human rights, including the goal of equality between women and men, is thereby elevated. This implies that a matter of ethics has become a contractual obligation for all governments and for the UN.

The UDHR strengthens and extends this emphasis on the human rights of women. It proclaims the entitlement of everyone to equality before the law and to the enjoyment of human rights and fundamental freedoms without distinction of any kind. It proceeds to include gender on the grounds of impermissible distinctions between the rights of people. Apart from CEDAW, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of 1966, also translate the principles of the Declaration into a legally binding form as they clearly state that the rights set forth are applicable to all persons without distinction of any kind, with specific reference to gender as an impermissible distinction. In addition, each Covenant specifically binds acceding or ratifying states to undertake to ensure that women and men have equal rights and enjoy all the rights they establish. These covenants are briefly discussed in the next sections.

### 2.5.1 *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*

The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) is a major international human rights instrument which exclusively deals with women's rights at international level. Human rights are safeguarded by the UDHR which is combined with related human rights treaties. The UDHR lays down a comprehensive set of rights to which all persons, including women, are entitled.<sup>204</sup> Nevertheless, in many societies women's humanity has proved insufficient to guarantee them the enjoyment of their internationally agreed rights. By 1979 the Commission, with the support of women delegates, NGOs and a new wave of feminists, had drafted and successfully lobbied the adoption of CEDAW.<sup>205</sup> In 1980, with the requisite number of ratifications obtained, the Convention became an international women's human rights treaty.<sup>206</sup> At the 1993 World Conference on Human Rights NGOs, focusing on women's human rights, brought the previously hidden issue of violence against women to international attention. 'Women's rights are human rights' became the cry.<sup>207</sup> However, despite the fact that the debate that began in 1405 continues, the Taliban's edict illustrates that women's position in society can deteriorate. There is now worldwide recognition that the term 'women's rights are human rights' is not redundant.<sup>208</sup>

The UN General Assembly decided to establish a sub-commission of the Commission of Human Rights in 1946 to deal specifically with women's rights.<sup>209</sup> The sub-commission was quickly granted the status of a full commission as a result of the pressure from women's activists and it was named the Commission on the Status of Women (CSW).<sup>210</sup> The CSW's duties included the preparation of recommendations relating to urgent problems requiring immediate attention in the field of women's rights, with the object of implementing the principle that men and women should have equal rights. It also engaged in the development of

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<sup>204</sup>Wondimu H *Handbook of Peace and Human Rights Education in Ethiopia* Organization for Social Science Research in Eastern and Southern Africa (2008) 75.

<sup>205</sup>Fraser (note 147) above.

<sup>206</sup>*Ibid.*

<sup>207</sup>United Nations Development Fund for Women South Asia Regional Office (UNIFEM), *CEDAW: Restoring Rights to Women* UNIFEM (2004) 28.

<sup>208</sup>*Ibid.*

<sup>209</sup>Bond J E 'CEDAW in Sub-Saharan Africa: Lessons in Implementation' *Michigan State Law Review* (2014) 241–262 at 249.

<sup>210</sup>*Ibid.*

proposals to give effect to such recommendations. On 5 December 1963, the General Assembly adopted Resolution No. 1921 (XVIII) which required the Economic and Social Council to formulate a draft declaration that would combine, in a single document, an international standard pronouncing the equal rights of men and women.<sup>211</sup> The UN system supported the process and the drafting of that document commenced in 1965. The drafting of the Declaration was not an easy task, especially in terms of Article 6, which addresses equality in marriage and the family in general, and Article 10, which relates to employment.<sup>212</sup> The question of whether the Declaration should call for the abolition of the customs and laws perpetuating discrimination or for their modification or change proved controversial for the application of those two articles.<sup>213</sup> The document was adopted as a declaration which amounted only to a statement of moral and political intent without any contractual force of a treaty.<sup>214</sup> Five years later, the Commission on the Status of Women (CSW) was concerned with the possibility of making a binding document. Their concern came from the emergence of a new consciousness of the patterns of discrimination against women and a rise in the number of organizations that were committed to combating the effect of such discrimination in many parts of the world.<sup>215</sup> The opposing impact of some development policies on women also became apparent.

The CSW considered the possibility of preparing a binding treaty that would give normative force to the provisions of the declaration. The Secretary-General was thus requested to call upon UN member states to submit their view on this issue. Thereafter, a text on CEDAW was prepared by working groups within the CSW. The movement to adopt CEDAW was encouraged by different interested parties, including the World Plan of Action for the Implementation of the Objectives of the International Women's Year, the World Conference of the International Women's Year held in Mexico City in 1975, and the General Assembly, which requested the CSW to complete its work by 1976.<sup>216</sup> Finally, on 18 December 1979, CEDAW was adopted by the United Nations General Assembly (UNGA) by votes of 130 UN members out of 178 in resolution 34/80 of the UNGA. The adoption of CEDAW denoted a vital historic point in the universal battle for women's human rights. CEDAW is often referred to as an

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<sup>211</sup>It was adopted on 7 November 1967.

<sup>212</sup>Banda (note 110) above.

<sup>213</sup>*Ibid.*

<sup>214</sup>Bond (note 209) above.

<sup>215</sup>Wondimu H (note 204) above.

<sup>216</sup>It is a UN document which was entered into force on 3 September 1981 United Nation Entity for Gender Equality and the Employment of Women. Available at <http://www.un.orgn/woemnwatc/daw/cedaw/cedaw.htm> accessed on 8 February 2015.

international bill of rights for women.<sup>217</sup> This women's international human rights instrument contains a Preamble and 30 Articles. It explains what constitutes discrimination against women and sets up a schema for national action to end such discrimination. Currently, 188 UN member states, including Tanzania, are parties to CEDAW.

CEDAW is divided into six parts and has 30 Articles.<sup>218</sup> The first part contains the initial six articles which include the definition of discrimination, a list of state responsibilities,<sup>219</sup> a provision on temporary special measures, and a provision on the suppression of trafficking and the exploitation or the prostitution of women. The second part covers women's rights to participate in public and international life and their nationality rights. The third part of CEDAW contains a list of socio-economic rights such as education, employment, health and specific development-oriented provisions pertaining to rural women. The fourth part comprises the provisions on the equality of men and women before the law, as well as Article 16 on marriage and family relations. The fifth part covers the setting up and composition of the Committee which oversees CEDAW<sup>220</sup> and states' reporting obligations under the Convention. The final part of the Convention contains the 'housekeeping' provisions, including provisions for ratifications, reservations, objections thereto, and the invocation of the International Court of Justice in case of interstate disputes on the interpretation or application of the Convention.<sup>221</sup> Implementations of CEDAW are monitored by the Committee on the Elimination of Discrimination against Women.<sup>222</sup> The Committee which, like the Convention, is also called CEDAW, consists of 23 experts on women's rights from different countries around the world who are independent of states although they are nominated by states.<sup>223</sup>

Women's human rights under CEDAW are based on three principles, which are non-discrimination, equality, and a framework for state obligation. The prism of women's human rights rests on those three principles. They provide the lens through which all sites of gender

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<sup>217</sup>Ibid.

<sup>218</sup>Burrows N 'The 1979 Convention on the Elimination of All Forms of Discrimination against Women' 32 *Netherlands International Law Review* (1985) 419.

<sup>219</sup>CEDAW Article 2. See also CEDAW General Recommendation No. 25 on Temporary Special Measures 7.

<sup>220</sup>CEDAW Article 17; UN, IWRAW, Commonwealth Secretariat *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* London, Commonwealth Secretariat (2000).

<sup>221</sup>Banda (note 110) above.

<sup>222</sup>Make Every Women Count 'African Women's Decade 2014 Annual Review' (2014) *Make Every Woman Count Annual Review*. Available at <http://www.makeeverywomancount.org/index.php?option> accessed on 2 March 2015.

<sup>223</sup>Ibid.

discrimination must be interrogated and corrected.<sup>224</sup> Hence a framework of goals, rights, duties, arrangements and accountability can be constructed from an understanding of these foundational concepts.<sup>225</sup> However, while each concept is different and nuanced in itself, it interacts with and mutually reinforces the others to build the core of CEDAW.<sup>226</sup> Discrimination against women is defined by this convention as:

“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>227</sup>

This definition is based on Article 1 of the Race Convention.<sup>228</sup> It makes it clear that all discrimination is prohibited, without regard as to where that discrimination occurs. This means that discrimination is prohibited regardless of whether it is committed by state personnel, a private individual, or a private organization.<sup>229</sup> Both direct and indirect forms of discrimination are prohibited under this provision. It also makes it clear that there should be equality of opportunity and result, so that formal pledges of equality may not in themselves be sufficient. This implies that states need to do more than simply change the law to ensure both *de jure* and *de facto* equality.<sup>230</sup> CEDAW applies its foundational framework to twelve sites of gender discrimination under Articles 5 to 16. However, the Convention could not possibly cover all situations in which discrimination against women may occur.<sup>231</sup> It therefore primarily sets out a framework of equality, non-discrimination and state obligation and addresses dominant areas of discrimination such as education, health, political participation, and marriage. This framework must necessarily be applied to varied situations and emerging issues to eliminate discrimination in any field.<sup>232</sup> CEDAW adopts a substantive model of equality which has the objective to deliver outcomes that ensure equality of opportunity, equality of access, and equality of benefit. It requires states to ensure equality of outcomes, thus imposing an

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<sup>224</sup>Hellum A & Aasen H S *Women's Human Rights: CEDAW in International, Regional and National Law* Cambridge University Press (2013) 7.

<sup>225</sup>Bond (note 209) above.

<sup>226</sup>Wondimu H (note 204) above.

<sup>227</sup>Article 1 of CEDAW.

<sup>228</sup>Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

<sup>229</sup> See CEDAW Article 2(e).

<sup>230</sup>Article 3 of CEDAW.

<sup>231</sup>UNIFEM (note 207) above.

<sup>232</sup>*Ibid.*

obligation upon the state to demonstrate results. That is to say, the Convention is more concerned with equal access and equal benefits than with equal treatment.<sup>233</sup>

CEDAW requires women to be given an equal start and be empowered by an enabling environment to achieve equality of results. Therefore, to guarantee women the treatment that is identical to that of men is not enough as biologically, socially and culturally constructed differences between women and men must be taken into account.<sup>234</sup> It is important to note that non-identical treatment of women and men is required under certain circumstances in order to address such differences. The pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming the under-representation of women and a redistribution of resources and power among men and women.<sup>235</sup> This agrees to a more aggressive use of temporary special measures to speed up the process of ensuring *de facto* equality for women.<sup>236</sup> This matter was well covered in the case of *EFTA Surveillance Authority v the Kingdom of Norway*.<sup>237</sup> The gist of the case was that Norway had passed a law in 1995 relating to universities and colleges which provides the following:

“If one sex is clearly underrepresented in the *category* of post in the subject area in question, applications from members of that sex shall be specifically invited. Importance shall be attached to considerations of equality when appointment is made. The Board can decide that a post shall be advertised as only open to members of the underrepresented sex.”<sup>238</sup>

Based on the language of this law, the University of Oslo allocated a number of doctoral fellowships to women.<sup>239</sup> It also earmarked four permanent academic positions for women, out of a total of 227 academic appointments during the same time period.<sup>240</sup> Additionally, ten more postdoctoral fellowships and twelve permanent academic posts were earmarked for women under the university's Plan for Equal Treatment 2000–2004.<sup>241</sup> However, the European Free Trade Surveillance Authority brought the case to court, claiming that Norway's policy of

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<sup>233</sup>Hellum A (note 224) above.

<sup>234</sup>Banda (note 110) above

<sup>235</sup>CEDAW General Recommendation No. 25 para 8. See also paras 4-7, 9-10. See also CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights on 11 August 2000 (contained in Document E/C.12/2000/4).

<sup>236</sup>Ibid. CESCR para 14.

<sup>237</sup>Case *E-1/02*, 24 January 2003.

<sup>238</sup>Norwegian Act No. 22 of 12 May 1995 relating to Universities and Colleges, Article 30(3). Ibid para 2.

<sup>239</sup>29 out of 179 positions in the period 1998–2001.

<sup>240</sup>Ibid. para 3.

<sup>241</sup>Ibid. para 4.

reserving employment places for women academics was in breach of Article 2(1) of the Directive which provides for equality. The Article states:

“For the purpose of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.”<sup>242</sup>

Furthermore, Article 3(1) of the Directive provides the following:

“Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.”

In defense, Norway cited Article 4(1) of CEDAW as authority for the recognition of affirmative temporary special measures being permitted. It also cited Article 141(4) of the EC Treaty, which permits states to maintain or adopt measures providing for specific advantages in order to make it easier for members of the under-represented gender to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.<sup>243</sup> The Norwegian government also cited Article 2(4) of the Directive as permitting derogation from the equality provisions which state:

“This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities.”<sup>244</sup>

As a justification for its law, Norway noted the social reality that the modest number of women in academia stood in glaring contrast to the percentage of women in the student body and that women tended to leave academic careers before they were qualified for higher academic positions. The defendant provided further that the aim of the disputed legislation was to achieve long-term equality between men and women as groups, therefore in acting as it had, it was in compliance with the Directive. Additionally, the Norwegian government argued that formal

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<sup>242</sup>Article 2(1) of Council Directive 76/207/EEC of 9 February 1976.

<sup>243</sup>*EFTA Surveillance Authority v the Kingdom of Norway*, paras 16 and 56. This was dismissed because the measures in question would not be lawful under that provision which, in any event, is not part of EEA law (para 23).

<sup>244</sup>*EFTA Surveillance Authority v the Kingdom of Norway*, paras 11 and 16. Norway also cited Article 14 of the European Convention 1950 on non-discrimination, Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 2000, European Treaty Series No. 177; Articles 2 and 5 of the ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation, and Recommendation No. R (85)2 from the Council of Europe. *EFTA Surveillance Authority v Norway* para 27.

equality in treatment was not sufficient to achieve substantive equality.<sup>245</sup> Although Norway was held to have failed to fulfil its obligations under the EEA (European Economic Area) Agreement, the Court specifically agreed with the contention of the applicant in the following:

“The Norwegian legislation in question must be regarded as going beyond the scope of Article 2(4) of the Directive, in so far as it permits earmarking of certain positions for persons of the under-represented gender. The last sentence of Article 30(3) of the University Act as applied by the University of Oslo gives absolute and unconditional priority to female candidates. There is no provision for flexibility, and the outcome is determined automatically in favour of a female candidate.”<sup>246</sup>

Although the Norwegian government tried to argue that the measures were temporary and so the provisions proportionate to the aim were sought to be achieved, the Court did not accept their reasoning because of the inflexibility of the rule bringing about the situation in the first place.<sup>247</sup> Regarding Article 4(1) of CEDAW, the Court noted the following:

“[T]he provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for derogations from obligations under EEA law.”<sup>248</sup>

In continuing to consider other provisions in CEDAW, we find that Article 2, which focuses on state obligations, specifically addresses the issue of local values, demands state parties to take all appropriate measures (including legislation), and to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.<sup>249</sup> It also requires state parties to tackle gender stereotyping. This requires state parties to take appropriate measures by modifying:

“...the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>250</sup>

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<sup>245</sup>Ibid.

<sup>246</sup>Ibid. 54. See applicant's contention para 22.

<sup>247</sup>Ibid. paras 50 and 53.

<sup>248</sup>Ibid. para 58.

<sup>249</sup>Article 2(f) CEDAW.

<sup>250</sup>Article 5(a) CEDAW. See also Holtmaat R *Towards Different Law and Public Policy: The Significance of Article 5(a) of CEDAW for the Elimination of Structural Gender Discrimination* The Hague, Ministry of Social Affairs and Employment (2004).



The obligations imposed by these last two provisions are radical and far-reaching as they aim for a total transformation of society. Other African countries such as Niger subjected this Article to reservation. The Government of the Republic of Niger proclaims that the provisions of Article 2 paragraphs (d) and (f), Article 5 paragraphs (a) and (b), Article 15 paragraph 4, and Article 16 paragraphs 1(c), (e) and (g), which relate to family matters, cannot be applied immediately to their country as they are contrary to existing customs and practices which, by their nature, can be modified only with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority.<sup>251</sup> Other state parties, including Tanzania, committed themselves to undertake a series of measures to end discrimination against women in all forms by accepting this Convention. The Convention, among other things, requires state parties to incorporate the principle of equality of men and women in their legal system and to abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women.<sup>252</sup>

Article 9(2) of CEDAW, which addresses the nationality of children, and Article 16 on family relations, together with other provisions of Article 2, have received much resistance which resulted in CEDAW having the highest number of reservations compared to other international human rights instruments.<sup>253</sup> CEDAW permits reservations provided that they are not incompatible with the object and purpose of the Convention.<sup>254</sup> The object and purpose of CEDAW have been considered as constituting an undertaking by state parties that they shall move progressively towards the elimination of all forms of discrimination against women and ensure equality between men and women.<sup>255</sup> In Africa, only countries that have Islam as the main religion have entered reservations on CEDAW, including Algeria,<sup>256</sup> Egypt, Libya<sup>257</sup> and Mauritania. These countries submitted general reservations that subjected CEDAW to the

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<sup>251</sup>Reservation of Niger to CEDAW. Available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> accessed on 7 June 2016.

<sup>252</sup>Article 24 of CEDAW.

<sup>253</sup>Available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> accessed on 12 June 2016.

<sup>254</sup>Article 28(2) of CEDAW.

<sup>255</sup>Cook R 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' 30 *Virginia Journal of International Law* (1990) 643–648.

<sup>256</sup>Algeria has agreed to implement Article 2 of the Convention on condition that it does not conflict with the provisions of the Algerian Family Code. See: Connors C F 'The Women's Convention in the Muslim World' in J Gardner (ed) *Human Rights as General Norms and a State's Right to Opt Out*. London, British Institute of International and Comparative Law (1997) 85; Also Holtmaat (note 250) above at 29; MENA Development Report 2004 Gender and Development in the Middle East and North Africa Women in the Public Sphere, World Bank (2004) 85.

<sup>257</sup>Egypt and Libya reserved part of Article 16 of CEDAW.

constitutional and Islamic law called Shari'a.<sup>258</sup> African non-Islamic states that have entered reservations to CEDAW include Lesotho. The Lesotho reservation states that "it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho".<sup>259</sup> The Constitution of Lesotho also exempts customary law from the operation of the principles of non-discrimination,<sup>260</sup> something which is interesting as one wonders why the government of Lesotho opted to ratify CEDAW at all.<sup>261</sup> The situation becomes more controversial as Lesotho was among the first five African states to ratify the Maputo Protocol as well as the seventh African state to ratify the Optional Protocol to CEDAW.<sup>262</sup>

All in all, it is difficult to reconcile this outward manifestation of commitment to the human rights of women with the country's reservation to CEDAW. Likewise, opting out of its obligation questions this state's commitment to improving the conditions of women and arguably violates the integrity of the treaty.<sup>263</sup> In addition to that, when international law is subjected to municipal law, it becomes difficult to ascertain a state's obligations. When making an international instrument subject to national law, it is technically problematic as national law can change at any time.<sup>264</sup> The frequency with which states reserved CEDAW gave rise to reasons why the Women's Committee made two general recommendations tackling the issue of reservations.<sup>265</sup> The Committee requested states to keep any reservations made under review and, if appropriate, to uplift them. It also gave guidelines for reporting and asked states to

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<sup>258</sup>Cairo Institute for Human Rights Studies 'Reservation is not a justification' (1996) Sawasiah 8–9.

<sup>259</sup>Available at <http://www.bayefsky.com/docs.php/area/reservations/state/97/node/3/treaty/cedaw/opt/0>. See also Allain J and O'Shea A 'Africa disunity: Comparing human rights law and practice of North and South African states.' 2 *Human Rights Quarterly* 86 (2002) 97–98.

<sup>260</sup>Constitution of Lesotho 1993 s 18(4)(b), reproduced in Heyns C (ed) *Human Rights Law in Africa* (The Hague, Kluwer International, 1996) 186 at 188.

<sup>261</sup>Linzaad E *Reservations to UN Human Rights Treaties* Dordrecht, Martinus Nijhoff (1995) 363–64; Clark B 'The Vienna Convention reservations regime and the Convention on Discrimination against Women' 85 *American Journal of International Law* (1991) 281.

<sup>262</sup>Optional Protocol to CEDAW (1999) note 133 above.

<sup>263</sup>Cook (note 255) above at 649.

<sup>264</sup>Clark (note 261) above at 317. *Specific Human Rights Issues Reservations to Human Rights Treaties* Final Working Paper Submitted by Françoise Hampson (19 July 2004) 4 E/CN.4/Sub.2/2004/42 at para 56.

<sup>265</sup>General Recommendation No. 4, Reservations, UN Doc A/42/38 and General Recommendation No. 20, Reservations to the Convention, UN Doc A/47/38. CEDAW General Recommendation No. 21 also tackles reservations - see paras 41-47. See also Human Rights Committee General Comment No. 24 on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant (2 November 1994) CCPR/C/21/Rev 1/Add 6. Controversially, the Human Rights Committee claims for itself the right to strike down reservations that it deems in violation of the objects and purpose of the ICCPR: see para 11. *Belilos v Switzerland* (1988) *ECHR Series A*, 132(4). See Baratta R 'Should invalid reservations to human rights treaties be disregarded?' 11 *European Journal of International Law* (2000) 413.

address their reservations. The Women Committee marked the 50<sup>th</sup> anniversary of the UDHR by issuing a statement on reservations<sup>266</sup> which noted: “Neither traditional, religious nor cultural practice, nor incompatible domestic laws and policies can justify violations of the Convention.”<sup>267</sup> Furthermore, in its statement on reservations, the Committee explained that experience had shown that reservations made to state obligations under Article 2 and Article 16 were seldom uplifted.<sup>268</sup>

The issue of reservations has a significant impact on women's rights, particularly those in the family.<sup>269</sup> The most challenged reservations were mainly those that justified using cultural and religious precepts for the violation of women’s rights. However, the act of objecting to another state's reservation might in itself be seen as a hostile act which few states are prepared to take.<sup>270</sup> The matter of reservations, explicitly those that refer to the enjoyment by women of their rights, might also not be considered as a subject worth entering into hostile debate.<sup>271</sup> However, some European states objected to reservations to key provisions of CEDAW,<sup>272</sup> as they argued that this kind of regional imbalance surged the possibility of charges of cultural imperialism.<sup>273</sup> The Committee on the Elimination of Racial Discrimination (CERD) on which CEDAW is based and which has widespread support in Africa has a tightly framed reservation provision which states that a reservation is not acceptable if two-thirds of state parties object to it.<sup>274</sup> It can be argued that when discrimination such as race affects men, they are prepared to be strong and refuse to allow any derogation to the application of the relevant Convention. However, gender inequalities, especially those that are justified by culture or religion, tend to be women's issues and are therefore seen as less important.

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<sup>266</sup>CEDAW 'Statement on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women' reproduced in UN IRAW, Commonwealth (2000) (note 221) above at 90.

<sup>267</sup>Ibid at 92.

<sup>268</sup>Ibid. para 19 at 92. Some states such as Malawi and Mauritius have uplifted their reservations.

<sup>269</sup>This is an issue that affects women in other parts of the world. See Hossain S 'Equality in the Home: Women's Rights and Personal Laws in South Asia' in R Cook (ed) *Human Rights of Women: National and International Perspectives* Philadelphia, University of Pennsylvania Press (2004) 466–473.

<sup>270</sup>Chinkin C 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women' in J Gardner (ed) *Human Rights as General Norms and a State's Right to Opt Out*, London, British Institute of International and Comparative Law (1997) 64.

<sup>271</sup>Banda (note 110) above.

<sup>272</sup>European states do not appear to object to reservations made by other European states. Mexico is also a state that has made objections.

<sup>273</sup>Chinkin (note 270) above.

<sup>274</sup>CERD Article 20(2).

Other treaties such as the ICCPR and the African Charter are silent on reservations, although both have been reserved in part by some state parties.<sup>275</sup> This suggests that state parties are permitted to enter reservations provided they do not violate the objects and purpose of the treaty.<sup>276</sup> There is a lack of consistency in African states when ratifying and making reservations to human rights treaties, for instance CEDAW is heavily reserved whereas the ICCPR, which does not have a non-discrimination provision and which aims to protect the right to family life and equality before the law, is not so frequently reserved.<sup>277</sup> This signifies that states will accept the obligations imposed upon them by one human rights instrument but not by another.<sup>278</sup> However, the Human Rights Committee under General Comment No. 18 adopted the definition of discrimination found in Article 1 of CEDAW, and the African Commission has in turn adopted the Human Rights Committee's interpretation of discrimination.<sup>279</sup> This means that states that have not acceded to CEDAW but that have done so in terms of ICCPR without any reservations can be said to have the same obligations to women as CEDAW ratifying states.<sup>280</sup> The uncertainty of states' commitment to upholding the human rights of women can be exploited by human rights advocates who can 'forum shop' for the best deal for women.<sup>281</sup>

Furthermore, state parties to CEDAW are obliged to establish tribunals and other public institutions to ensure the effective protection of women against discrimination and to eliminate all acts of discrimination against women by persons, organizations or enterprises. CEDAW provides the basis for establishing equality between women and men by ensuring women's equal access to, and equal opportunities in, political and public life, including the right to stand for election and to vote as well as the right to health, education and employment.<sup>282</sup> State parties to CEDAW agreed to take all appropriate measures, including temporary special measures and legislation, so that women can enjoy all human rights and fundamental freedoms as guaranteed by this Convention.<sup>283</sup> The Convention affirms the reproductive rights of women and targets

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<sup>275</sup>Egypt has a general reservation to the ICCPR, ICESCR and the CRC, as it cites the provisions of the Shari'a as determining the extent of its obligations.

<sup>276</sup>Banda (note 110) above at 63.

<sup>277</sup>Chinkin (note 270) above.

<sup>278</sup>*Ibid.*

<sup>279</sup>Banda (note 110) above at 57.

<sup>280</sup>*Ibid.*

<sup>281</sup>Chinkin (note 270) above.

<sup>282</sup>Articles 3–14 of CEDAW.

<sup>283</sup>*Ibid.*

culture and tradition as influential forces that shape gender roles and family relations.<sup>284</sup> CEDAW is the only international human rights treaty which affirms the reproductive right of women. CEDAW also guarantees women's right to change, acquire or retain their nationality and also the nationality of their children. State parties are also required to take appropriate measures against all forms of trafficking in women and the exploitation of women.<sup>285</sup>

CEDAW requires states that have ratified it to put the provisions of the Convention into practice. Countries that have become party to CEDAW are also bound to submit national reports stating the measures they have taken to comply with their treaty obligations after at least every four years.<sup>286</sup> During its sessions, the Committee considers each report from state parties and explore areas for further action by the specific country.<sup>287</sup> Thereafter, the Committee addresses its concerns and recommendations in the form of concluding observations to the relevant state party. The CEDAW Committee is of great importance to women as it watches over the progress that is made in those countries that are state parties to CEDAW and it also monitors the enforcement of all the rights guaranteed in CEDAW to make sure that all women around the world are enjoying their rights. When the Committee makes recommendations on issues affecting women, it requires state parties to devote more attention to women's rights. The general recommendations made by this Committee are interpretations of an accord to assist state parties in implementing their obligations in terms of women's rights. The system of reporting progress in terms of obligations under the Convention is an important instrument for state parties to reflect on the application or non-application of CEDAW provisions.<sup>288</sup> The reporting procedure gives the opportunity to governments and political parties to reconsider their justification for the application or non-application of women's rights and to evaluate whether the intended results have been achieved.<sup>289</sup> The reporting obligation also offers an important opportunity for NGOs to comment on the raised issues in their shadow reports, to monitor the discussion between the CEDAW Committee and their respective governments, and to lobby for the implementation of relevant recommendations in terms of the CEDAW Committee's concluding comments.

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<sup>284</sup>Article 11(1) F & Article 11(2). Also Article 16(1) C.

<sup>285</sup>Article 9.

<sup>286</sup>The optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 2002.

<sup>287</sup>*Ibid.*

<sup>288</sup>UNIFEM (note 207) above.

<sup>289</sup>*Ibid.*

The CEDAW Optional Protocol is discussed in the next section. This Optional Protocol to CEDAW has given a mandate to CSW to receive communications from individuals or groups of individuals who wish to submit claims of violations of rights that are protected under CEDAW.<sup>290</sup> Another power given to the CEDAW Committee by the Optional Protocol is to initiate inquiries into situations of grave or systematic violations of women's rights. However, these procedures are optional and are only available where the state concerned has accepted them. The CSW also has the power to formulate general recommendations and suggestions which are directed to states concerning articles or themes in the Conventions.<sup>291</sup>

### 2.5.2 *The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*

This Protocol is a separate international instrument which provides complaints procedures for CEDAW.<sup>292</sup> It is common that human rights treaties are followed by optional protocols which generally provide procedures with regard to the treaty or else address a substantive area related to the treaty. Such optional protocols to human rights treaties are treaties in their own right. Optional protocols are also open to signature, accession or ratification only by countries who are party to the main treaty. The need of having a complaint procedure was suggested during the drafting of CEDAW but it was not adopted because some delegates argued that complaints procedures were suitable for serious international crime such as racial discrimination and apartheid rather than discrimination against women.<sup>293</sup> However, on June 1993 the World Conference on Human Rights that was held in Vienna acknowledged the need for new procedures to strengthen the implementation of women's human rights and called on the CEDAW Committee to examine the possibility of introducing the right of petition through the preparation of an optional protocol to CEDAW.<sup>294</sup> In September and October 1994, an independent expert group from all regions met at the Maastricht Centre for Human Rights and adopted a draft Optional Protocol. This team of experts included members of CEDAW, the

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<sup>290</sup>Article 1 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 2002.

<sup>291</sup>Article 9 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 2002.

<sup>292</sup>Amnesty International *Claiming Women's Rights: Optional Protocol to the UN Women's Convention* Amnesty International (2001) 27.

<sup>293</sup>Byrnes A 'Slow and steady wins the race? The development of an optional protocol to the Women's Convention' 91 *ASIL Proc.* 38 (1997) 3.

<sup>294</sup>Byrnes A & Connors J 'Enforcing the human rights of women: A complaints process for the Women's Convention?' *Brooklyn Journal of International Law* XXI (3) (1996) 682–797.

Committee on the Elimination of Racial Discrimination, the Human Rights Committee, and other experts in the field of international human rights and women's rights organizations at large.

On March 1995, the Secretary-General invited governments, inter-governmental organizations, and NGOs, at the request of the Committee, to submit their views on an Optional Protocol.<sup>295</sup> The 4th World Conference on Women which took place in Beijing on September 1995 called on UN member states to support the elaboration of the Optional Protocol. In March 1996, an open-ended working group on the Optional Protocol was established by CFSW.<sup>296</sup> This open-ended group discussed the idea of the Optional Protocol and some other main issues raised by it. The Working Group discussed a draft Optional Protocol and adopted it.<sup>297</sup> The Optional Protocol entered into force on 22 December 2000, following the ratification of the tenth state party to the Convention.<sup>298</sup>

The Optional Protocol to CEDAW provides procedures for the implementation of CEDAW which include two kinds of procedures referred to as 'communication procedures' and 'inquiry procedures' which are usually conducted by the CEDAW Committee, as stated in the previous section of this chapter. The entry into force of the Optional Protocol put it on an equal footing with the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, which all have communications procedures.<sup>299</sup> Communications procedure give individual women, NGOs and groups of women the right to complain to the Committee and to refer any violation of the rights as guaranteed by CEDAW.<sup>300</sup> These procedures are common under the UN and provide the right to petition and the right to complain about violations of rights. The procedures require that all complaints are submitted in writing and enable the Committee to focus on individual cases and to be able to say what is required from states in individual circumstances. The

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<sup>295</sup>Byrnes (note 294) above.

<sup>296</sup>Ibid.

<sup>297</sup>Ibid.

<sup>298</sup>Cartwright S 'Rights and remedies: The drafting of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' 9 *Otago Law Review* (1998) 239.

<sup>299</sup>Wörgetter A 'The draft Optional Protocol to the Law on the Elimination of All Forms of Discrimination against Women' 2 *Austrian Review of International and European Law* (1997) 261.

<sup>300</sup>Article 6 of the Optional Protocol to CEDAW.

communication procedure helps states to better understand the meaning of the obligations they have undertaken by acceding to CEDAW.<sup>301</sup>

Another enforcement procedure provided in this Optional Protocol is the inquiry procedure which enables the CEDAW Committee to conduct inquiries into grave or systematic serious abuses of women's human rights in the countries that are state parties to the Optional Protocol.<sup>302</sup> The inquiry procedure allows the investigation of substantial abuses of women's human rights by an international body of experts. This procedure is very useful in instances where individual communications fail to reflect the systemic nature of widespread violations of women's rights. The inquiry procedure requires that widespread violation be investigated only where individuals or groups may be unable to make communications due to fear of reprisals or even for practical reasons.<sup>303</sup> The inquiry procedure also gives the Committee an opportunity to make recommendations regarding the structural causes of violations, something which allows the Committee to address a broad range of issues in a particular country. The inquiry procedure was borrowed from Article 20 of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Another procedure available in the protocol is the interstate procedure that is provided under Article 29 of CEDAW, where two or more state parties are allowed to refer disputes about the interpretation and implementation of CEDAW to arbitration. This procedure provides room for referring that matter to the International Court of Justice when the dispute is not settled by the arbitrator. Many countries which are party to CEDAW have recused themselves from using this procedure and to date it has never been used.<sup>304</sup> The Protocol makes the inquiry procedure mandatory to all state parties to it by virtue of Article 17, which provides that no reservations may be entered under its terms.

The Optional Protocol to CEDAW also incorporates a settlement procedure which would allow the Committee to facilitate the settlement of a dispute in some circumstances.<sup>305</sup> In addition, the Optional Protocol gives a mandate to the Committee to request the state party concerned to

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<sup>301</sup>O'Hare U 'Ending the "ghettoisation": The right of individuals to petition to the Women's Convention' *Web Journal of Current Legal Issues* (1997) 5.

<sup>302</sup>Article 8 of the Optional Protocol to CEDAW.

<sup>303</sup>Roche M 'The Proposed Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' 3 *Human Rights Law and Practice* (1993) 268.

<sup>304</sup>Cartwright (note 298) above.

<sup>305</sup>Article 14 of the Optional Protocol to CEDAW.



take specific measures to remedy violations of CEDAW.<sup>306</sup> The request may include the amendment of legislation, stopping discriminatory practices, or even implementing affirmative action measures to enhance existing mechanisms for the implementation of human rights within the UN system and to create greater public awareness of human rights standards relating to discrimination against women.<sup>307</sup> States are also required by the Protocol to publicize procedures which are within the provisions of the Optional Protocol.<sup>308</sup> Communications and inquiries under the Optional Protocol also receive publicity, which increases public awareness of CEDAW and the Optional Protocol. This Optional Protocol is the first gender specific international complaints procedure. It has put CEDAW on a par with other human rights treaties which have complaints procedures, as it enhances existing mechanisms by specifically incorporating practices and procedures that have been developed under other complaints procedures.<sup>309</sup>

### 2.5.3 *Declaration on the Elimination of Violence against Women*

In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women which became the first international instrument explicitly addressing violence against women.<sup>310</sup> This Declaration provides a framework for national and international action. It defines violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>311</sup> This definition of violence against women is currently the most widely accepted one.<sup>312</sup> The Declaration provides three different classifications of violence against women. The first category is violence perpetrated by the state, for example the violence against women in custody or as part of warfare.<sup>313</sup> The second category is about the violence which happens within the general community, such as rape, trafficking in women, sexual harassment

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<sup>306</sup>Article 5 of the Optional Protocol to CEDAW.

<sup>307</sup>O'Hare (note 301) above.

<sup>308</sup>Article 13 of the Optional Protocol to CEDAW.

<sup>309</sup>Wörgetter (note 301) above.

<sup>310</sup>On 19 December 1993 the General Assembly adopted the Declaration on the Elimination of Violence against Women under Resolution No. A/RES/48/104. See United Nations Entity for Gender Equality and the Empowerment of Women. Available at <http://www.un.org/womenwatch/daw/daw/index.html> accessed on 29 October 2015.

<sup>311</sup>Articles 1 & 2 of the Declaration on the Elimination of Violence against Women of 1993.

<sup>312</sup>Band (note 110) above.

<sup>313</sup>Article 2(c) of the Declaration on the Elimination of Violence against Women.

and intimidation at work.<sup>314</sup> The third category of violence that is elaborated in the Declaration is violence in the family and in the private sphere, which includes incest and selective abortions.<sup>315</sup>

The Declaration also provides provisions for the root of violence against women that it is entrenched in the historically unequal power relations between men and women. The declaration specifically declares that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. The Declaration on the Elimination of Violence against Women is often seen as complementary to, and a strengthening of, the work of CEDAW. This Declaration resulted in designating November 25 as the International Day for the Elimination of Violence against Women. This date was officially selected by the General Assembly in 1999 led by the representative from the Dominican Republic. The Declaration turned into a primary universal instrument which expressly addresses savagery against women. The Declaration also resulted in the appointment of the United Nations Special Rapporteur on Violence against Women by the Commission on Human Rights who has a mandate to collect and analyse data from governments, treaty bodies, NGOs, specialized agencies, and other interested parties, and to respond effectively to such information.<sup>316</sup> In addition, the Special Rapporteur has a duty to make recommendations on international, national and regional levels and to link with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights.<sup>317</sup>

The General Assembly has dealt with a number of specific aspects of violence against women in recent years. The topics covered by the General Assembly have, since 2000, included trafficking in women and girls,<sup>318</sup> all forms of violence against women,<sup>319</sup> traditional or

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<sup>314</sup>Ibid. Article 2(b).

<sup>315</sup>Ibid. Article 2(a).

<sup>316</sup>She was appointed on 4 March 1994. See the Commission on Human Rights under Resolution No. 1994/45[8].

<sup>317</sup>Reilly N *Women's Human Rights: Seeking Gender Justice in a Globalising Age* Polity Press (2009) 67.

<sup>318</sup>Ibid..

<sup>319</sup>On this aspect, the General Assembly adopted a number of resolutions and reports prepared by the Secretary-General, including: Elimination of all Forms of Violence, including Crimes against Women (A/RES/55/68, of December 2000); Elimination of All Forms of Violence against Women, including crimes identified in the outcome document of the twenty-third special session of the General Assembly, entitled 'Women 2000: Gender Equality, Development and Peace for the twenty-first Century' (A/RES/57/181 of December 2002); Elimination of all Forms of Violence against Women, Including Crimes Identified in the Outcome Document of the Twenty-Third Special Session of the General Assembly, entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century' (A/RES/59/167 of December 2004) and Intensification

customary practices affecting the health of women and girls, violence against women migrant workers, crimes committed in the name of honour, and domestic violence. Some of the grounds added in the Declaration have been threatened by the rise of conservative forces within the international community.<sup>320</sup> Proponents of women's rights as human rights have expressed concern after objections raised to Article 4 of the Declaration by some UN state members.<sup>321</sup> For instance, during the UN meeting of the Commission on the Status of Women, some delegates from countries such as Iran, Egypt, Pakistan and Sudan disputed the inclusion of a declaration paragraph that requires governments to condemn violence against women and to refrain from invoking any custom, tradition, or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration of the Elimination of Violence against Women.<sup>322</sup> As a consequence, the meeting was marked as the first ever diplomatic failure of the UN Commission on the Status of Women.<sup>323</sup>

#### *2.5.4 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*

The above Convention is a UN international instrument that agrees upon the standards of marriage.<sup>324</sup> This instrument has been signed by sixteen countries and so far 55 countries have ratified it. The treaty reaffirms the consensual nature of marriages and calls for state parties to establish a minimum marriage age by law and to ensure the registration of marriages within their states. This instrument also calls upon state members to take legislative action to specify a minimum age for marriage and stipulates that no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to the age, for serious reasons, in the interest of the intending spouses.<sup>325</sup> The Convention requires parties to eliminate the marriage of girls under the age of puberty and requires that states

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of Efforts to Eliminate all Forms of Violence against Women (A/RES/61/143 of January 2007. See United Nations Entity for Gender Equality and the Empowerment of Women, Violence against Women, Work of the General Assembly on Violence Against Women in United Nations Women. Available at <http://www.un.org/womenwatch/daw/vaw/reports.htm#all> accessed on 7 November 2015.

<sup>320</sup>Richards D & Haglund J *Violence against Women and the Law* Routledge (2016) 24.

<sup>321</sup>Ibid.

<sup>322</sup>The meeting took place in March 2003.

<sup>323</sup>Freeburg E 'UN pact sinks on issue of violence against women' *Women's eNews* 23 April 2003. Available at <http://womensnews.org> accessed on 12 June 2016.

<sup>324</sup>The Treaty was opened for signature and ratification by General Assembly Resolution 1763 A (XVII) on 7 November 1962 and entered into force on 9 December 1964.

<sup>325</sup>Article 2 of the Marriage Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

stipulate the minimum age of marriage.<sup>326</sup> This Convention recalls Article 16(1) of the UDHR which provides that men and women of full age and without any limitations have the right to marry and to found a family.<sup>327</sup>

Furthermore, the Convention establishes that state parties should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary, and establishing a civil or other register in which all marriages will be recorded.<sup>328</sup> The Marriage Convention highlights the free and full consent of both parties to the marriage<sup>329</sup> and registration of all marriages in an appropriate official register.<sup>330</sup> Though the Convention was entered into force 52 years ago, most African countries, including Tanzania, have not ratified it yet. African countries that ratified it include South Africa, Rwanda, Niger and Zimbabwe.<sup>331</sup> Africa is among the regions with numerous underage marriages of girls.<sup>332</sup> Although this Convention is applicable to both men and women, it has been referred to as one among the conventions which protect women's rights because more young girls have been victims of early marriages compared to boys.<sup>333</sup> Likewise, girls are frequently the underage party in forced marriages. Countries' legislations vary in provisions for the minimum age of marriage for men and women, but the minimum age for women to get married is generally below that of men, which is against this Convention and constitutes gender inequality.<sup>334</sup>

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<sup>326</sup>Ibid. Article 2.

<sup>327</sup>The Preamble of the Marriage Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

<sup>328</sup>Ibid.

<sup>329</sup>Article 1 of the Marriage Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

<sup>330</sup>Ibid. Article 3.

<sup>331</sup>UN Treaty Convention Data Base, status as at 17 May 2016, 07:34:25 EDT. Available at <https://treaties.un.org> accessed on 12 June 2016.

<sup>332</sup>Thematic Report of the Special Rapporteur on Contemporary Forms of Slavery, including its causes and Consequences, to the UN Human Rights Council, on Servile Marriage, UN doc. A/HRC/21/41, July 2012 para 95.

<sup>333</sup>Girls not Brides 'Understanding the scale of child marriage' *Girls not Brides* (2014) 3.

<sup>334</sup>Rude-Antoine E 'Forced marriages: A comparative study of legislation and political initiatives' *Directorate General of Human Rights, Council of Europe* (2005) 12.

### 2.5.5 *Other UN international instruments that protect women's rights*

Many international human rights treaties contain provisions that address women's rights directly or indirectly. The provisions within different international treaties have been classified into three categories, namely corrective, protective and non-discriminatory.<sup>335</sup> However, some international instruments contain elements of all three categories.<sup>336</sup> Protective treaties undertake that women should be treated differently to men in particular circumstances due to their physical differences which make them more vulnerable than men.<sup>337</sup> The International Labor Organization's (ILO) Convention Concerning Night Work of Women Employed in Industry of 1948 is a good example of international instruments that endorse protective rights for women.<sup>338</sup> This Convention limits the amount of night work which can be undertaken by women. Another Convention which has protective provisions is the Third Geneva Convention on the Laws of War of 1949 that requires particular treatment for women prisoners of war.<sup>339</sup> These special provisions for women acknowledge the differences in women and men's lives. Nevertheless, these protective provisions also tend to stereotype women as weak and helpless.

Corrective treaties are those treaties which attempt to improve women's treatment without making open comparisons to the situation of men. An example of these treaties is the Convention for the Suppression of the Traffic in Women and Children of 1950 and the Convention on the Nationality of Married Women of 1957, which deals with the requirement for women to marry only with their full and free consent.<sup>340</sup> The non-discrimination category refers to those international instruments that emphasize the right to equal treatment and non-discrimination on the basis of gender.<sup>341</sup> The non-discrimination category is the most widely used in international instruments with respect to women. The international legal system has dealt with non-discrimination on the basis of gender in both generally applicable instruments and women-specific instruments.<sup>342</sup> Apart from CEDAW and its Optional Protocol, a number of international instruments focus entirely or in part on discrimination against women. These

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<sup>335</sup>Said M 'Women's Human Rights: More Said Than Done' Legal Service India (2013). Available at [http://www.legalserviceindia.com/articles/pris\\_sys.htm](http://www.legalserviceindia.com/articles/pris_sys.htm) accessed on 4 May 2016.

<sup>336</sup>Ibid.

<sup>337</sup>Banda F. Project on a Mechanism to Address Laws that Discriminate Against Women, Commissioned by Office of the High Commissioner for Human Rights – Women's Rights and Gender Unit, 6 March 2008.

<sup>338</sup>Article 3 of Night Work (Women) Convention (Revised) 1948 (No. 89).

<sup>339</sup>Articles 14, 16, 69 of the Third Geneva Convention on the Laws of War of 1949.

<sup>340</sup>Wörgetter (note 299) above.

<sup>341</sup>Ibid.

<sup>342</sup>Byrnes & Connors (note 294) above.

include the Convention on the Nationality of Married Women, the Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages of 1962, and the Convention on the Political Rights of Women of 1952.

International instruments that deal with discrimination in general include the International Covenant on Civil and Political Rights (ICCPR). Articles 2 and 3 of the ICCPR require state parties to ensure that women and men enjoy all the civil and political rights in the Covenant on a basis of equality. Article 26 of the ICCPR also provides that all people are equal before the law, are entitled to equal protection of the law without discrimination, and that the law shall guarantee equal and effective protection against discrimination. This Article prohibits discrimination in law or in fact in any field regulated by public authorities. The scope of Article 26 is not limited to civil and political rights alone, as it was decided by the Human Rights Committee that Article 26 can therefore be used to challenge discriminatory laws whether or not they relate to civil and political rights.<sup>343</sup> This Article was once used as the basis of a communication under the first Optional Protocol to the ICCPR to challenge a social security law that discriminated on the ground of gender in the case *W M Broeks v the Netherlands*.<sup>344</sup> The ICCPR has its optional protocol which also allows individuals whose countries are party to the ICCPR and the protocol to submit written communications to the UN Human Rights Committee in case their rights under the ICCPR have been violated, and they have exhausted all domestic remedies.<sup>345</sup> In a number of cases women have used the communication procedure under the first Optional Protocol to the ICCPR to complain to the UN Human Rights Committee about gender discrimination which breaches the ICCPR.<sup>346</sup>

Another International instrument which touches on women's rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR). This instrument covers a broad range of women's economic and social rights. The ICESCR was adopted in 1966 and entered into force in 1976. It forms party to the International Bill of Rights together with the Universal Declaration on Human Rights and the ICCPR. The Covenant states that men and women have an equal right to the enjoyment of all the rights guaranteed therein. This instrument uses the word 'every person' in almost all of its article to evade any kind of discrimination. The rights

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<sup>343</sup>Byrnes & Connors (note 294) above.

<sup>344</sup>*W M Broeks v the Netherlands, Communication No. 172/1984, U.N. Doc. Supp. No. 40 (A/42/40) at 139 (1987).*

<sup>345</sup>Optional Protocol to the International Covenant on Civil and Political Rights of 1976 (2).

<sup>346</sup>O'Hare (note 301) above.

guaranteed in ICESCR include the right to work, which includes the opportunity to gain a living by work which is freely chosen;<sup>347</sup> the right to just and favourable conditions of work, including fair and equal remuneration;<sup>348</sup> the right to form and join trade unions;<sup>349</sup> and the right to social security.<sup>350</sup> The rights also include an adequate standard of living (i.e., adequate food, clothing and housing);<sup>351</sup> the right to the highest attainable standard of physical and mental health; the right to education; and the right to take part in cultural life.<sup>352</sup> Special mention is made of the family, which should be accorded “the widest possible protection and assistance”, while “marriage must be entered into with the free consent of intending spouses.”<sup>353</sup>

Article 2(2) of ICCPR sets out the principles of equality and non-discrimination in relation to the provision of covenant rights. However, decisions made by this instrument are not legally binding and it lacks the authority to drive any political reform to ensure that states parties' commitment to the ICESCR is upheld. International courts cannot hold states accountable for violations of economic, social and cultural rights. The implementation mechanism of ICESCR is via the system of reporting to the Committee.<sup>354</sup> Those states that have ratified the Covenant are expected to submit a report to the Committee within two years of ratifying the Covenant, and then to provide a follow-up report every five years.

## **2.6 Protection of Women’s Rights at Regional Level**

Human rights in Africa are mainly protected by the African Charter on Human and People’s Rights (ACHPR), also known as the Banjul Charter.<sup>355</sup> The ACHPR is a primary human rights instrument which is intended to promote and protect human rights and basic freedoms in African countries. The Charter guarantees the basic rights and freedom of all people, including

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<sup>347</sup>Article 6 of the ICESCR.

<sup>348</sup>Article 7 of the ICESCR.

<sup>349</sup>Article 8 of the ICESCR.

<sup>350</sup>Article 9 of the ICESCR.

<sup>351</sup>Article 11 of the ICESCR.

<sup>352</sup>Article 13 of the ICESCR.

<sup>353</sup>Article 10(1) of the ICESCR.

<sup>354</sup>The African Charter was adopted in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986, CAB/LEG/67/3/Rev.

<sup>355</sup>IWRAW Asia Pacific & ESCR ‘Claiming Women’s Economic, Social and Cultural Rights’ (2013) available at <https://www.escr-net.org/sites/default/files/Guide%20on%20Women's%20ESCR%20-%20Final.pdf> accessed on 30 July 2015.

women.<sup>356</sup> The African Charter was ratified by all 53 member states of the African Union and is the parent treaty of the Protocol on the Rights of Women in Africa. It covers various human rights issues, from general fundamental rights to those of specific groups such as women. The ACHPR specifically recognizes and affirms women's rights and requires all African states to eliminate every discriminatory law against women and to ensure the protection of the rights of women and children.<sup>357</sup> The African Charter further recognizes regional and international human rights instruments. Moreover, African practices that are consistent with international norms on human and people's rights are important reference points for the application and interpretation of the ACHPR.<sup>358</sup> In addition, the ACHPR declares equality of all people and provides that all people need to enjoy the same respect. It stipulates that nothing shall justify the domination of one people by another.<sup>359</sup> In fact, all rights in the African Charter apply to women and some are of particular relevance, including those on equality and non-discrimination and those dealing with personal liberty, integrity, and dignity. There are some similarities between the ACHPR and CEDAW, not least the recognition in both instruments of the importance of civil, political, socio-economic and cultural rights and their interdependence.<sup>360</sup> The contents of some of the rights of women that are protected by the Charter, for instance on family,<sup>361</sup> were fleshed out in CEDAW.<sup>362</sup> African states have shown formal commitment to these provisions, even if this commitment has not always translated into domestic implementation of the rights contained therein.

However, women's human rights provisions as guaranteed in ACHPR have been viewed as inadequate and ineffective and this has raised the need for an optional protocol which can specifically protect women's rights.<sup>363</sup> After years of activism by women's rights supporters, the draft of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, well known as the Maputo Protocol, was originally adopted by the Assembly of the African Union (AU).<sup>364</sup> Fifteen Countries undertook to ratify this Protocol before it came into force, but almost a year later only one had done so. A group of women then started

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<sup>356</sup> Articles 2 and 3.

<sup>357</sup> 18(3) of the ACHPR.

<sup>358</sup> Articles 60 and 61

<sup>359</sup> Article 19 of ACHPR.

<sup>360</sup> Banda (note 110) above.

<sup>361</sup> African Charter Article 18(1).

<sup>362</sup> CEDAW Article 16.

<sup>363</sup> AWID 'Maputo Protocol 10 years: How can it be used to end child marriage?' (2013). Available at [www.awid.org](http://www.awid.org) accessed on June 2015.

<sup>364</sup> It was adopted in Maputo, Mozambique on July 11, 2003 and came into force on 25 November 2005.



campaigning to make the proposal a reality.<sup>365</sup> Their complaints were championed by the Solidarity for African Women's Rights (SOAWR) which comprised a 23-member strong coalition of civil society and publishers of books.<sup>366</sup> Other organisations which worked for the adoption of the Protocol were WiLDAF, Equality Now, Acord, Africa Leadership Forum, and Femnet.<sup>367</sup> After the Beijing Conference of 1995 there was an increased interest by civil society organizations in the proposed measures to protect women's rights. Women's networks rallied across the continent to make the proposal a reality.<sup>368</sup> The Maputo Protocol is a comprehensive legal framework to enable African women to exercise their rights. It is indeed a positive step towards combating discrimination and violence against women and a significant instrument in efforts to promote and ensure respect for the rights of African women.<sup>369</sup>

The Maputo Protocol addresses women's rights and clarifies the obligations of African governments with respect to those women's rights that are missing from the African Charter.<sup>370</sup> This Protocol is the highest ratified instrument in Africa so far, with the exception of Botswana and Egypt.<sup>371</sup> With the adoption of the Maputo Protocol, Africa has demonstrated its will to safeguard respect for women's human rights as well as the development of norms and standards in the domain of protection of women's and girls' rights on the African continent.<sup>372</sup> The Protocol is an innovative legal treaty in many respects and its effective implementation will enable the realization of significant advances in terms of women's rights in many spheres of their lives.<sup>373</sup> The Protocol provides broad protection for women's human rights in Africa and is a comprehensive framework for the promotion and respect of women's rights in Africa, as will be discussed in the next section.

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<sup>365</sup>Burnett P Karmali S & Manji F *Grace, Tenacity and Eloquence: The Struggle For Women's Rights In Africa*, Fahamu Networks for Social Justice (2007) 1.

<sup>366</sup>AWID (note 363) above.

<sup>367</sup>*Ibid.*

<sup>368</sup>Njorogel A K 'The Protocol on The Rights of Women in Africa to The African Charter on Human and People's Rights (The Maputo Protocol)' Paper presented at Thematic Session II during the sub-Regional Conference on Female Genital Mutilation (FGM) held in Djibouti (2005).

<sup>369</sup>*Ibid.*

<sup>370</sup>Burnett (note 365) above.

<sup>371</sup>Njorogel (note 368) above.

<sup>372</sup>A guide to use the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa Equality Now (2011) 2.

<sup>373</sup>Burnett (note 365) above.

### 2.6.1 *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol)*

The Maputo Protocol is an important advance in the protection and the promotion of the rights of women in Africa. The principles enshrined in the Protocol are in some instances based on existing international human rights standards, but in many others significantly advance international human rights standards which specifically enhance the protection and promotion of women's rights in Africa. In particular, the Women's Rights Protocol makes explicit the protection of women's rights in areas which are not expressly covered by existing treaties.<sup>374</sup> It is the first international law instrument to call for an end to all forms of violence against women, whether in private or in public, including sexual harassment and the protection of a woman's right to seek abortion under certain conditions. The Protocol defines what constitutes discrimination and violence against women and proceeds to outline measures which state parties are required to take in both the public and private spheres to put to an end such practices.<sup>375</sup> The Protocol among other things requires African governments to eliminate all forms of discrimination and violence against women in Africa and to promote equality between men and women.<sup>376</sup> Member states are obliged to integrate a gender perspective in their policy decisions, legislation, development plans, and activities, and to ensure the overall well-being of women.<sup>377</sup> The Protocol defines discrimination against women to mean the following:

“... is any distinction, exclusion or restriction or any differential treatment based on sex whose objectives or effects compromise or destroy the recognition, enjoyment or exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.”<sup>378</sup>

There is similarity of the definition of discrimination provided by the Maputo Protocol and that of Article 1 of CEDAW, although there are minor points of difference. For instance, the Maputo Protocol definition does not contain the phrase that the enjoyment of rights is to be 'on a basis of equality of men and women'. Moreover, instead of listing all the contexts in which discrimination can occur as CEDAW does (“...political, economic, social, cultural, civil or any other field...”), the Maputo Protocol puts all these together in one phrase: “...in all spheres of life”. This definition of the Maputo Protocol excludes girls in the understanding of women.

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<sup>374</sup>Ibid.

<sup>375</sup>Articles 1 and 2 of the Maputo Protocol.

<sup>376</sup>Article 2 of the Maputo Protocol.

<sup>377</sup>Articles 2 and 3 of the Maputo Protocol.

<sup>378</sup>African Protocol on Women's Rights Article 1(f).

The Maputo Protocol recognizes that much of the controversy about the human rights of African women is the issue of cultural values and their interpretation; consequently it acknowledges the importance of African culture, but makes a plea for the inclusion of African women in the formulation of cultural values which it argues should not discriminate on the basis of gender under Article 17(1). The Protocol also puts African cultural values into a filter under paragraph 2 of its Preamble, which states:

“Women shall enjoy, on the basis of equality with men, the same rights and respect for their dignity and contribute to the preservation of those African cultural values that are positive and are based on the principles of equality, dignity, justice and democracy.”<sup>379</sup>

These words in the Preamble do not only give some meaning to the concept of African values which are missing from the African Charter, but put it clearly that in invoking these values, the issue of permitting different entitlements to men and women because they have different roles and responsibilities within their societies is not to be permitted. Because there is provision for women to enjoy rights on the basis of equality with men, the entitlement of men and women may not be different in any way. Furthermore, the Preamble recognizes that unequal relations at domestic level are often a reflection of unequal power relations at national level. Given the importance of culture in the construction of women's entitlement to enjoy their human rights in Africa, the Maputo Protocol echoes Article 5(a) of CEDAW in its Article 4(b), and specifies that state parties should undertake to:

“...modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

The Protocol requires state parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards.<sup>380</sup> Female genital mutilation (FGM) is specifically mentioned by the Protocol as a traditional practice that is harmful to women and needs to be eliminated.<sup>381</sup> The Maputo Protocol also requires African states to play a proactive role in order to eliminate harmful cultural, traditional and other practices based on the idea of the inferiority or

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<sup>379</sup>In the version of the Protocol that was finally adopted, this provision was amended and moved to the Preamble.

<sup>380</sup>Article 5 of the Maputo Protocol.

<sup>381</sup>Article 5 of the Maputo Protocol.

superiority of either of the sexes, or on stereotyped roles for men and women. Article 17 of this Protocol obliges states to ensure the right of women to live in a positive cultural context. The Maputo Protocol sets forth a broad range of economic and social rights, including the right to equal pay for equal work and the right to adequate and paid maternity leave in both the public and private sectors.<sup>382</sup> It endorses affirmative action to promote the equal participation of women at all levels of decision-making and calls for equal participation of women in law enforcement and the judiciary.<sup>383</sup> It thus recognizes the right of women to participate in the promotion and maintenance of peace. The Women's Rights Protocol further provides important protections for adolescent girls as well as for particularly vulnerable groups of women, including widows, elderly women, disabled women, poor women, women from marginalized population groups, and pregnant or nursing women in detention.<sup>384</sup>

Family rights such as marriage, separation, divorce and annulment of marriage are also addressed.<sup>385</sup> The Protocol provides that marriages that take place without the free and full consent of both parties are outlawed while the minimum age of marriage for women is set at 18 years of age.<sup>386</sup> This Protocol goes further and calls upon state parties to take measures to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Article 7 of the Protocol provides for rights which wives are entitled to in case of separation, divorce or annulment of marriage. The Maputo Protocol therefore encourages monogamy as the preferred form of marriage. Family rights in the Protocol have extended to the protection of widows. The provision also requires that a widow automatically becomes the guardian and custodian of her children after the death of her husband unless this is contrary to the interest and the welfare of the children.<sup>387</sup> It guarantees the right of a widow to remarry and, in such an event, to marry a person of her choice. A widow's right to have an equitable share in the inheritance of the property of her husband is also addressed by this Protocol. The Protocol is the only treaty which so far has addressed women's rights in the realization that HIV/AIDS is a key component of women's sexual and reproductive rights. Reproductive rights and health

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<sup>382</sup>Kombo B Sow R & Mohamed F 'Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa' *Equality Now* (2013) 10.

<sup>383</sup>*Ibid.*

<sup>384</sup>AWID (note 363) above.

<sup>385</sup>Article 6 of the Maputo Protocol.

<sup>386</sup>Article 6 of the Maputo Protocol.

<sup>387</sup>Article 20 of the Maputo protocol.

rights of African girls and women are also addressed by this Protocol while Article 15 covers women's right to food security which is an important right and a huge issue in Africa.<sup>388</sup>

Special provision for the protection of elderly women with regard to their physical, economic and social needs and especially to ensure their right to freedom from violence is also available in the Protocol.<sup>389</sup> State parties are also required to ensure the protection of women with disabilities and to adopt measures to facilitate their access to employment and professional and vocational training.<sup>390</sup> Other women's rights guaranteed in the Maputo Protocol include the right to life and security, access to justice and equal protection before the law, the right to participate in political and decision-making processes, the right to peace, protection of women in armed conflicts, the right to education and training, economic and social welfare rights, the right to adequate housing, the right to sustainable development, and special protection of women in distress.<sup>391</sup>

It is important to note that there are two contentious issues in the Maputo Protocol which have resulted in opposition to it. One issue is reproductive health, especially in terms of abortion which is opposed mainly by Catholics and other Christians. The other issue involves the provisions in terms of female genital mutilation, polygamous marriages, and other traditional practices.<sup>392</sup> These are some of the reasons that led to the slow ratification of the Protocol by many African states when it was first introduced.<sup>393</sup>

Implementation procedures of the Maputo Protocol are provided under Article 26 which calls state parties to ensure the implementation of the Protocol at national level through the submission of periodic reports as provided by Article 62 of the African Charter on Human and People's Rights. State parties are required to indicate the legislative and other measures undertaken for the full realization of the rights enumerated in the Protocol. Matters of interpretation arising from the application and implementation of the Maputo Protocol are handled by the African Court on Human and People's Rights (AfCHPR).<sup>394</sup> This Court came

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<sup>388</sup>Article 15 of the Maputo protocol.

<sup>389</sup>Article 22 of the Maputo protocol.

<sup>390</sup>Article 23 of the Maputo protocol.

<sup>391</sup>Articles 11–19 of the Maputo Protocol.

<sup>392</sup>Human Life International *The Maputo Protocol, Clear and Present Danger* Human Life International (2009) 25.

<sup>393</sup>*Ibid.*

<sup>394</sup>The AfCHPR was established by an Optional Protocol to the African Charter of Human and People's Rights.

into force on 25 January 2004 with the ratification by fifteen member states for establishing it.<sup>395</sup> The AfCHPR has the mandate to deal with all cases and disputes submitted to it concerning the interpretation and application of the AfCHPR, the Maputo Protocol, and any other relevant human rights instrument ratified by the states concerned.<sup>396</sup> Apart from that, the AfCHPR has the capacity to issue advisory opinions on any legal matter relating to the ACHPR or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the AfCHPR.<sup>397</sup> The AfCHPR has the power to entertain cases challenging violations of human rights, including civil and political rights and economic, social and cultural rights guaranteed under the African Charter.<sup>398</sup> The Court consists of eleven judges who are nationals of member states to the AU.<sup>399</sup> The integration of the Protocol into the African Charter ensures that women whose rights have been violated under the Protocol have access to the AfCHPR and the African Commission for the vindication of these rights.

Before AfCHPR was entered into force, matters of interpretation of the AfCHPR were referred to the African Commission of Human and People's Rights (ACmHPR) that was established under Article 30 of the African Charter in 1988. ACmHPR has been receiving and determining cases of human rights violations in Africa.<sup>400</sup> It has through the years developed a valuable and unique African body of human rights case law, including cases on women's rights such as<sup>401</sup> *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt (2013)* which was the first decision of ACmHPR regarding women's rights. The case involved issues of gender-based violence, sexual violence and freedom of speech of four women journalists. Another case was *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v Sudan (2009)* which involved sexual and gender-based violence against women and girls in the Darfur conflict in 2003. The Commission found that Egypt failed to protect four women journalists from violence and in doing so violated their human rights, including the right to equality and non-discrimination, and the right to dignity and protection from cruel inhuman

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<sup>395</sup>The Protocol that established the African Court on Human and People's Rights was adopted by the OAU Assembly of Heads of State and Governments in 1998.

<sup>396</sup>Article 7 of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>397</sup>Article 4 of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>398</sup>Article 7 of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>399</sup>Article 11 of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>400</sup>This procedure of receiving cases is referred to as a communications procedure.

<sup>401</sup>Cornell Law School 'Women and justice: African Commission on Human and People's Rights'. Available at <http://www.lawschool.cornell.edu/womenandjustice/Legal-and-Other-Resources/African-Commission-on-Human> accessed on 25 May 2016.

and degrading treatment. Another famous case that was decided by the ACmHPR was *Interights (on behalf of Husaini and Others) v Nigeria (2005)* concerning harmful traditional practices and gender discrimination. The complaint was filed by an international human rights organization on behalf of Ms Safiya Hussaini and others against Nigeria's Islamic Sharia courts, which had sentenced Safiya Hussaini, a nursing mother, to death by stoning for adultery. ACmHPR also decided on the case of *Doebbler v Sudan (2003)*. In this case, eight female students of the university were punished with fines and 25 to 40 lashes for engaging in immoral activities such as wearing trousers, dancing with men, crossing legs with men, sitting with boys, and sitting and talking with boys. The lashings took place in public by use of a wire and plastic whip and the girls were bareback in public while they were lashed. The Commission found that the lashing punishments violated Article 5 of the African Charter and requested Sudan to abolish the punishment of lashing and compensate those girls for their injuries.

The ACmHPR is still working *mutandis mudandis* with the AfCHPR on hearing cases of violations of human rights in Africa. The AfCHPR has so far determined two human rights cases, namely *Michelot Yogogombaye v the Republic of Senegal Application No. 001/2008* and *African Commission on Human Rights and People's Rights v Great Socialist People's Libyan Arabs Jamahiriya No. 004/2011*.

The main function of the ACmHPR is to promote and ensure the protection of human rights on the African continent. The ACmHPR has a mandate to deal with promotional and productive activities which include complaints, examining state parties' reports, and the interpretation of the African Charter.<sup>402</sup> The jurisdiction of ACmHPR is also compulsory and automatic for those states that have ratified its founding treaty.<sup>403</sup> ACmHPR usually sits twice a year in April and November in Banjul, Gambia. It is composed of eleven members who are chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and people's rights. However, particular consideration is being given to persons with legal experience.<sup>404</sup> Article 6 of the Protocol for the establishment of AfCHPR states that the ACfHPR will rule on admissibility

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<sup>402</sup>The ACmHPR's competence to hear and determine complaints against state parties is regulated by Articles 47–59 of the ACmHPR.

<sup>403</sup>Ibid.

<sup>404</sup>Article 31 of the ACmHPR.

of cases, but it may request the opinion of the ACmHPR and may consider cases or transfer them to the ACmHPR.

The Maputo Protocol offers a real remedy for women at regional level when remedies for violations are exhausted at national level; something which gives women victims of human rights violations an alternative forum, especially when remedies for violations are not available at national level.<sup>405</sup> Individuals, including individuals other than the victims themselves and NGOs, are allowed to bring a complaint on behalf of victims. However, Article 34(6) of the Protocol, which established this Court, requires the Court to receive individual petitions when the state against which the complaint has been lodged has recognized the competence of the AfCHPR to receive such communications. So far, very few African countries, including Tanzania, Burkina Faso, Ghana, Malawi and Mali, have recognized such competence.<sup>406</sup> The right of individuals to seek redress is gravely affected by this provision. The AfCHPR has the capacity to pass binding decisions against states found in violation of human rights guarantees.<sup>407</sup> In this regard, state parties are required not only to comply with the judgment in any case to which they are party, but also to guarantee the execution of such judgments.<sup>408</sup> Free legal representation is given to parties that appear before the AfCHP if the interests of justice so require.<sup>409</sup> The Court also has the mandate to take provisional measures and to order the payment of compensation.<sup>410</sup> The AU Council of Ministers has a duty to monitor the implementation of the decisions of AfCHPR, consequently injecting a political element into enforcement.<sup>411</sup>

The Maputo Protocol still has some inadequacies and has missed opportunities to address a number of issues that continue to plague African women despite its numerous progressive provisions.<sup>412</sup> For instance, it has failed to address HIV/AIDS from a human rights perspective by omitting to connect it with other women's human rights such as the freedom from discrimination and the right to dignity and bodily integrity.<sup>413</sup> Also, the right to sexual and reproductive health that is guaranteed in Article 14 of the Maputo Protocol is limited in its

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<sup>405</sup>Njorogel (note 368) above.

<sup>406</sup>Ibid.

<sup>407</sup>Article 27 of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>408</sup>Article 30 of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>409</sup>Article 10(2) of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>410</sup>Article 17 of the Protocol on the ACHPR on the establishment of AfCHPR.

<sup>411</sup>Njorogel (note 368) above.

<sup>412</sup>Mukumu I 'The Maputo Protocol: Evaluating women's rights' *Pambazuka News* 11 June 2015.

<sup>413</sup>Ibid.



scope to the extent that it only provides for the right to be informed of one's status and that of one's partner. The Protocol fails to appreciate that women living with HIV/AIDS face serious stigmatization and violations of their reproductive and health rights.<sup>414</sup> For example, in the Namibia case of *L M, M I and N H v the Government of Namibia (2012) [2]*, the High Court of Namibia held that the government of Namibia was liable for the sterilization of women living with HIV/AIDS without their consent and to provide monetary compensation to the women. The Protocol therefore fails to effectively protect the rights of women as a special interest group who suffer due to their HIV/AIDS status. Moreover, the Maputo Protocol is condemned for legitimizing the death penalty and for missing an opportunity to encourage states to abolish the death penalty in totality as it merely calls upon states that have the death penalty not to enforce it against pregnant women and nursing mothers.<sup>415</sup>

Additionally, the Protocol is silent on the obligation of states to address the issue of the right of women to pass on nationality despite of it being clear on the elimination of discrimination against women. Consequently, the Protocol in this instance fails to guarantee the equal right of women in respect of nationality, leaving it to state parties' discretion.<sup>416</sup> Some writers also condemn the Maputo Protocol as an assault on the African family and unborn children in that it contributes to the continued breakdown of the traditional family due to Article 14(2)(c), which talks about comprehensive access to reproductive health care, including safe abortions.<sup>417</sup> Some African states even ratified it with reservations around that particular article.<sup>418</sup> Article 14(20)(c) states:

“State parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”

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<sup>414</sup>Njorogel (note 368) above.

<sup>415</sup>Ibid.

<sup>416</sup>Mukumu I (note 412) above.

<sup>417</sup>Family Watch International 'The Maputo Protocol' (2009). Available at [http://www.familywatchinternational.org/fwi/documents/fwipolicybriefmaputoprotocol\\_000.pdf](http://www.familywatchinternational.org/fwi/documents/fwipolicybriefmaputoprotocol_000.pdf): Also Human Life International (note 394) above.

<sup>418</sup>Countries such as Burundi, Sudan, Rwanda Senegal and Libya.

As a way of further clarifying some of the contents of Article 14 of the Protocol, the ACmHPR has issued two important General Comments in this regard.<sup>419</sup> The second General Comment focuses on provisions for women's reproductive self-determination as stipulated in Article 14(1) and (2) of the Maputo Protocol.<sup>420</sup> The Commission explains that reproductive self-determination encompasses women's right to make autonomous and voluntary decisions concerning their reproductive health and being able to fulfil those decisions.<sup>421</sup> It further provides that social norms and structures which promote and sustain gender-based inequality must be addressed and transformed in order for women to meaningfully claim and enjoy their reproductive freedom and rights. The General Comments serve as an authoritative interpretation of the provisions of the Maputo Protocol that should guide states in realizing their obligations under the treaty.

### 2.6.2 *Solemn Declaration on Gender Equality in Africa (SDGEA)*

Africa has other instruments that also safeguard women's rights, such as the Declaration on Gender Equality according to which all state members of the AU have reaffirmed their commitment to the principle of gender equality. The AU Heads of State summit adopted a Solemn Declaration on Gender Equality in Africa (SDGEA) as well as a Gender Policy in order to promote and expand the gender parity principle, the active promotion and protection of the human rights of the women and girls, legislation in favour of women's rights as it relates to land ownership and housing, among others.<sup>422</sup> The AU embarked on a new chapter of moving forward the gender equality agenda in Africa on July 2004, representing another milestone for women's effective participation. The AU adopted the Solemn Declaration on Gender Equality in Africa (SDGEA) at its Summit meeting in Addis Ababa, Ethiopia. For the first time in history, an African continental organization took ownership of gender mainstreaming at the highest level, calling for the continued implementation of gender parity in the AU and at national level, the ratification of the Maputo Protocol, and the protection of women against

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<sup>419</sup>Initiative for Strategic Litigation in Africa ( ISLA) Colloquium on Advancing Sexual and Reproductive Health and Rights in Africa through Strategic Litigation, Thematic Workshop on Article 14 of the Maputo Protocol: Johannesburg, 22–23 June.

<sup>420</sup>General Comment No. 2 on Article 14.1(a), (b), (c) and (f) and Article 14. 2(a) and (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted by ACmHPR in its 55<sup>th</sup> Ordinary Session held from 28 April–12 May 2014 in Luanda, Angola.

<sup>421</sup>Ibid.

<sup>422</sup>Stefiszyn K 'The African Union: Challenges and opportunities for women' *Africa Human Rights Law Journal*, 5(2) (2005) 358–386.

violence and discrimination.<sup>423</sup> The SDGEA reaffirms its commitment to the principle of gender equality as enshrined in Article 4(1) of the Constitutive Act of the African Union, as well as in other existing commitments, principles, goals and actions set out in various regional, continental and international instruments on human and women's rights. These instruments include CEDAW, UN Security Council Resolution 1325 (UNSCR 1325), and the Millennium Development Goals (MDGs).<sup>424</sup> The SDGEA covers several gender issues and reiterates the implementation of earlier commitments that African heads of states had made to address gender inequality in various sectors. It also acknowledges the unfavourable status that women hold in relation to literacy and education and the negative impact this brings about in all dimensions of women's lives.<sup>425</sup>

Among the issues included are: ensuring the active promotion and protection of all human rights for women and girls; hastening the implementation of gender specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic;<sup>426</sup> extending the gender parity principle adopted regarding the Commission of the African Union to all the other organs of the African Union;<sup>427</sup> and actively promoting the implementation of legislation to guarantee women's land, property and inheritance rights, including their right to housing.<sup>428</sup> The declaration also provides the specific measures that states need to take to ensure the education of girls and the literacy of women, especially in rural areas, to achieve the EFA goals.<sup>429</sup> The African Women's Movement, after several consultations on how to best use the SDGEA to advance the African Women's agenda, decided to create the campaign called 'Gender is my Agenda' (GIMAC) a year after the adoption of the SDGEA.<sup>430</sup> The purpose of the GIMAC campaign was to collectively advocate for the implementation of the SDGEA by heads of state and to inform and mobilize civil society around the SDGEA.<sup>431</sup> The Campaign was officially launched at the 8<sup>th</sup> Women's Pre-Summit held in Banjul, Gambia, in June 2006. The AU member states committed themselves to report annually on progress made in terms of gender

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<sup>423</sup>Articles 9 and 4 of SDGEA.

<sup>424</sup>Preamble to the SDGEA.

<sup>425</sup>African Union Solemn Declaration on Gender Equality in Africa. Electronic Library on Girls' Education. Available at <http://library.unesco-icba.org/English/Girls%20Education> accessed on 27 November 2015.

<sup>426</sup>Article 4 of the SDGEA.

<sup>427</sup>Article of the SDGEA.

<sup>428</sup>Article of 7 the SDGEA.

<sup>429</sup>Article 8 of the SDGEA.

<sup>430</sup>The campaign was introduced during the 6<sup>th</sup> Women's Pre-Summit Consultative meeting held in Tripoli, Libya in July 2005.

<sup>431</sup>Available at <http://www.genderismyagenda.com/campaign/sdgea.html> accessed on 27 November 2015.

mainstreaming and to support and champion all issues raised in the declaration, both at national and regional levels, and to regularly provide each other with updates on progress made during their Ordinary Sessions.<sup>432</sup> The reporting procedure is to assist member states to share best practices and to identify areas in need of improvement in order to enhance the status of women.<sup>433</sup> It also serves as a form of peer review and peer learning.<sup>434</sup>

The AU chairperson is also obliged by the Declaration to submit an annual report, during the Ordinary Sessions, on measures taken to implement the principle of gender equality and gender mainstreaming, and all issues raised in the Declaration both at national and regional levels.<sup>435</sup> However, a report found that only eighteen out of the 53 African (34 per cent) member states had honoured the commitment of subsequent reporting on progress made in implementing the SDGEA as required by Article 12.<sup>436</sup> The Declaration is an important African instrument for promoting gender equality and women's empowerment, as it strengthens the ownership of the gender equality agenda and keeps the issues alive at the highest political level on the continent. It hence serves as a reporting framework for member states on gender equality and women's empowerment. This Declaration has resulted in a lot of implementation frameworks, including the Declaration of the Women's Decade (DWD) 2010–2020 that provides a road map for the realization of the objectives for the DWD.<sup>437</sup> It also intends to strengthen the Directorate through funding of initiatives planned for the DWD and the Gender Development Directorate (WGDD) and to establish a coherent dialogue on gender.<sup>438</sup> The theme of the DWD is 'Grassroots Approach to Gender Equality and Women's Empowerment' which emphasizes a bottom-up approach to development.<sup>439</sup> At the national level, DWD committees take responsibility for the development of annual work plans and budgets for the committees at all levels and the preparation of annual reports on the activities for the implementation of the

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<sup>432</sup>Article 12 of the SDGEA.

<sup>433</sup>19th African Women's Pre-Summit Consultation on Gender Mainstreaming in the African Union Report by Paul Mpayimana GFP, UNESCO, Addis Ababa, January 24–26 (2012) Addis Ababa, Ethiopia.

<sup>434</sup>AUC workshop to assess the implementation of the Solemn Declaration on Gender Equality in Africa (SDGEA) by Member States. Available at <http://www.au.int/en/newsevents/14736/auc-holds-workshop-assess-implementation-solemn-declaration-gender-equality-africa#sthash.oZQC4LrS.dpuf> accessed on 25 November 2015.

<sup>435</sup>Article 13 of the SDGEA.

<sup>436</sup>Solidarity for African Women's Rights (SOAWR) 'Evaluation of the Solemn Declaration on Gender Equality' SOAWR September 2014. Available at <http://www.soawr.org/tags/solemn-declaration-gender-equality-africa-sdgea> accessed on 26 November 2015.

<sup>437</sup>Stefiszyn (note 422) above.

<sup>438</sup>Ibid.

<sup>439</sup>Udombana N J 'The institutional structure of the African Union: A legal analysis' *California Western International Law Journal* 33 (2012) 61–69.

DWD. At regional level, it oversees the setting up of working committees for the African Women's Decade, it supports advocacy campaigns, and prepares annual reports on the activities for the implementation of the Decade.

Another implementation framework resulted from the SDGEA is the financing mechanism called Fund for African Women which was created as a single mechanism to ensure policy implementation as well as the effective mainstreaming of gender in policies, institutions and programmes at regional, national and local levels.<sup>440</sup> Fund for African Women became operational in 2011.<sup>441</sup> The AU organs and member states in this regard are committed to allocating a budget for the implementation of policy. Member states have been requested to devote one per cent of the assessed contribution to the Fund and some member states have contributed more because the funds mobilized through this means are not sufficient to strengthen partnerships with international financial agencies and institutions to increase technical expertise and to facilitate the exchange of best practices and financial support for the implementation of AU gender policies.<sup>442</sup> The Fund has supported 53 grassroots projects across 27 AU member states during its first year of operation in 2011. Other UN countries like Australia have also supported the fund. Though all these instruments have enabled the member states and the RECs to advance their own legal, administrative and institutional frameworks to make progress on women's rights and gender equality, many lack political backing and resources, constraining the use of these tools and the implementation of strategies.<sup>443</sup> Most instruments adopted by the AU since 2003 have provisions for gender equality and women's participation.<sup>444</sup>

### 2.6.3 *The African Charter on the Rights and Welfare of the Child*

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the OAU in 1990 and, in 2001, the OAU legally became the AU and the ACRWC entered into force in 1999.<sup>445</sup> Like the United Nations Convention on the Rights of the Child (CRC), the

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<sup>440</sup>Omotosho B J 'African Union and gender equality in the last ten years: Some issues and prospects for consideration' *Journal of Integrated Social Sciences*. Available at [www.JISS.org](http://www.JISS.org)- 5(1) (2015) 92–104.

<sup>441</sup>*Ibid.*

<sup>442</sup>Udombana (note 439) above.

<sup>443</sup>*Ibid.*

<sup>444</sup>Omotosho (note 440) above.

<sup>445</sup>Article 3 of the ACRWC.

ACRWC is a comprehensive instrument that sets out the rights of children and defines universal principles and norms for their status. The ACRWC and the CRC are the only international and regional human rights treaties that cover the whole spectrum of civil, political, economic, social and cultural rights. The ACRWC covers women's rights by specifically providing for the rights of the girl child to have access to education, and for a pregnant girl to be afforded an opportunity to complete her education. This article requires state parties to the Charter to employ all appropriate measures to ensure that children who become pregnant before completing their education are given the opportunity to continue with their education on the basis of their individual ability.<sup>446</sup> The ACRWC also guarantees the right of girls to not be exposed to harmful social practices that affect the welfare, dignity, normal growth and development of the child. In particular, it addresses those customs and practices that are prejudicial to the health or life of the child and those customs and practices that are discriminatory to the child on the grounds of sex or other statuses, which include female genital mutilation.<sup>447</sup> This Charter also addresses sexual exploitation and the sale, trafficking and abduction of children, all of which primarily affect the girl child.<sup>448</sup>

The African Committee of Experts on the Rights and Welfare of the Child was established in 2001 pursuant to Articles 32 through 46 of the ACRWC. This Committee under Article 44 considers communications received about violations of children's rights, including girls' rights. Other provisions of the ACRWC which are relevant to women's rights include Article 3 which provides for the eradication of discrimination of every kind to children, including sex discrimination. Also, Article 5 provides for survival and development and states that every child has an inherent right to life. The ACRWC also covers the protection of privacy for all children under Article 10 which provides as follows:

“No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to the attacks upon his honor or reputation.”

Health and health services in general have been included in the ACRWC, as these are among the rights that teach women appropriate skills to a large extent.<sup>449</sup> Article 14(2) of the ACRWC obliges state parties to undertake measures to reduce infant and child mortality rates and to ensure appropriate health care for expectant and nursing mothers. The ACRWC protects all

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<sup>446</sup>Article of 11 of the ACRWC.

<sup>447</sup>Article 21 of the ACRWC.

<sup>448</sup>Article 29 of the ACRWC.

<sup>449</sup>Article 14(1).

children against abuse and torture of all forms, including sexual abuse, which is the kind of abuse that happens more to girls than to boys. Research has shown that as many as 1 out of 4 girls and 1 out of 6 boys will experience some form of sexual abuse before the age of 18.<sup>450</sup>

Article 16 of the ACRWC requires states parties to take specific legislative, administrative, social and educational measures to protect the child against abuse. This provision also specifies these protective measures, including effective procedures for the establishment of special monitoring units to provide the necessary support for the child and for those who have the care of the child, as well as other forms of prevention. It also addresses identification, reporting, referral, investigation, treatment, and follow-up processes in instances of child abuse and neglect.<sup>451</sup> Likewise, child marriages and the betrothal of girls are prohibited by this charter. The ACRWC also provides for effective action to be taken by states, including enacting legislation that specifies the minimum age of marriage to be 18 years and the compulsory registration of all marriages in an official registry.<sup>452</sup> The ACRWC also includes in the recognition of the notion that children have rights to understand that both parents without discrimination are under an obligation to provide and care for their children in equal measure.<sup>453</sup> This situation occurs increasingly in African societies. For example, whatever the marital regime of the spouses, when the children are young the maternal preference prevails and women are given custody of children in the majority of cases, which is a practice that reflects the uneven burden placed on women. This practice is supported by a gender stereotyping inherent in the operation of the maternal preference rule which constructs women's role as being the nurturers of children.<sup>454</sup>

#### 2.6.4 *The AU Gender Policy*

The AU Gender Policy process began as early as 2006 with the strategy to present the policy to the AU summit in 2007. The policy was rooted in the ACHPR, the SDGEA and the Post Conflict Reconstruction and Development initiative which heads of state and governments

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<sup>450</sup>Centre for Disease Control and Prevention 'Adverse childhood experiences study: Data and statistics' Centre for Disease Control and Prevention, National Centre for Injury Prevention and Control (2005). Available at <http://www.cdc.gov/nccdphp/ace/prevalence.htm> accessed on 26 November 2015.

<sup>451</sup>Article 16(2) of the ACRWC.

<sup>452</sup>Article 21(2) of the ACRWC.

<sup>453</sup>Article 20 (10) (a-c).

<sup>454</sup>Banda (note 110) above.

adopted in 2006. In 2009, the AU approved the first ever AU Gender Policy together with the Action Plan which were both adopted in 2010. This document summarises decisions and declarations of the AU Assembly and other global commitments on gender and women's empowerment. It thus demonstrates the continued leadership of the AU in advancing gender equality in Africa. Some of the decisions presented in the policy were a reflection of the 1948 UN Charter and the UDHR emphasizes the freedom of humans irrespective of gender differences. According to AU, it has participated in almost all the activities and subdivisions of the UN which facilitated understanding of the complexities and dimensions of women's empowerment.<sup>455</sup> The policy is divided into four parts. Part one deals with the historical background to gender issues in Africa; part two deals with policy goals, principles and targets; part three presents the commitment of the policy; and the last part explores and explains the institutional framework for the implementation of the policy.<sup>456</sup> This Gender Policy offers the basis for the eradication of barriers to gender equality and fosters the reorientation of existing institutions by making use of gender disaggregated data and performance indicators.<sup>457</sup> It also provides a mandate for the operationalization of GA commitments and the accompanying comprehensive Action Plan guides the implementation of these commitments by AU organs which will be reviewed periodically.

The AU Gender Policy also complements ongoing implementation of these commitments at member states level and in regional economic communities (RECs).<sup>458</sup> Likewise, the policy establishes measures to hold heads of states, governments and the managers of different organisations in Africa accountable for policy implementation. It is the supreme organ of the AU which also has the function to determine the sanctions to be imposed on any member state for non-compliance with the decision of the Union.<sup>459</sup> The policy commitments target eight areas and one of the commitments is the creation of an enabling and stable environment to ensure that all decisions and political declarations are geared towards the eradication of persisting barriers that militate against gender equality and women's empowerment.<sup>460</sup> The

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<sup>455</sup>Omotosho (note 440) above.

<sup>456</sup>African Union Gender Policy (10 February 2009). Rev. 2. Available at <http://wgd.au.int/en/content/african-union-gender-policy> accessed on 27 November 2015.

<sup>457</sup>Ibid.

<sup>458</sup>Kikwete J Former Chairperson of the Assembly of the AU and President of the United Republic of Tanzania, in the Preface of AU Gender Policy. Available at [www.chr.up.ac.za/gender/african%20union%20gender%20policy.d](http://www.chr.up.ac.za/gender/african%20union%20gender%20policy.d) accessed on 17 June 2016.

<sup>459</sup>Olga M 'The African Union's mechanisms to foster gender mainstreaming and ensure women's political participation and representation.' International Institute for Democracy and Electoral Assistance (2013) 5.

<sup>460</sup>Ibid.



Action plan requires gender parity and representation to be enforced in all AU structures; something which they have already achieved by charging the Commission with the appointment of five women and five men.<sup>461</sup> Other commitments include the development of policies that support gender mainstreaming and capacity building in gender mainstreaming in the field of gender mainstreaming and avoiding duplication of efforts, resources and interventions; and promoting best practices on the continent by facilitating the alignment, harmonization and effective implementation of RECs and member states' gender policies. A target was determined in 2011 for implementation where appropriate, but this has not yet been achieved.<sup>462</sup> The Commission initially developed a five-year Gender Mainstreaming Strategic Plan (GMSP) for social and political clusters, aimed at providing a framework for the AUC, RECs, AU organs and member states in gender mainstreaming and women's empowerment. Once the Gender Policy had been approved, the GMSP was revised and aligned with the Action Plan for the Women's Decade.

The Action Plan guides the implementation of commitments by AU organs, member states and RECs and is reviewed periodically through the establishment of gender-responsive political and governance policies, the adoption of affirmative action programmes, and quota shares and representation to increase women's participation in decision making.<sup>463</sup> The policy also aims to build accountable governance and gender-sensitive democracies, to establish accountability mechanisms to promote gender-equality commitments, and to build capacity for women to become effective political actors.<sup>464</sup> The Commission has begun operationalizing the Gender Management System (GMS) as part of the new AU Specialized Technical Committee structure. Under this structure, ministers of gender and women's affairs will play an important role in determining policies applicable to the continent.<sup>465</sup> Until today, only a few AU member states have established the GMS which is under Part IV of the AU Gender Policy as an objective to be achieved by 2020.<sup>466</sup> Nevertheless, like other AU policies, the Gender Policy raises fears in

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<sup>461</sup>Economic Commission for Africa African Women's Report 2009: Measuring gender inequality in Africa: Experiences and lessons from the African Gender and Development Index. Available at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=443&menu=1515> accessed on 18 June 2016.

<sup>462</sup>The sixth AU Course on Gender Responsive Economic Policy-Making in Africa, AU and UN African Institute for Economic Development and Planning (IDEP) in February 2012.

<sup>463</sup>Kumar K 'Aftermath: Women and women's organizations in post conflict societies' USAID Evaluation Highlights No. 74, Center for Development Information and Evaluation. Washington, DC: USAID (2001).

<sup>464</sup>Ibid.

<sup>465</sup> Omotosho (note 440) above.

<sup>466</sup> Byanyima W 'Africa and gender equality: Priorities of the AU' in Akokpari J. *The African Union and its Institutions* Auckland Park: Fanele (2006) 19.

one's mind regarding its implementation.<sup>467</sup> The major problem for the establishment of GMS to AU member states is the mobilization and allocation of financial and non-financial resources to implement this policy and the Action Plan.<sup>468</sup> While seventy percent of member states have ratified this document, one is curious about the implementation of its provisions.<sup>469</sup> The evidence available regarding the commitment to the policy among member states in practical terms is not encouraging.<sup>470</sup> For example, large numbers of women in African countries are still marginalized based on religion and cultural factors, regardless of the fact that the Policy set aside 2011 as the date for actualization of many parts of its provisions.<sup>471</sup>

## 2.7 Protection of Women's Rights in African Sub-Regions

The AU is composed of 53 member states and seven regional Economic Communities (RECs) that represent African sub-regions.<sup>472</sup> At regional level, the AU has encouraged its member states to adopt, ratify, implement and domesticate treaties, conventions and decisions that carried consensus on gender equality issues among member states and that have played an important role in supporting research on gender issues.<sup>473</sup> At sub-regional level, the AU has provided guidance to the RECs in complementing and harmonizing global and regional frameworks by integrating and translating various resolutions and commitments into their policies and plans of action. Therefore, the EAC (East African Community), ECOWAS (Economic Community of West African States), SADC (Southern African Development Community), COMESA (Common Market for Eastern and Southern Africa), ECCAS (Economic Community of Central African States) and IGAD (Intergovernmental Authority on Development) have adopted gender policies and declarations in their policies and they have also taken seriously the issue of human rights of women. The RECs are expected to monitor the implementation of integration-related policies and programmes, to mobilize the necessary resources to support such policies and programmes, and to report on progress.<sup>474</sup> For instance,

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<sup>467</sup>Ibid.

<sup>468</sup>Olga M (note 459) above.

<sup>469</sup> Omotosho (note 440) above. Also Olga M (note 401) above.

<sup>470</sup> Murithi T 'The African Union as an international actor' in Mangala J (ed.) *Africa and the New World Era* New York: Palgrave Macmillan (2010) 18.

<sup>471</sup>Ibid.

<sup>472</sup>Stefiszyn (note 422) above.

<sup>473</sup>Office of the Special Advisor in Africa (OSAA) 'Gender equality and women's empowerment in Africa' OSAA (2015). Available at <http://www.un.org/en/africa/osaa/peace/women.shtml> accessed on 26 November 2015.

<sup>474</sup>Ponga A 'Gender equality is a right, but it's about economic growth too' *Mail & Guardian* 10 July 2015.

the RECs all possess dedicated gender units which include declarations and tools for gender audits and mainstreaming.<sup>475</sup>

SADC established a Gender Unit in 1996 as well as gender focal points at sector level and it adopted a Gender Policy Framework in 1997.<sup>476</sup> A SADC Plan of Action for gender and development was created to audit the programmes and to mainstream gender. SADC member states undertook in Article 6(2) of the SADC Treaty not to discriminate against any person on the grounds of, inter alia, race or gender.<sup>477</sup> SADC member states have dedicated themselves to mainstreaming gender into the SADC Programme of Action and other community building initiatives as a prerequisite for sustainable development.<sup>478</sup> They believe that the goals to deepen regional integration and strengthen community building can only be realised by eliminating gender inequalities and the marginalisation of women throughout the SADC region.<sup>479</sup> Consequently, they put paramount importance on implementing appropriate policies, legislation, programs, projects and activities aimed at ensuring gender equality and women's empowerment.<sup>480</sup> SADC heads of state, with the exception of Botswana and Mauritius, signed and adopted the SADC Protocol on Gender and Development in August 2008.<sup>481</sup> This Protocol has already been ratified by eleven of the thirteen member states that signed it.

Among others, the objectives of the Protocol are to eliminate discrimination, to achieve gender equality, and to provide for the empowerment of women through the implementation of gender responsive legislation, policies, programmes and projects.<sup>482</sup> It also seeks to harmonize the various international, continental and regional gender equality instruments that SADC member states have subscribed to. Therefore, the Protocol consolidates and creates synergies between various commitments on gender equality and women's empowerment into one comprehensive regional instrument that enhances the capacity to plan, implement and monitor the SADC

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<sup>475</sup>Ibid.

<sup>476</sup>Stefiszyn (note 422) above.

<sup>477</sup>Forere M & Stone L 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights?' *9 African Human Rights Law Journal* (2009) 334–458.

<sup>478</sup>Ibid.

<sup>479</sup>SANGONeT 'The SADC Gender Protocol: Are the 2015 objectives achievable?' *SANGONeT* Wednesday, 17 August 2011. Available at <http://www.ngopulse.org/article/sadc-gender-protocol> accessed on 22 March 2016.

<sup>480</sup>Ibid.

<sup>481</sup>Leboha L 'Examining women's socio-economic rights in SADC through protocols and treaties' *Open Social Initiatives for Southern Africa* 26 March 2015.

<sup>482</sup>Article 3.

gender agenda effectively.<sup>483</sup> The SADC Gender Protocol has innovatively provided for rights that do not appear in the Maputo Protocol and yet are important in the pursuit of gender equality. It has introduced an obligation which binds all government ministries and departments to include an allocation to gender equality awareness in their budgets.<sup>484</sup> However, there are some rights which have not been included in the SADC Gender Protocol without any strong reasons, although they appear in the Maputo Protocol. The rights which have been omitted include the protection of women against harmful traditional practices, special protection of elderly women, special protection of women in distress, the rights of women to choose the number of children they want to have, and the right to the decision concerning the spacing between these children. Also, the SADC Gender Protocol is silent on the protection of asylum seeking women, refugees, returnees and internally-displaced women, as contained in Article 11(3) of the Maputo Protocol.

The ECOWAS member states have also taken the initiative to adopt an ECOWAS legal instrument for the equality of rights between women and men, similar to the SADC Gender Protocol. The Council of Ministers from the fifteen ECOWAS member states also adopted the ECOWAS Gender Policy in 2004. The initiative for the adoption of an ECOWAS Protocol on Equal Rights between Women and Men (EWM) for sustainable development took root in 2008 at a workshop organized in Conakry, Guinea.<sup>485</sup> The meeting brought together the six Uniterria-partner Coalitions for Women's Rights and Citizenship in French-speaking West Africa.<sup>486</sup> They collectively took stock of the status of women's rights and found that women do not enjoy the effective exercise of their rights in spite of favourable legal instruments in place at all levels. It was also found that true and effective monitoring of commitments made by governments through legal instruments is practically impossible due to a lack of adequate indicators. They also realised that new issues and challenges faced by women are not adequately addressed by existing instruments. Currently, the different organisations and networks behind the initiative are mobilizing to raise awareness for the initiative among actors in the political and governmental arenas and to garner their support for the Protocol's adoption. Among the objectives of the draft proposal for an ECOWAS Protocol on Equality of Rights between

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<sup>483</sup>Article 1.

<sup>484</sup>Article 33(1) of the SADC Gender Protocol.

<sup>485</sup>Equal Rights for Women and Men 'Campaign for the Adoption of an ECOWAS Protocol on Equal Rights between Women and Men for sustainable development' Paper presented at a workshop organized in Conakry, Guinea (2008).

<sup>486</sup>Ibid.

Women and Men for Sustainable Development are: the drive to provide for women's economic empowerment; the elimination of discrimination; and initiatives to achieve gender equality and equity through the development and effective implementation of legislation and policies.

The founding treaty establishing the East African Community (EAC)<sup>487</sup> comprising the Republics of Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda contains the objective to enhance the role of women in socio-economic development under provisions in Chapter 22. Additionally, the EAC Treaty echoes Articles 2(f) and 5(a) of CEDAW which require states to abolish legislation and discourage customs that are discriminatory against women, to mainstream women's interests into the development process, and to improve their participation in decision making.<sup>488</sup> The Treaty also requires states to take appropriate measures to eliminate prejudices against women and to promote the equality of the female gender in line the male gender in every respect.<sup>489</sup> East Africa at sub-regional level has also passed the East African Community's Human Rights and People's Rights Bill.<sup>490</sup>

This Bill paved the way for the establishment of the East African Human Rights Commission. Women's rights are among the rights guaranteed in this instruments. Article 9 specifically provides that women and men have the right to equal treatment which includes the right to opportunities in political, economic, cultural and social activities. Equal rights in marriage have also been explicitly stipulated in this instrument under Article 13, which provides that both parties to the marriage have equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage, should it occur. Article 47(4) of the East African Community's Human Rights Bill of 2012 confers responsibilities to state organs and public officers to undertake and equip themselves to deal with the need of special groups within the society, including women. Currently, East African countries are campaigning to advocate for the East African Protocol for Gender Equality, which was inspired by the SADC Gender Protocol that identified core gender issues in the SADC region.<sup>491</sup> The East African Bill is expected to raise

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<sup>487</sup>Treaty establishing the East African Community in 1999, reproduced in part in Heyns (2004) (note 54) above vol. 1 at 634–39.

<sup>488</sup>Ibid. Article 1(a).

<sup>489</sup>Ibid. Article 1(e).

<sup>490</sup>This Bill was passed on April 2012 by the Legislative Assembly of the East African Community comprising Kenya, Tanzania, Uganda, and the Republics of Burundi, Rwanda and South Sudan.

<sup>491</sup>Nambaziira N. 'Regional Conference on the Proposed East Africa Community Gender Equality Bill, Kampala' *EASSI the Women Lexis* Issue 4 May 2015.

the profile of the needs of women and girls in East Africa and to catalyze regional and national action towards improving their social, economic and political status.

Likewise, foreign ministers of Arabian countries adopted the Cairo Declaration on Human Rights in Islam in 1990 (generally referred to as the Cairo Declaration),<sup>492</sup> which is premised on obedience to God.<sup>493</sup> It contains a non-discrimination provision which provides as follows:

“All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations.”

The reference to gender in the above definition means that discrimination against women is not allowed.<sup>494</sup> However, although all men are declared to be equal in human dignity, it is unclear whether dignity means the same thing for women as it does for men. Article 6(a) of this declaration also provides as follows:

“Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform; and has her own civil entity and financial independence, and the right to retain her name and lineage.”

However, the Cairo Declaration does not define dignity. The concept of dignity is an important part of African jurisprudence,<sup>495</sup> so it is unclear whether it is understood in the same way throughout the continent. For some dignity is seen as important in understanding and interpreting rights to equality.<sup>496</sup> If dignity is viewed from this perspective, it can be seen as enhancing existing rights, rather than limiting or prescribing different treatment for men and women.<sup>497</sup> However, based the language of Article 6(a), it is doubtful whether they fit this interpretation as the Article suggests that a woman's rights and duties are in some respects different from those of a man.<sup>498</sup> Suggestively, there does not appear to be room for negotiation or choice by women on the rights and duties front. However, the Declaration offers some more

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<sup>492</sup>Cairo Declaration on Human Rights in Islam (5 August 1990) UN GAOR, World Conference on Human Rights, 4<sup>th</sup> Session, Agenda Item 5 (1993) UN Doc A/CONF.157/PC/62/Add.18 (English translation).

<sup>493</sup>Ibid. Article 1(a).

<sup>494</sup>It is common in legal drafting to see the word 'all men' being used to mean all of humanity, including women.

<sup>495</sup>Cowen C 'Can "Dignity" guide South Africa's equality jurisprudence?' 17 *South African Journal on Human Rights* (2001) 34; Allain J & O'Shea A 'African Disunity: Comparing human rights law and practice of North and South African States' 24 *2 Human Rights Quarterly* 86 (2002) 107. See also the Constitution of Malawi 1994, Constitutional Principles s 12(iv); Constitution of Uganda 1995, Principles of State Policy XXIV (a).

<sup>496</sup>Banda (note 110) above at 52.

<sup>497</sup>Ibid.

<sup>498</sup>World Bank *MENA Development Report: Gender and Development in the Middle East and North Africa* Washington DC, World Bank (2004) 94–98.

generous provisions in terms of women's rights than those enjoyed by some of their non-Islamic sisters, such as the right to financial independence with no reciprocal obligations of support as well as a the right to retain their name.<sup>499</sup>

The Cairo Declaration makes it clear that the rights in the Declaration are subject to the Shari'a, and also that the Shari'a shall be the only interpretive source for the rights contained within it.<sup>500</sup> Nevertheless, the Arab Charter on Human Rights 1994<sup>501</sup> confirms its commitment to the ICCPR, ICESCR and the Cairo Declaration under its Preamble. The Arab Charter seems less equivocal than the Cairo Declaration in its construction of the rights of women as it provides the following:

“Each state party to the present Charter undertakes to ensure to all individuals within its territory and subject to its jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women.”<sup>502</sup>

Furthermore, the Arab Charter guarantees equality before the law and the right to a legal remedy.<sup>503</sup> Although these provisions suggest that the principles of non-discrimination and equality before the law are recognized without limitation and distinction between men and women, it is meaningless in light of the reservations expressed to CEDAW by many of the African states that are also state parties to the Arab Charter. This is because the interpretation of women's rights is only understood if they are endorsed by a conservative interpretation of the Shari'a.<sup>504</sup> Article 17 of the Arab Charter also seals off the private sphere of the family from scrutiny, as it states:

“Privacy shall be inviolable and any infringement thereof shall constitute an offence. This privacy includes private family affairs, the inviolability of the home and the confidentiality of correspondence and other private means of communication.”

This provision shields the family and home from investigation and accountability, which means that discrimination against women in the home may continue unchecked. However, it is the

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<sup>499</sup> Banda (note 110) above at 53.

<sup>500</sup> Articles 24 and 25 of the Cairo Declaration.

<sup>501</sup> Arab Charter on Human Rights (1994). Reprinted (1997) 18 *Human Rights Law Journal* 151. Available at <http://www1.umn.edu/humanrts/instree/arabhrcharter.html> accessed on 20 November 2015.

<sup>502</sup> Article 2 of the Arab Charter (1994).

<sup>503</sup> Ibid. Article 9.

<sup>504</sup> Banda (note 110) above at 54.

family's private sphere that is the springboard for defining the scope of women's ability to enjoy their right to equality and to participate in the public sphere.

## 2.8 Protection of Women's Rights in Tanzania

Since independence, Tanzania has joined the world's efforts to protect women's rights by signing and ratifying several treaties, but before those international treaties can come into force, the parliament is vested with the duty of enacting legislation to implement them and the executives are the ones who are mandated to initiate the process of incorporating them into the municipal laws of the country.<sup>505</sup> Unlike civil law countries where ratified international treaties form a direct part of their municipal laws, Tanzania as a common law country following the dualism principle which requires further incorporation of these international treaties into its domestic laws through legislation. However, Tanzania recognized the UDHR even before the introduction of the Bill of Rights under Article 9(a) and (f) of the Constitution which provides the following:

“[T]he state authority and all its agencies are obliged to direct their policies and programmes towards ensuring - (a) that human dignity and other human rights are respected and cherished; ... (f) that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.”

So far Tanzania has not enacted any specific law to incorporate the CEDAW and the Maputo Protocol. However, some of the contents of CEDAW and the Maputo Protocol are reflected in Tanzania's domestic legislation. For instance the Constitution, which is the supreme law of the land, contains provisions that support the principles of gender equality and non-discrimination. Articles 9, 12, and 13 of the Constitution support the equal treatment of men and women and cover a wide range of issues. The basic provision asserts that ‘All human beings are born free, and are equal. Every person is entitled to recognition and respect for his dignity’.<sup>506</sup>

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<sup>505</sup>The legislature plays no part in the treaty-making process in Tanzania. Therefore, if treaties were to become part of the law in Tanzania without legislative endorsement, wide law-making powers would be conferred on the executive. Constitutional amendments under Act No. 20 of 1992 vested the power to the National Assembly to ‘deliberate upon and ratify all treaties and agreements to which the United Republic of Tanzania is a party and the provisions of which require ratification. Article 63(3), (d) & (e) of the Constitution also gives the National Assembly the power to ‘enact legislation where implementation of international treaty requires legislation’. See Kamanga K ‘International human rights law as reflected in Tanzania's treaty and court practice’ in Binchy W & Finnegan C (eds) *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives* (2006) 53–70 at 54.

<sup>506</sup>Article 12(1) of the Constitution.



Subsequently, the principle of non-discrimination is laid down in Article 13(5) of the Constitution, which stipulates that the specific base upon which each law is established may not discriminate against gender. Accordingly, Article 13 guarantees the following:

“All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law. No legislative authority shall make any provision in any law that is discriminatory either in itself or in its effect. No person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the discharge of the functions of any state office or the party, and its organs.”

Article 9(g) of Tanzania’s Constitution also calls upon the government and its organs to give equal opportunities to all citizens, men and women alike. Furthermore, Article 9(f) incorporates the UDHR and calls upon the state and its organs to uphold the dignity of human beings through full compliance with the Declaration. Interestingly, Article 9(h) requires the state and its organs to eradicate all forms of injustice, discrimination, oppression or favouritism. These provisions specify that discrimination based on gender is a denial of equal opportunity and protection, which is prohibited under the Constitution. These clauses correspond with international and regional instruments, such as Articles 2 and 7 of the UDHR, Articles 2, 3 and 4 of CEDAW, and Articles 2, 3 and 5 of the Maputo Protocol. Theoretically, these clauses in the Constitution incorporate non-discriminatory norms that are encapsulated in them, and they state which discriminatory acts are prohibited by these treaties. The form and content of these rights correspond with international human rights standards. Nevertheless, it has been argued that these Articles of the Constitution are not an absolute guarantee of adherence to basic human rights due to the provision contained in Article 30(2) of the Constitution which states the following:

“...no provision contained in this Part of this Constitution which stipulates the basic human rights, freedom and duties shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law....”

The derogatory nature of this Article has been used to justify a virtual breach of fundamental rights, as some pieces of Tanzania’s legislation openly discriminate against women, contrary to the above Article of the Constitution and international treaties. In this context, it should be noted that customary law is recognised by this Article as part of the Tanzanian legal system and that it thus receives Constitutional recognition and protection.<sup>507</sup> The Constitution itself is

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<sup>507</sup>Article of the 11 of the Judicature and Application of Laws Act of 1920.

silent about what is to happen in the event of conflict between customary laws and Constitutional provisions which guarantee equality. Most of the time the difficulty arises in determining what to do when laws within a state are in conflict and in particular what should happen when personal laws violate the principle of equality. The derogatory clause which limits the proper application of the rights guaranteed in the Constitution paves the way for the infringement of those rights by other applicable legislation. It may thus be argued that, in most cases, the judiciary has been making decisions based on discriminating laws, because interpretations have been allowed to override the principles of equality as guaranteed in the Constitution in favour of customary and discriminatory laws. A nation's Constitution is its supreme law and, accordingly, all legislation and government actions should conform to the norms established in the Constitution. Constitutional measures that uphold the rights of women are therefore critical and can shape government practice. Many constitutions provide remedies that can form the basis for litigating violations of women's rights.

A national Constitution as a law of the highest authority; therefore it should be unambiguous in securing the equality of women and men in all matters. For instance, the constitutions of Ghana and Uganda contain provisions that protect women from harmful customary practices. Section 26(2) of Ghana's Constitution of 1992 provides the following:

“All customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited.”

More interesting is the Ugandan Constitution of 1995 under Section 33(6), which states:

“Laws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.”

Similarly, the constitutions of countries such as Namibia,<sup>508</sup> Malawi<sup>509</sup> and South Africa<sup>510</sup> clearly address the problem of inequality by provisions that stipulate that, in the event of a conflict, non-discrimination or equality provisions rank above the custom or culture under consideration. These countries' constitutions are termed as the most female-friendly constitutions that have been drafted after 1990.<sup>511</sup> Furthermore, the constitutions of these

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<sup>508</sup>Article 10 of Constitution of the Republic of Namibia of 1990.

<sup>509</sup>Articles 20(1) and 24(1) of the Constitution of Malawi of 1994. See also Malawi's Principles of national Policy, Article 13(a) (ii).

<sup>510</sup>Articles 9(1) and 9(3) South African Constitution of 1996.

<sup>511</sup>Byrnes A & Connors J (note 294) above.

countries provide that there can be no derogation from equality Articles even in the event of the declaration of a state of emergency.<sup>512</sup> The constitutions of other countries go further to reflect and acknowledge the sacrifices made by women during the struggle for liberation which led to the independence of their countries. For instance, the Constitution of Mozambique gives specific recognition to the sacrifices that women made in the war against the Portuguese.<sup>513</sup> These constitutions have subverted the existence of customary law in favour of equality before the law provisions. However, some other African countries' constitutions fail to address gender equality as they perpetuate the application of cultural rights by explicitly declaring that guarantees of non-discrimination are not applicable in matters governed by customary and religious law. These countries include Botswana, Lesotho, Zambia and Zimbabwe, which all expressly safeguard customary law, meaning that customary law is exempt from the scrutiny demanded by constitutions that are friendly to women.<sup>514</sup>

Most of the domestic legislation which is currently in operation in Tanzania was enacted by the British colonial authority to sustain the colonial system. This was done without careful consideration of the rights or welfare of the inhabitants and especially those of vulnerable groups such as women.<sup>515</sup> These laws were enacted before the principle of human rights was articulated and enshrined by the UDHR. Although Tanzania did not do much to change some British colonial legislation to incorporate the principle of human rights, efforts have been made to ensure that new laws which have been enacted since then reflect the principle of equality.<sup>516</sup> Additionally, most of the rights declared under UDHR have been incorporated into different pieces of domestic legislation, though it does not appear that they have been effectively enforced.<sup>517</sup> This is attributed to derogatory clauses which are provided in much of the country's domestic legislation, as well as ignorance among law enforcers and society in general.<sup>518</sup> It is therefore regrettable to note that Tanzania still retains laws in her statutes that

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<sup>512</sup>Article 66 of the Namibian Constitution of 1990; Article 24(2) of the Malawian Constitution of 1994; and Articles 30, 31(2) and 37(5)(c) of the South African Constitution of 1996.

<sup>513</sup>Constitution of Mozambique, 1990, Article 57(2). See also the Preamble and Article 7.

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<sup>514</sup>Section 15(4)(c) of the Constitution of Botswana of 1966; Section 18(4)(b) of the Constitution of Lesotho of 1993; Section 23(4)(c) of the Constitution of the Republic of Zambia of 1991; and Section 23(3)(a) of the Constitution of the Republic of Zimbabwe of 1979.

<sup>515</sup>Legal and Human Rights Centre *Tanzania Human Rights Report 2013*, LHRC (2014).

<sup>516</sup>Such as Articles 21 and 66(1) of Tanzania's Constitution which were amended to make sure that there are special parliamentary seats for women representatives; Sections 7 and 33 of the Employment and Labour Relations Act No.6 of 2004.

<sup>517</sup>These include the Anti-Trafficking in Persons Act of 2008 and the Law of the Child Act of 2009.

<sup>518</sup>Legal and Human Rights Centre 'Tanzania Human Rights Report, 2013 (2014) LHRC 107.

are biased against women; such biases are against their own Constitution and their country's international commitments. It is important to note that Article 1 of CEDAW defines the phrase 'discrimination against women' to mean any distinction, exclusion or restriction made on the basis of their gender which has the effect of impairing the recognition, enjoyment or exercise by women of their rights.

This CEDAW definition has three components. First, conduct or legislation can be discriminatory both in terms of their effects as well as in terms of their purposes. Something is discriminatory in effect if it has a discriminatory impact and something is discriminatory in terms of its purposes if the legislature intended to be so.<sup>519</sup> Secondly, discrimination against women in CEDAW is not limited to state action or other actions done under colour of the law. CEDAW also prohibits private discrimination. Thirdly, the use of the phrase "or any other field" in CEDAW demonstrates that the ambit of discrimination is extended beyond traditional categories.<sup>520</sup> Therefore, any discrimination against women cannot be immunised from scrutiny under CEDAW by the fact that it does not involve any kind of question whether political, economic, social, cultural or civil. CEDAW affirms that discrimination against women is a violation of the fundamental rights and freedom of human beings and impairs their enjoyment of these rights and freedom. Thus, all rules that make a distinction on the basis of gender or that exclude women have the effect of preventing women from enjoying their human rights. The discriminatory legislations not only involve gender discrimination, but also violate the protection of the right to equality before the law and the enforcement of the right to equal protection under the law. The next section provides a discussion of Tanzania's discriminating legislation which is against international human rights instruments for the protection of women.

### *2.8.1 Laws that govern marriage and matrimonial relationships*

The Law of Marriage Act of 1971 as the major law which governs matrimonial relationships contains a discriminatory clause. In this piece of legislation, discrimination can be found in

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<sup>519</sup>Maina W & Kimwangana J 'Do sections 11(1) and 23 of the Tanzania Citizenship Act violate Tanzania's obligations regarding the equality of men and women under international human rights law and its own Constitution? Legal Opinion Case No. 112, International Court of Justice. Available at [http://www.icj-kenya.org/dmdocuments/opinions/Legal\\_Opinion\\_Case112.pdf](http://www.icj-kenya.org/dmdocuments/opinions/Legal_Opinion_Case112.pdf) accessed on 3 November 2015.

<sup>520</sup>Article 1 of CEDAW.

relation to parents' permission concerning the marriage of their daughters.<sup>521</sup> The law allows a young girl of 15 years old to get married with the consent of her parents and denies young girls the right to choose their life partners and make their own decisions in this regard.<sup>522</sup> Furthermore, Sections 130 and 136(2) to (3) of the Tanzania Penal Code, Cap 16 as amended by Section 5 of SOSPA in 1998 allows the betrothed an engaged girl to marry. These pieces of legislation are against various women's human rights instruments, specifically the Convention on Consent to Marriage, the Minimum Age for Marriage, and the Registration of Marriages of 1965, Article 16 of the UDHR,<sup>523</sup> Article 23(3) of the ICCPR,<sup>524</sup> Articles 16(1)(a) and (b) of CEDAW,<sup>525</sup> and Article 6(a) and (b) of the Maputo Protocol.<sup>526</sup> These Conventions make it clear that there should be equality between men and women and that they have the same rights in terms of their decision to enter into marriage. Specifically, men and women should have the right to freely choose their spouses with their full consent. Also, the African Charter on the Rights and Welfare of the Child prohibits the betrothal and the marriage of a child. Article 16 of CEDAW and Article 6 of the Maputo Protocol stipulate that women should have the same right as men to freely choose a spouse and to enter into marriage only of their own free will and their full consent. A girl of 15 years is not able to make a decision or to give her consent by reason of her young age. This also denies those girls who enter into marriage under 18 years to exercise their rights and responsibilities as parents during and after their marriage, as provided in Article 16(c) and (d) of CEDAW, due to their immaturity.

In addition, the Law of Marriage Act allows a 14-year-old girl to get married by leave of the court in special circumstances that make the marriage desirable.<sup>527</sup> The Maputo Protocol determines that the minimum age of marriage for women is 18 while Article 16(2) of CEDAW

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<sup>521</sup>UNFPA 'Marrying too young ends child marriage in Tanzania' UNFPA Child Marriage Fact Sheet (2014) Available at [http://tanzania.unfpa.org/sites/esaro/files/resourcepdf/Child%20Marriage%20fact%20sheet%20English%202014\\_0.pdf](http://tanzania.unfpa.org/sites/esaro/files/resourcepdf/Child%20Marriage%20fact%20sheet%20English%202014_0.pdf) accessed on 27 June 2016.

<sup>522</sup>Ibid. Section 17(1).

<sup>523</sup>Article 16(1) provides that "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution." (2) "Marriage shall be entered into only with the free and full consent of the intending spouses."

<sup>524</sup>The Article states: "No marriage shall be entered into without the free and full consent of the intending spouses."

<sup>525</sup>Article 16(1) states: "Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall 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."

<sup>526</sup>It provides as follows: "State parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: a) no marriage shall take place without the free and full consent of both parties; b) the minimum age of marriage for women shall be 18 years."

<sup>527</sup>Section 13.

provides that the betrothal and the marriage of a child shall have no legal effect at all. In addition to this provision, the CEDAW Committee in its General Recommendation 21, paragraph 36 specifies that it considers the minimum age mentioned in Article 16(2) to be 18 for both men and women. This law denies girls their right to development, health and education which are fundamental and inalienable for all children and vital for human development as well as democratic functioning.<sup>528</sup> It is difficult for a girl to get married at the age of 14 and to continue with her studies and it is also against Tanzania's national and international instruments. Section 56(2) of the Tanzania National Education Act [Cap. 353 R.E. 2002], Article 12 of the Maputo Protocol, and Article 10 of the CEDAW require governments to eliminate discrimination against women in order to ensure that they have equal rights with men in the field of education. There is sufficient evidence that most girls who got married under 18 failed to continue with their studies due to matrimonial responsibilities such as parental duties. Early pregnancy affects young girls' health and sometimes causes their death in childbirth.<sup>529</sup> Clearly, the law governing marriage needs to be amended to raise the legal age of marriage so that the government can be able to take disciplinary legal measures against those who force children into a marriage, including parents/guardians who force their daughters to enter into child marriage as well as men who marry young girls. Tanzania has been reported to have the highest child marriage prevalence in the world.<sup>530</sup>

In eighteen African nations, the minimum age for marriage is either biased or below 18. Sudan has the lowest minimum age of marriage at 10 years for young men and adolescent girls in Muslim marriages (which are the most common), and 13 for girls and 15 for boys in non-Muslim marriages.<sup>531</sup> South Africa reduced the legal age of marriage from 21 to 18 years, which is the legal age of marriage for both sexes. Nevertheless, South Africa's Marriage Act also provides that a boy who is under 18 years and a girl who is under 15 years are allowed to

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<sup>528</sup>Adrathy T 'Legal contradictions influence early marriage in Tanzania' *We Write For Rights* (2013) 24 August (2013). Available at <https://wewriteforrights.wordpress.com/2013/08/24/legal-contradictions-influence-early-marriage-in-tanzania/> accessed on 22 June 2016.

<sup>529</sup>Human Rights Watch 'Tanzania: Child marriage harms girls' 29 October 2014. Available at <https://www.hrw.org/news/2014/10/29/tanzania-child-marriage-harms-girls>; Also Legal and Human Rights Centre, *Tanzania Human Rights Report 2014*, LHRC (2015) 380.

<sup>530</sup>UNFPA (note 18) above.

<sup>531</sup>In Burundi, Burkina Faso, Cameroon, Chad, Congo Brazzaville, Cote D'Ivoire, DRC, Gabon, Mali, Niger, Senegal, Seychelles, Sudan, and Zimbabwe, it is discriminatory between girls and boys. In Malawi, Zambia and Guinea Bissau the minimum age of marriage for both boys and girls is 15 and 16 respectively. See Odala V. 'How important is minimum age of marriage legislation to end child marriage in Africa?' *The African Child Policy Forum*. Tuesday 11 June 2013. Available at <http://www.girlsnotbrides.org/> accessed on 28 June 2016.

get married upon their parents' consent or the consent of the Minister of Home Affairs.<sup>532</sup> Other African countries have managed to overcome this culture of youth marriages by amending their constitutions to specifically stipulate the legal age of marriage. Those countries include Uganda whose Constitution affirms that a man and a woman are entitled to marry only if they are each of the age of 18 years and above and are entitled at that age to equal rights at and in marriage, during the marriage, and at its dissolution.<sup>533</sup> Similarly, the Namibian Constitution provides as follows:

“Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>534</sup>

Zimbabwe is also among the African countries that stipulate the legal age of marriage in their constitutions.<sup>535</sup> Other African countries such as Tanzania that used to have discriminatory statutes in terms of the legal age of marriage have already changed their laws. These countries include Algeria, which changed the minimum age of marriage from 18 years for women and standardized it to 19 years for both men and women in February 2005.<sup>536</sup> In line with these standards, 32 African countries have set the minimum age of marriage at 18 for both girls and boys.<sup>537</sup> In other countries such as Lesotho, Libya and Rwanda, the minimum age of marriage is above 18 for both girls and boys.

Furthermore, the Law of Marriage Act of Tanzania allows men, but not women, to have multiple spouses.<sup>538</sup> Section 152(1) of the Law of Marriage Act is actually making it an offence for a married woman to marry another man. Research that was done in 2010 showed that 29

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<sup>532</sup>Section 26 of the South African Marriage Act No. 25 of 1961.

<sup>533</sup>Article 32 of the Constitution of the Republic of Uganda of 1995.

<sup>534</sup>Article 14(1) and (2) of the Constitution of the Republic of Namibia.

<sup>535</sup>Constitution of Zimbabwe of 2013 Chapter 4 section 4.30(1) provides that: “Everyone who has attained the age of eighteen years has the right to marry a person of the opposite sex who is of marriageable age, and no such person may be prevented from entering into such a marriage. (2) Everyone who has attained the age of eighteen years has the right to found a family. (3) No one may be compelled to enter into marriage against their will.”

<sup>536</sup>Article 7 of Algeria Family Code of 2005.

<sup>537</sup>These are Angola, Benin, Botswana, Cape Verde, Central African Republic, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Sao Tome, Sierra Leone, Somalia, South Africa, South Sudan, Togo, Tunisia and Uganda. See Odala (note 531) above.

<sup>538</sup>Section 10(1) of the Law of Marriage Act.

per cent of women aged 15 to 49 were married to men with more than one wife in Tanzania.<sup>539</sup> Polygamous marriages are discouraged in Article 6(c) of the Maputo Protocol, which encourages monogamy as the preferred form of marriage. Nonetheless, it has been urged that not all international human rights laws are appropriate for our society due to our level of social development, like that of monogamous marriages, and that means it would be very hard to implement such a law if it were domesticated.<sup>540</sup> It is the view of the researcher that, although some of the international human rights laws seem to be against our cultural practices, they need to be taken into consideration, especially in this century of many rampant incurable diseases.

### 2.8.2 *Employment and Labour Relations Act No. 6 of 2004*

The Employment and Labour Relations Act No. 6 of 2004 allows women, whether married or not, to receive maternity benefits. It provides maternity leave for women employees for 84 days or 100 days if an employee gives birth to more than one child.<sup>541</sup> The leave commences at the discretion of the woman any time after seven months of pregnancy.<sup>542</sup> During the period of maternity leave, the employer is obliged to pay a full salary to the woman employee. Section 33(8) of this law provides that a female employee shall not be entitled to more than four periods of paid maternity leave. This is an interference with regards to women's freedom of choice to plan their families as they are bound not to deliver more than four children in order to keep their income. Therefore, some choose not take the maternity leave and continue to work to earn their salary, which is dangerous for their health.<sup>543</sup>

This law is contrary to Articles 11 and 16(e) of CEDAW, which require a woman to have the right to decide freely and responsibly on the number and spacing of her children. In the neighbouring country of Kenya, women are allowed to take twelve weeks' maternity leave without any restriction as to how many times they are required to take that leave.<sup>544</sup> The Basic Conditions of Employment Act No. 11 of 2002 of South Africa allows sixteen consecutive

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<sup>539</sup>Tanzania National Bureau of Statistics and ICF Macro, *2010 Tanzania Demographic and Health Survey: Key Findings* (2011) Calverton, Maryland, USA: NBS and ICF Macro.

<sup>540</sup>Howland R & Koenen A 'Divorce and polygamy in Tanzania' Social Justice Center, Loyola University, Chicago (2013) 15. Available at [http://ecommons.luc.edu/social\\_justice/15](http://ecommons.luc.edu/social_justice/15) accessed on 24 November 2015.

<sup>541</sup>Section 33(6)(a) & (b).

<sup>542</sup>Section 33(2)(a) & (b).

<sup>543</sup>Ellis A Blackden M Cutura J MacCulloch F & Seebens H *Gender and Economic Growth in Tanzania: Creating Opportunities for Women* (2007) World Bank, Washington DC.

<sup>544</sup>Kenya Employment Act, CAP 226.



weeks of maternity leave which can even be taken a month or more before a due date.<sup>545</sup> Furthermore, this law allows six weeks maternity leave to a worker who has had a miscarriage on her third trimester or bore a stillborn child.<sup>546</sup> In Uganda, maternity leave for women is very short, as they are allowed to have only eight weeks leave with full salary, but without any restriction as to how many times they can take such leave.<sup>547</sup> The Employment and Labour Relations Act of Tanzania gives only the maximum of two hours per day for a nursing mother to breastfeed her child during working hours and it does not provide mechanisms for the establishment of nursing units in the working place.<sup>548</sup>

### 2.8.3 *Evidence Act [Cap. 6 R.E. 2002]*

Section 164 of this Act is discriminatory as it allows the demeanour of a raped woman to be brought before the court of law. The section states that “the credit of the witness may be impeached in the following ways by an adverse party or, with the consent of the court, by the party who will call him when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.” Having this provision in the Evidence Act undermines the spirit of SOSPA of 1998, which protects women’s and children’s rights. In other words, the provision allows men to rape women of ‘bad character’, such as prostitutes. This implies paradoxically that these women ‘cannot be raped’, yet they do not give consent to sex not all the time. However, the denial of legal protection for women of ‘bad character’ – who may be prostitutes – is equivalent to discrimination. This particular section of the Evidence Act is contrary to international instruments which protect all women from all forms of harmful practices.<sup>549</sup>

### 2.8.4 *The Tanzania Citizenship Act [Cap. 357 R.E. 2002]*

This Act directly discriminates against Tanzanian women as it allows men to live with foreign wives under dual nationality which a foreign woman automatically acquires soon after marrying a Tanzanian man.<sup>550</sup> This is not the case with a Tanzanian woman. If she is married

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<sup>545</sup>Section 25 (1) and (2).

<sup>546</sup>Section 25 (4).

<sup>547</sup>Legal and Human Rights Center (note 515) above.

<sup>548</sup>Section 33(10).

<sup>549</sup>Article 5 of the Maputo Protocol and Articles 11, 12 and 13 of CEDAW.

<sup>550</sup>Section 11 of the Tanzania Citizenship Act of 1995.

to a foreigner, her husband will not be able to acquire Tanzanian citizenship. Section 11(2) of the Act provides that a woman who is married to a citizen is entitled to be naturalised, but it is silent on the part of a man who marries a citizen. The regulation clearly discriminates against women by penalising women who marry foreigners as well as their children. In the situation where a Tanzanian woman marries a foreign man, the foreign man is neither eligible to apply for citizenship nor allowed to live in the country without a permit, as dual citizenship is prohibited,<sup>551</sup> and hence Tanzanian women who marry foreigners might have difficulty staying in the country with their families. Ultimately, she might have to renounce her Tanzanian citizenship.

This law imposes additional burdens on women with regard to their married life. Apart from that, section 23 of this law also ousters the jurisdiction of the court by providing that the Minister responsible for citizenship decisions need not give reasons for denying anyone citizenship and it ousts the jurisdiction of the court to review such a decision. Furthermore, the Minister alone is the one who has the power to grant that right.<sup>552</sup> This means women have no rights to challenge the discriminative nature of section 11(2) in any court of law in Tanzania. On the face of it, this discriminatory law is contrary to Article 12(1) and (2) of the Tanzanian Constitution, Article 9 of the CEDAW, and Article 2 of the Maputo Protocol, all of which require states to guarantee equal rights for men and women to acquire, change or retain nationality. This right should apply not only to parents, but also to the nationality of their children.<sup>553</sup>

This discriminative law concretises the African discriminative culture which undervalues women and that determines that a woman, once married, loses her independent identity and that is why she is not permitted to pass her nationality on to her children. Furthermore, in African culture a child 'belongs' to a father rather than to a mother, so a father's nationality is the one which is supposed to be attached to the children even if they live in the mother's home country. Children are not allowed to claim their mother's nationality as they 'belong' to their fathers.

However, it seems that this particular law is trying to protect Tanzanian treasures, especially land, due to the fact that many foreigners could come to marry poor Tanzanian women in order

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<sup>551</sup>Section 4 of the Citizenship Act.

<sup>552</sup>Section 22.

<sup>553</sup>Article 9 of CEDAW.

to gain citizenship and be entitled to all Tanzanian rights, including possession of the land.<sup>554</sup> Regardless of this potential threat to land ownership, the basic rights of other people should not be used as a shield to violate the rights of citizens of the country. Although international law has left the matter of nationality under the domestic jurisdiction of countries,<sup>555</sup> the issue at this point is different as Tanzania is not at liberty, under international law, to treat its women citizens differently from its male citizens. If Tanzania decides to grant its men citizens the right to marry foreign women who may then acquire citizenship, it is obliged to grant the same right to its women citizens. If a state decides, as a matter of its domestic jurisdiction, to confer certain rights to its citizens, it cannot select which of its nationals will enjoy those rights. Section 23 is therefore also contrary to Article 30(3) of the Constitution, which gives every person the right to seek redress, as it provides the following:

“Any person alleging that any provision in this part of this chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.”

Article 30(3) offers a comprehensive range of remedies to every person in the country, including non-citizens. It is also the mandate of the state to facilitate the fair hearing and appeals on matters relating to the enforcement of the rights of every person by taking the necessary procedures. Lastly, this Article gives room for redress as well as anticipated violations. Section 11 of the Citizenship Act was once challenged in the *Sion Gabriel Jones v Minister of Home Affairs and Others* case,<sup>556</sup> which questioned the supremacy of the Constitutional provisions on equality over the discriminatory provisions of the nationality legislation. A Tanzanian woman, Sion Gabriel Jones, was married to a British citizen while they were in the United States of America and before their marriage, Sion’s husband had already been living and working in Tanzania for sixteen years. He had obtained a resident’s permit two years after their marriage. They applied for a dependant’s pass so that they could start a family in Tanzania. Their application was rejected based on Sion’s status as a Tanzanian woman and because such passes are only available to the foreign wives of Tanzanian men. Later, Sion gave birth to a baby daughter in a hospital in Kenya and sought to have the girl entered on her passport for re-entry into Tanzania. Once more her application was rejected by the Tanzanian High Commission on the basis that the baby’s father was not a Tanzanian citizen.

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<sup>554</sup>Mukhopadhyay M & Singh N *Gender Justice, Citizenship and Development* International Development Research Centre (2007) 57.

<sup>555</sup>Article 2(7) of the Charter of the United Nations and Matters of Domestic Jurisdiction.

<sup>556</sup>High Court of Tanzania (2002).

As a result, Sion's husband then had to apply for a British passport for his daughter, who was then allowed to enter Tanzania. Sion filed a Constitutional Case before the High Court of Tanzania requesting the discriminatory provisions of statutes relating to nationality to be declared unconstitutional and therefore void and asking that non-citizen husbands of Tanzanian wives be allowed the same rights as non-citizen wives of Tanzanian husbands. However, the case was unsuccessful in the High Court of Tanzania and an appeal against the High Court decision was lodged in the Court of Appeal, but it was again dismissed on a procedural technicality and there were no further avenues of appeal. Sion's family still suffers from the insecurities and hardships created by the continuing discrimination, anxiety for the family, as well as the cost of litigation.

### 2.8.5 *Inheritance Laws*

Tanzania's inheritance laws limit women's inheritance on the basis of their gender. Both customary and Islamic laws, the two predominant systems of intestate succession in Tanzania, deny women the right to own property upon divorce or the death of their husbands. History indicates that, in the past, properties such as land were rarely individually owned in traditional societies.<sup>557</sup> Ownership of the major means of production was held by the clan, in which male members retained and controlled the rights to use property and these economic and social rights were passed on to male heirs, usually first born sons through inheritance.<sup>558</sup> These discriminative traditions and attitudes have continued to prevail in many societies in Tanzania.<sup>559</sup> Under governing Islamic law, daughters inherit the smallest share with attached restrictions while widows only inherit half as much as men. Islamic law follows the Qur'an which provides that a widower with children is entitled to a quarter of his spouse's estate, while a widow with children is only entitled to one-eighth.<sup>560</sup> Likewise, a widower without children is entitled to one-half of his spouse's estate, while a childless widow is only entitled to one-quarter.<sup>561</sup> This facial discrimination is worse in polygamous marriages where the wives are

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<sup>557</sup>Dancer H *Women, Land and Justice in Tanzania* James Currey (2015) 62.

<sup>558</sup>Ellias (note 543) above.

<sup>559</sup>*Ibid.*

<sup>560</sup>Holy Qur'an 4:12 Ahmadiyyah Anjuman Isha'at Islam, Lahore, Inc., (1995) states: "And you shall have half of what your wives leave if they have no child, but if they have a child, then you shall have a fourth of what they leave after [payment of] any bequest they may have bequeathed or a debt; and they shall have the fourth of what you leave if you have no child, but if you have a child then they shall have the eighth of what you leave after [payment of] a bequest you may have bequeathed or a debt."

<sup>561</sup>The Statement of Islamic Law Order No. 121 of 1962 (GN. No 222).

required to equally divide the small share allocated to the wife. This means if there are four wives, each wife will get one thirty-second part of the estate.<sup>562</sup>

Men have never faced this problem, because it is illegal for a woman to have more than one husband in Tanzania.<sup>563</sup> Husbands in a polygamous marriage are required to inherit a spousal share of at least one-quarter from each of his wives or the equivalent of a whole share when he has four wives.<sup>564</sup> Similarly, Islamic Law discriminates against daughters and sisters by granting them half the inheritance which is received by sons and brothers. Muslim men justify this discriminatory division of property as reasonable because sons have to take care of their sisters and mothers, while fathers have to take care of their daughters.<sup>565</sup> Islamic culture has given men responsibility over women. They have to take care of them and that is why men are assumed to need more property.<sup>566</sup> This discriminative law places women at the mercy of their brothers and sons and the situation is complicated when a widow has to rely on someone other than her children, such as her brother-in-law or father-in-law, for support.<sup>567</sup> This law perpetuates stereotypes and inferior roles.

Another discriminatory law is the customary law which has been codified and included among the laws of the country under Customary Law (Declaration) Order No. 436/63. This law discriminates against women as widows and daughters with respect to inheritance. Women and girls are unable to inherit clan land, and they inherit less of other types of property than their male counterparts. Upon being denied rights to property after divorce or death of their husbands, women are usually left with few options and sometimes with no place to live at all. The law thus treats women as third class heirs in matters relating to inheritance. Women cannot inherit property from their husbands, sons, uncles or other males, as male relatives are given preference over women in matters of inheritance, except in the absence of male heirs.<sup>568</sup> This law allows women to simply use land under 'usufructuary' rights that provide as follows:

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<sup>562</sup>Ibid.

<sup>563</sup>Sections 14 &152 of the Law of Marriage of 1971.

<sup>564</sup>Holy Qur'an 4:11 & 12 provides that: "Allah enjoins you concerning your children: for the male is the equal of the portion of two females." If there are no descendants or parents, the deceased's brothers and sisters inherit under a similar pattern, and "the male is the like of the portion of two females". See also the statement of Islamic Law Order (note 33) above.

<sup>565</sup>Ezer T 'Inheritance law in Tanzania: The impoverishment of widows and daughters' (2006) *The Georgetown Journal of Gender and Law Vol. VII* 599–658.

<sup>566</sup>Ibid.

<sup>567</sup>Ellias (note 543) above.

<sup>568</sup>Ezer (note 565) above.

“The widow has no share of the inheritance if the deceased left relatives of his clan; her share is to be cared for by her children, just as she cared for them.”<sup>569</sup>

This law treats widows as minors who are dependent on the care of others and as a property to be inherited by their deceased husband’s family. Rule 51 of this law delegates the responsibility of taking care of the widow to the deceased’s heir who is usually her son, and if the widow’s sons are young, the law provides that a guardian must be appointed to look after them, their mother, and their property.<sup>570</sup> The law also sets out an inheritance hierarchical scheme based on gender under which daughters are granted the smallest share of inheritance. Rule 30 of this law grants a larger portion of inheritance to the older children than the younger ones and males receive more than females. Customary law divides heirs into three degrees. The first degree is for the first son, the second degree is for other sons, and the third degree is for daughters.<sup>571</sup> Under this scheme, the first degree obtains the largest share, and the third degree the smallest.<sup>572</sup> Therefore, daughters inherit less than both their older and younger brothers. The law goes further and attaches limitations to the smallest property inherited by daughters in the sense that a woman cannot fully inherit clan land. She may use the land but, unlike her sons, she is forbidden to sell it even if she is the only child in the deceased’s family.<sup>573</sup> This law is against Article 12 of the Maputo Protocol, which provides that widows have the right to adequately share in the inheritance of the property of their husbands and the right to continue to live in the matrimonial house. This Article also provides for the right of men and women to inherit their parents’ property in equitable shares:

“A widow shall have the right to an equitable share in the inheritance of the property of the husband. A widow shall have the right to continue to live in the matrimonial house .... Women and men shall have the right to inherit, in equitable shares, their parents’ properties.”<sup>574</sup>

Rule 66(a) of this law deals with the residential rights of a widow in respect of her matrimonial home. It states in part that the widow may claim her right to reside with her offspring in the house of the deceased kinfolk. In the case of *Scolastica Benedict v Martin Benedict*,<sup>575</sup> the Court of Appeal held that the appellant widow was not entitled to reside in the matrimonial home in Bukoba Township, but rather she had to move to an inferior house at Kinondoni

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<sup>569</sup>Rule 17 of the Customary Law (Declaration) Order.

<sup>570</sup>*Ibid.* Rules 5, 7, 11 and 13.

<sup>571</sup>Rule 25.

<sup>572</sup>Rules 19 and 30.

<sup>573</sup>Rules 20 and 31.

<sup>574</sup>Article 21(1) & (2) of the Maputo Protocol.

<sup>575</sup>*Court of Appeal of Tanzania at Dar es Salaam [1993] TLR 1.*

Shamba, according to the decision of the clan council and administrators. It is submitted that provisions such as this put women at extreme disadvantage, as they are capable of dispossessing and disorientating widows who have to move to a new and unfamiliar neighbourhood. Furthermore, procedural laws that are entrenched in the customary laws such as the one above favour the selection of male administrators, even if they are distant relatives of the deceased, and thus women are excluded from the management of estates. Because Rule 5 of the said law excludes widows and daughters from acting as estate administrators, female heirs are left financially vulnerable.<sup>576</sup> This rule is still applicable in Tanzania, especially in rural areas where it is believed that if they will let a widow inherit the land, that land can be misused by her future husband.<sup>577</sup> Thus, women are supposed to get their share from their imminent husbands. Once their husbands have died, it is not good for widows to inherit the land because they might get married to another man and pass the inherited land on to strangers.<sup>578</sup> In this context, the Committee responsible for implementing CEDAW specifically instructed that the allocation of unequal inheritance shares to widows and daughters contravenes the Convention and should be abolished.<sup>579</sup>

In other societies such as Ngora, when a widow insists on inheriting clan land she can be put to death. In order to legitimately stay in their matrimonial houses, most women therefore submit to being inherited as a wife of another member of the family.<sup>580</sup> This law was once questioned in parliament by an MP, Dr H. G. Mwakyembe, who asked the Ministry of Justice and Constitutional Affairs for the reason behind its failure to expunge this customary law which discriminates against women in the use of land.<sup>581</sup> The response of the Ministry was to the effect that customary law is counted as expunged from the book because it was quashed by the High Court as required by law. This kind of reply from the Ministry, which required people to assume the non-existence of the law while the law still exists in legislation, is irresponsible. The current Revised Edition of Tanzania Legislation of 2002 included the above law, despite the fact that the law was quashed by the High Court, and this is probably what have made law enforcers abide by it until now and why they ignored the existence of the High Court's decision.

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<sup>576</sup>Legal and Human Rights Centre (note 518) above.

<sup>577</sup>Dancer (note 557) above.

<sup>578</sup>Ibid.

<sup>579</sup>CEDAW Committee, General Recommendation 21, Equality in Marriage and Family Relations, 13<sup>th</sup> Sess., 1992, U.N. Doc. A/49/38, at 1 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 257, para 35, U.N. Doc. HRI/GEN/1/Rev.6 (12 May 2003) [hereinafter CEDAW General Rec. 21].

<sup>580</sup>Ezer (note 565) above.

<sup>581</sup>Hansard of 8 April 2008.

This was clearly demonstrated in the case of *Elizabeth Steven v AG*,<sup>582</sup> in which the petitioner filed a petition for an order declaring paragraphs 1 to 51 of the second schedule of the Local Customary Law unconstitutional, as they deny women the right to inherit land and give males preference over females. The same order also places heirs in classes, with women being in the lowest class, notwithstanding their age. The petitioner provided that those paragraphs fall within the ambit of discrimination as defined in Article 13(5) of the Constitution of the United Republic of Tanzania.

The petitioners via the service of their advocates also referred the court to a litany of International treaties that Tanzania ratified, such as the CEDAW of 1979, ACHPR of 1981, CRC of 1989 and ICESCR of 1966, which provide for, among other things, the elimination of discrimination against women. They invited the court to regard international treaties as an additional obligation and to consider their ratification as not merely a formality. Moreover, they referred to the Bangalore Principles of 1988 which encourage the domestic application of international human rights norms. Despite all that, the court was not able to grant rights to the petitioners, claiming that a court of law should not be the place for eliminating customary laws and that they should be left to pass away with time. The court passed the following verdict:

“After agreeing that the impugned paragraphs are discriminatory in more ways than one, we have thought whether it will be in the best interest to give the orders prayed for.... We are aware that what the Order did was to declare and recognize some of the customs of the people which were there for many years before. These customs evolve and change with time, a process that does not end, nor can it be ended.... What we are saying is this: it is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality. This will open Pandora’s Box, with all seemingly discriminative customs from our 120 tribes plus following the same path....”<sup>583</sup>

Although the court seemed to depart from its traditional requirement of precedence, the government was also partly to be blamed for this fracas. Clearly, government needs to amend this particular legislation and remove that law completely in order to strengthen the hands of decision makers who seem to ignore the principle of precedence instead of assuming that they will abide by the principle. The above case represents one of the occasions when the decisions by the court of law also ignored international human rights instruments openly, despite the

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<sup>582</sup>*High Court of Tanzania at Dar es Salaam: Miscellaneous Civil Cause No. 82 of 2005 (Unreported).*

<sup>583</sup>*Ibid.*



availability of precedence,<sup>584</sup> which insists on recognising and applying international instruments. It revealed that nothing, not even the Constitution of the United Republic of Tanzania, can hinder the court from applying international instruments, but some judges seem to persist in ignoring the existence of international instruments.<sup>585</sup> The court is the ultimate organ entrusted with determining the rights of citizens and it needs to uphold human rights, otherwise citizens will end up suffering.<sup>586</sup> However, most women judges seem to stand up for the rights of their fellow women. Some of their decisions will be discussed in the next chapter. Tanzania has ratified CEDAW and is bound by it. Article 2 of this Convention clearly and unambiguously calls for the abolition of existing laws, customs and practices that discriminate against women. The Convention states:

“States parties undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women and to repeal all national penal provisions which constitute discrimination against women.”<sup>587</sup>

To exclude women from property inheritance and distribution under customary laws deprives them of shelter, exposes them to physical harm such as sexual violence and abuse, and carries negative social and economic significances for them and their dependents. Likewise, it violates a range of rights, including the rights to property, dignity, equality, and non-discrimination, and may lead to the violation of their right to health, including their sexual and reproductive health. In support of this is Article 3, which places an obligation on governments to take appropriate measures, including legislation in all fields, to implement the provisions as outlined in Article 2 and to guarantee women basic human rights and fundamental freedoms on the basis of equality with men. CEDAW also imposes significant positive cultural and social duties on state parties in Article 5(a) to modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices, biased customs, and all other practices that are based on the idea of the inferiority or the superiority of the sexes or on the stereotyped roles of men and women.

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<sup>584</sup>Such as *Transport Equipment Ltd & Reginald John Nolan v Devran P. Valambhia Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 19 of 1993 (unreported)*.

<sup>585</sup>Ezer (note 567) above.

<sup>586</sup>Ibid.

<sup>587</sup>Article 2(f) and (g) of the CEDAW.

Therefore, although Tanzania freely gave her consent to be bound by this international Convention, it has failed to respond to it and to effectively amend the provisions concerned.<sup>588</sup> Despite the fact that non-discrimination against women is one of the rights protected by the Constitution of the United Republic of Tanzania, practice has shown that it has often been disregarded in the above legislations.<sup>589</sup> Articles 11, 12 and 13 of CEDAW prohibit all forms of discrimination against women in the field of employment, health care and other areas of economic and social life. Furthermore, the special protection of rural women, as provided for in Article 14(1) of CEDAW, requires that state parties shall take into account the particular problems faced by rural women and the significant role they play in the economic survival of their families. This includes their work in the non-monetised sector of the economy, and involves taking appropriate measures to ensure the application of the provisions of CEDAW to women in rural areas.

Research has also shown that Tanzania needs to put more effort into the protection of rural women as required by CEDAW, because the provisions of laws that are governed by outdated cultural notions which are offensive to rural women are still in use.<sup>590</sup> The latter situation gives confidence to courts of law to keep on making decisions based on such law while forgetting their roles of contributing to law making. This can be seen in the reason for the decision of the presiding judge in the case of *Elizabeth Steven and Another v AG*.<sup>591</sup> The judge declared that, although he agreed that the law was discriminatory, he found no reason to decide otherwise because he believed culture, tradition and customs should be left alone to change with time as they had been there for many years.

Conversely, some neighbouring countries such as Uganda have already gone a long way in implementing Article 14(1) of CEDAW. Article 33 of this country's Constitution<sup>592</sup> provides specifically for women's rights, as Article 33(5) provides that women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or customs. Apart from that, a sub-article clearly provides the following:

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<sup>588</sup>Ellias (note 543) above.

<sup>589</sup>Judges and Magistrates are still deciding based on the above discriminatory laws in Court.

<sup>590</sup>Dancer (note 557) above.

<sup>591</sup>*Elizabeth Steven & Another v AG* (note 582) above.

<sup>592</sup>Constitution of Uganda, amended in 1995.

“Law, cultures and customs of traditions which are against the dignity, welfare or interests of women or which undermine their status are prohibited by this Constitution.”<sup>593</sup>

Significantly, as was discussed above, discrimination against women in all matters relating to marriage and family relations have been analysed in terms of CEDAW. The Convention makes it clear that there should be equality between men and women and that they should have the same rights to enter into marriage, freely choose a spouse, to enter into marriage with full consent, and to have the same rights and responsibilities during marriage and its dissolution. Furthermore, it guarantees the same rights to both spouses in respect of their ownership, acquisition, management, and enjoyment as well as disposition of property. Thus Tanzania’s inheritance laws impoverish women and leave their survival at the mercy of men. Tanzania’s inheritance regime violates women’s fundamental rights to equality, property, an adequate standards of living, family, and dignity under the Tanzanian Constitution and binding international conventions. Women lack access to economic resources and are kept in a state of perpetual dependence because of they are denied equal shares of inheritance. Speaking on these matters, the former Minister of Community Development, Gender and Children said it had been very hard to amend this law as it touched many communities which had different views on the matter.<sup>594</sup> However, he maintained that each and every action, whether by the state or individuals, should abide by the Constitution. Tanzania’s Constitution contains provisions that support the principles of gender equality and non-discrimination, so there is no need to hesitate to amend the laws which are against the Constitution simply because some communities in the country have a vested interest in them. The country has managed to get rid of some other customs which were common in certain communities by enacting punitive legislation to abolish them.<sup>595</sup>

Though some of the laws which protect women in Tanzania are consistent with international law, those that are inconsistent have a big impact. A tiny offensive word in the legislation may have a big impact on society. Women need to enjoy the same rights as men in all spheres. The efforts which have been made by Tanzania to ensure the participation of women in parliament are satisfactory, but more needs to be done in other areas to ensure that there is equality in all areas. It seems that the government has been very slow to abolish customs that affect women because most of the officials who are responsible for legislative amendments in the government

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<sup>593</sup>Article 33(6) of Constitution of Uganda, amended in 1995.

<sup>594</sup>Legal and Human Rights Centre *Tanzania Human Rights Report 2014* LHRC (2015).

<sup>595</sup>For instance, the FGM practice which is criminalized by Section 21 of SOSPA.

are men whose minds seem to be clouded by male dominance thinking and so they cannot push through the amendments. This is due to the fact that Tanzania has enacted new laws and regulations with regard to the development of a modern economy and modern technology and that it has been able to develop practices that suit a modern democracy. However, it is slow to accept changes in the area of women's rights.

## 2.9 Conclusion

While it is important to state that there has been a great improvement in the struggle for gender equality in Africa and that evidence exists of more commitments towards ensuring a gender balance on the continent, it is also expedient to argue that legislative activities have not translated to the desired changes that are required for gender equality within different spaces of the continent.<sup>596</sup> Women's rights have been widely safeguarded in international, regional and sub-regional instruments, but a large number of women in Africa are still living in misery. Many countries, including Tanzania, have signed and ratified various instruments that address equity and equality, but the procedures for and the pace of their implementation and enforcement within countries differ. It is undeniable that, whenever a state enters into an agreement with the intent of being governed by international law, it puts itself under obligation to comply with such an agreement. The legalisation of the agreement, from this perspective, creates a special obligation beyond that which is created by a mere non-legal agreement. This special obligation is usually captured by the *pacta sunt servanda* doctrine.<sup>597</sup> Under the mainstream international law theory, legalization enhances compliance by increasing the normative strength of the agreement and thus a state party's sense of obligation.

The review of relevant literature that was undertaken clearly demonstrates that, although a body of literature has developed in recent years in the area of implementation of international human rights instruments which protect women, scholarship has been dominated by scholars from the United States and Europe who wrote mostly from a Eurocentric perspective. Accordingly, insight that illuminates an African female perspective on the harmful cultural and discriminatory laws such as those prevalent in Tanzania is lacking. There is therefore an apparent dearth of literature that dwells on Tanzania's cultures and traditions in respect of the

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<sup>596</sup>Banda (note 110) above at 54.

<sup>597</sup>Mapunda B T 'Treaty making and incorporation in Tanzania' 28-30 *East Africa Law Review* (1996) at 156.

area under study, although it was found that the existing literature provides an important theoretical background for the examination and discussion of the implementation of women's rights in Tanzania. Existing theories on the implementation of international human rights instruments, culture and women's rights have almost exclusively been developed and addressed from the viewpoints of other countries, which are not necessarily relevant to Tanzania due to the fact that cultural norms and practices differ according to society. This study therefore went beyond these limitations by focusing on the extent to which international instruments have been incorporated and are reflected in Tanzania's legislative framework for women's rights. It was found that much of the literature does not address the manner in and the extent to which culture and traditions hinder the implementation of international obligations on women's rights in Tanzania, nor does it discuss the role of the courts in interpreting international treaties which safeguard women's rights. The following chapter will therefore illuminate the extent to which international instruments for women's rights have been implemented in Tanzania at national level, and the discussion will demonstrate how harmful cultural and traditional practices have been major impediments to the implementation of women's rights legislation, regardless of the fact that such rights are enshrined in international and regional instruments as well as in the Constitution of the United Republic of Tanzania.

## CHAPTER THREE

### TRADITIONAL CULTURE WHICH IMPEDES IMPLEMENTATION OF WOMEN'S RIGHTS IN TANZANIA

#### 3.1 Introduction

All African communities have certain practices which reflect their values and beliefs. These practices reflect positive and negative aspects of the traditional cultures of those communities. The positive aspects are always beneficial to all the members of those communities.<sup>1</sup> However, there are also traditional practices that are harmful to certain groups in the communities, particularly women and girls. Such harmful practices violate some national and international human rights laws. These practices persist because they take on an aura of morality in the eyes of the society which practises them.<sup>2</sup> Regardless of the colonial experience and the manner of its conclusion, the postcolonial legal system in Tanzania is pluralistic as it recognises common law which is based on a combination of the laws of the colonisers, customary laws, and religious laws, including those based on Islamic, Christian and Hindu principles.<sup>3</sup> However, those customary and religious laws are all applicable under family laws; this is something which makes the pluralistic conform to some minimum standards.<sup>4</sup> Apart from such a pluralistic system which has the potential to raise internal conflict in terms of the law, it also disadvantages women who may be caught in a pincer movement when two or more legal systems collide despite reflecting and acknowledging diversity.<sup>5</sup> Though the universality of human rights norms has been challenged by the rights to enjoy one's own culture and respect for cultural diversity, CEDAW adopted a universal approach instead of a relativist one to culture and custom.<sup>6</sup>

Governments that are state parties to the Convention are obliged to modify or abolish customs and practices which constitute discrimination against women in terms of Article 2(f) of

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<sup>1</sup> Williams R *Culture and Materialism* VERSE (2005) 78.

<sup>2</sup> Zom J 'Issues in contemporary customary law: Women and the law' in Jowih A & Cain T (eds) *Law Society and Governance in the Pacific* ANU Press (2010) 95–125.

<sup>3</sup> Mapunda B T 'Treaty making and incorporation in Tanzania' (2003) 28-30 *East Africa Law Review* at 156; Tanzania Human Rights Report: Country Reports on Human Rights Practices for 2013.

<sup>4</sup> Tanzania Law of Marriage Act No. 5 of 1971.

<sup>5</sup> Glenn H *Legal Tradition of the World* Oxford University Press (2010) 132.

<sup>6</sup> Maluleke M J 'Culture, tradition, custom, law and gender equality' (2012) *PER/PELJ* 15(1).

CEDAW. This is reinforced by a state's obligation under the Convention to modify social and cultural patterns of conduct of men and women, with a view to eliminating customary and other practices that are conducive to discrimination against women.<sup>7</sup> This means that traditional and cultural practices which are harmful can no longer be justified and legitimised on the basis of respect for cultural diversity. While Tanzania has ratified CEDAW and the Maputo Protocol, many of the provisions of these instruments continue to be violated in both law and practice and discrimination and violence against women persist.<sup>8</sup> Existing laws that protect women's rights are often not implemented or practised because of a prevalent patriarchal system and customs.<sup>9</sup> There are 120 ethnic groups or tribes in Tanzania with different cultural practices depending on the socio-economic circumstances of the particular group.<sup>10</sup> Therefore, there is no uniformity of cultural and traditional practices in Tanzania as aspects of cultural practices and tradition differ from one society to another.

Notwithstanding the existence of various international and national legislations guaranteeing women's rights, women in Tanzania have continued to face discrimination and abuse of their basic rights.<sup>11</sup> The discrimination stems from cultural practices and societal attitudes that are gender-biased. Some of those cultural practices are the source of slowing down the reformation processes of discriminatory laws. This chapter explores the impediments to the implementation of CEDAW and the Maputo Protocol that are primarily caused by deeply embedded Tanzanian culture and traditions in the country. The aim of this part is to identify women's rights abuses that are often committed with impunity under the shield of culture despite the existence of national and international human rights instruments that provide for and protect the enjoyment of rights by all. The goal of this chapter is to ascertain the gaps in law reform that need to be considered for the proper protection of women's rights. Comparative lessons from other African countries will be provided throughout the chapter to gain deeper insight and to illuminate the lessons that should be considered in addressing the challenges pertaining to the achievement of women's rights.

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<sup>7</sup>Article 5(a) of CEDAW.

<sup>8</sup>United States Department of Bureau of Democracy, Human Rights and Labor: Country Report on Human Rights Practices for 2014. Available at [www.state.gov/j/drt/rls/hrrpt/humanrightsreports/#wrapper](http://www.state.gov/j/drt/rls/hrrpt/humanrightsreports/#wrapper) accessed on 15 February 2015.

<sup>9</sup>Legal and Human Rights Centre *Tanzania Human Rights Report 2013* LHRC (2014).

<sup>10</sup>Maluleke (note 6) above.

<sup>11</sup>Legal and Human Rights Centre *Tanzania Human Rights Report 2012* LHRC (2013) 107.

### 3.2 Traditional Faith Healing and Witchcraft

Traditional faith healing and witchcraft are among the cultural practices that evoke beliefs that infringe on some people's right to live meaningfully and safely in Tanzania. The notion of witchcraft itself is not a new phenomenon in African culture, as it has been widely practised since before colonialism. However, how witchcraft beliefs are practised differs from one society to another.<sup>12</sup> History tells us that before colonial rule, witchcraft beliefs formed an integral part of everyday life in most African societies.<sup>13</sup> As such, numerous tenets of customary law had to provide sanctions aimed at restitution depending on the harshness of abuse caused by witchcraft.<sup>14</sup> These sanctions ranged from enslavement to execution or from ostracism to compensation.<sup>15</sup> This belief, which cuts through all classes of the society, has remained a social reality in Tanzania to this day. The problem with this practice is that it attempts to justify why bad things happen to certain people in the society, which is a practice that leads to accusations against certain individuals who are suspected of having been directly involved in the acts of witchcraft which, in turn, have resulted in the occurrence of 'bad things' in the society.<sup>16</sup> The 'bad things' that are often associated with witchcraft result in accusations that usually lead to the violation and abuse of the right to life, liberty and security; the right to property; and the right against torture. It has also led to the social and economic marginalisation of those blamed for the practice of witchcraft. Anger, hatred, envy, lust and greed have been identified as sources of this belief and practice.<sup>17</sup>

Article 16 of the Constitution of the United Republic of Tanzania guarantees the right of respect and security of a person. This respect refers to respect for the self, the family and a place for all. Therefore torture, killings and other forms of harassment as a result of witchcraft beliefs amount to the violation of this constitutional right. Additionally, Tanzania has legislation which criminalises the practice of witchcraft in the form of the Witchcraft Act of 1928.<sup>18</sup> Witchcraft practices are criminalized by section 3 of this Act while section 4 criminalizes the accusation of witchcraft. However, section 4 criminalizes the accusation of witchcraft only when such an

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<sup>12</sup>Miguel E 'Poverty and witchcraft killing' *Review of Economic Studies* 72 (2005) 1 153–172.

<sup>13</sup>Mesaki S 'Review of witchcraft and the law in Tanzania' *International Journal of Sociology and Anthropology* 1(8) (2010) 132–138.

<sup>14</sup>Legal and Human Rights Centre (note 11) above.

<sup>15</sup>Ibid.

<sup>16</sup>Mesaki S (note 13) above.

<sup>17</sup>Miguel E (note 12) above.

<sup>18</sup>Cap. 18 [R.E. 2002].



accusation is not made to the proper authorities. Sections 5(1) and (2) also of this legislation provide for punishment in relation to the accusations of witchcraft. Despite the existence of this law, there has been an increase in the violation of the right to life through killings and torture in relation to witchcraft beliefs in recent years in Tanzania.<sup>19</sup> This happened when people accused of practising witchcraft were punished by mob justice, which in many instances led to the murder of the accused persons.<sup>20</sup> Older women in particular happen to be the most affected members that are targeted by this practice.<sup>21</sup> Red eyes are perceived to be a sign of one engaging in witchcraft practices, but most elderly women in rural areas use firewood for cooking and end up having red eyes as a result of being subjected to firewood smoke for a long time.<sup>22</sup> This problem of gender bias has been explained as a result of the marginalization of women in society. Targeting women in witchcraft killing is also associated with ownership of property.<sup>23</sup> Elderly women who have immovable property such as land and houses have become vulnerable to attacks and killings by persons who use witchcraft as an excuse to obtain their property.<sup>24</sup> Most often those who killed these women were close relatives of the victims, and were often even their own sons.<sup>25</sup>

The Witchcraft Act criminalizes the practice of witchcraft as well as accusations aimed at anyone for practising witchcraft. This law does not deal with the challenges resulting from the practice of witchcraft, especially when there has been violations such as the one above. Apart from that, this law does not provide a clear definition of witchcraft. Section 2 of the Act defines witchcraft as follows:

“...includes sorcery, enchantment, bewitching, the use of instruments of witchcraft, and the purported exercise of any occult power and the purported possession of any occult knowledge.”

This definition has been considered to refer to practices of the occult and the existence of power rather than the effects of the act.<sup>26</sup> Witchcraft has incited the violation of the right to life,

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<sup>19</sup>Green M ‘Discourses on inequality: Poverty, public bads and entrenching witchcraft in post-adjustment Tanzania’ *Anthropological Theory* 5(3) (2005) 247–266.

<sup>20</sup>Ibid.

<sup>21</sup>HelpAge International Tanzania ‘NGO thematic shadow report on older women’s rights in Tanzania’ A Report Submitted to the 41st session of the Committee on CEDAW in relation to Tanzania’s combined fourth, fifth and sixth periodic report of state parties, 16 April 2007 (CEDAW/C/TZA/6) April 2008.

<sup>22</sup>Ibid.

<sup>23</sup>Legal and Human Rights Centre (note 9) above.

<sup>24</sup>Green (note 19) above.

<sup>25</sup>Ibid.

<sup>26</sup>Mesaki (note 13) above.

leading to the death of a large number of people. More is needed than a legal solution to address this problem as the legal system alone does not sufficiently address the realities of witchcraft.<sup>27</sup> There is a need to educate the society on the misconception of witchcraft and to take serious the persecution of those who are suspected of practising witchcraft to the full extent of the law. Another challenge of depending on this legislation to curb violations resulting from the accusation of practising witchcraft is the issue adducing of the evidence in a court of law.<sup>28</sup> The Witchcraft Act itself is a very old law as it was enacted during the colonial period and was inherited after independence. The repeal of this Act was once suggested in 1992 by the Nyalali Commission, which recommended its abandonment on the basis of the following words:

“...the law dates back to colonial rule and it has remained to date. The law is useless; it should be repealed.”<sup>29</sup>

However, the Law Reform Commission opposed the recommendations made by the Nyalali Commission for the reasons that witchcraft practices are abhorred and that the negative impacts of such beliefs and practices, including terror and threats, foster disharmony and hatred amongst the people. It was thus argued that retaining the Witchcraft Act was essential in addressing these negative impacts.<sup>30</sup> Tanzanian laws prohibit the act of taking another’s life under Section 16 of the Penal Code which states the following:

“Anybody with malice aforethought who causes the death of another person by an unlawful act or omission is guilty of murder.”<sup>31</sup>

Therefore, killings related to witchcraft need to be treated as criminal and the perpetrators must be prosecuted to the full extent of the law, as the Penal Code does not provide any excuse not to prosecute the perpetrators of acts of witchcraft when there is enough evidence to support their prosecution. However, regardless of the existence of the Act, witchcraft practices have been reported to continue, leaving the inference that legal sanctions have failed to address the issue.<sup>32</sup> It has been reported that killings related to witchcraft have continued to claim the lives of hundreds of Tanzanians and thus it was ranked as the second highest cause of abuse of the

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<sup>27</sup>HelpAge International Tanzania (note 21) above.

<sup>28</sup>Miguel E (note 12) above.

<sup>29</sup>United Republic of Tanzania, the Law Reform Commission: Final Report on Designated Legislation in the Nyalali Commission Report, April 1994.

<sup>30</sup>Ibid.

<sup>31</sup>Cap 16 [R.E 2002].

<sup>32</sup>Legal and Human Rights Centre (note 11) above.

right to life just behind mob violence in 2013.<sup>33</sup> Statistics indicate that violation of the right to life due to witchcraft-related killing has increased in recent times. For example, 630 people were killed in the year 2012 whereas 765 were killed in 2013. Of those killed in 2013, 505 were women while 260 were males.<sup>34</sup> Women have continued to constitute the larger portion of people affected by witchcraft-related killings, especially in the regions of Shinyanga, Geita, Mwanza, Mbeya, Tabora and Iringa.<sup>35</sup> Sensitization by the government, religious organisations and civil society regarding witchcraft-related issues will enable the communities in Tanzania to understand the impact of persecuting people because of the belief that a particular person is involved in the practice of witchcraft. It is envisaged that such sensitisation may enable people to abandon beliefs in witchcraft practices as a means of solving their social issues.

Due to these cultural practices, Tanzania has failed to honour its international obligations under human rights norms despite being a signatory to a number of related international instruments. CEDAW recognizes gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.<sup>36</sup> Article 2 of CEDAW obligates states to embrace legislative and other measures prohibiting discrimination against all women and taking measures to eliminate discrimination against women by any person, organisation or enterprise. The Maputo Protocol also requires state parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.<sup>37</sup> Article 17 of this Optional Protocol commits states to ensure the right of women to live in a positive cultural context. Specific to this culture is Article 22 of the Maputo Protocol which requires state parties to protect elderly women with regard to their physical, economic and social needs and especially to ensure their right to freedom from violence.

Similarly, witchcraft and faith healing are now associated with killing and violence against people with albinism in Tanzania. Albinos in Tanzania are under the threat of extinction, as they are being attacked and killed with impunity based on the belief that a potion made from their body parts can bring good luck, wealth and success. Tanzania is thought to have one of the world's largest populations of people living with albinism, and they are estimated to be

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<sup>33</sup>HelpAge International Tanzania (note 21) above.

<sup>34</sup>Miguel E (note 12) above.

<sup>35</sup>Ibid.

<sup>36</sup>CEDAW General Recommendation No. 19, 11<sup>th</sup> Session, 1992, para 1.

<sup>37</sup>Article 5 of the Maputo Protocol.

more than 30 000.<sup>38</sup> Practitioners of witchcraft search for albino body organs in the belief that they can be used to create power and wealth, especially in business and politics.<sup>39</sup> Over 80 albinos have been killed since 2013 for their body parts while more than 70 have lost their body parts through mutilations and cutting.<sup>40</sup> This practice has led to many people who are living with albinism to leave their economic activities, their homes and villages for their safety and they have had to migrate to special centres and urban areas to continue their lives there.<sup>41</sup>

This wave of albino attacks began in 2007 and took the form of killings fuelled by the sale of albino body parts to witchdoctors, especially in the Lake Victoria regions of Tanzania.<sup>42</sup> An uneducated society is more easily influenced by traditional beliefs, and superstitions that are rife among poorly educated rural communities have been identified as the main source of these inhumane practices.<sup>43</sup> It is claimed that witchdoctors use albino body parts to create potions and charms that allegedly bring wealth and success to those who purchase and consume them.<sup>44</sup> The lake zone area is rich in fish and minerals, which are economic activities that attract a huge workforce; this in turn leads to economic pressure and competition. Therefore, whenever yields in the respective industries decline, those engaging in it tend to look for an easy way to increase the yield. As a result, witchdoctors in the area exploit opportunities by telling people that the body parts of people with albinism can be used to create a charm that is likely to increase yields and thus increase their wealth.<sup>45</sup> A complete set of an albino's body parts includes all four limbs and the genitals, ears, tongue and nose. It is estimated that such a set may yield as much as US\$75 000.<sup>46</sup> Well-organised syndicates allegedly sell albino body parts in lucrative business deals that involve witchdoctors, fortune seekers, dealers in albino body parts, and the actual bounty hunters. It has been reported that family members of people with albinism sometimes

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<sup>38</sup>Wesangula D 'Albinism in Tanzania: Slow progress in combating violence and discrimination' *Global Development Professional Network, The Guardian* 12 March (2015) available at <http://www.theguardian.com/global-development-professionals-network> accessed on 8 September 2015; Also, The Government of Tanzania (2012) Population and Housing Census Report, available at [http://www.nbs.go.tz/sensa/PDF/Census%20General%20Report%20%2029%20March%202013\\_Combined\\_Final%20for%20Printing.pdf](http://www.nbs.go.tz/sensa/PDF/Census%20General%20Report%20%2029%20March%202013_Combined_Final%20for%20Printing.pdf) accessed 12 May 2015.

<sup>39</sup>Marcom V *Albinism in Tanzania: A Human Rights Issue, An Experience of Monitoring a White Black* (2013) Univerita Delis StudiDipadova 2. Available at [http://www.academia.edu/9140081/Albinism\\_in\\_Tanzania](http://www.academia.edu/9140081/Albinism_in_Tanzania) accessed on 27 April 2015.

<sup>40</sup>IRIN 'Child witchcraft allegations on the rise' (2010). Available at <http://www.irinnews.org> accessed on 10 July 2015.

<sup>41</sup>Ibid.

<sup>42</sup>Legal and Human Rights Centre (note 11) above.

<sup>43</sup>Marcom V (note 39) above.

<sup>44</sup>Ibid.

<sup>45</sup>Wesangula D (note 38) above.

<sup>46</sup>Legal and Human Rights Centre (note 9) above.

take an active role in the attacks while local leaders have also been suspected of being involved in such syndicates.<sup>47</sup> Attacks on and the killing of people with albinism for their body parts were allegedly supported by some politicians who desired to be victorious in the 2015 general election in Tanzania.<sup>48</sup>

The government has been working with NGOs, civil society and the general public to investigate and improve the situation. Tanzanian laws recognise albinisms and its associated impairment as a disability.<sup>49</sup> The Persons with Disability Act of 2010 also ensures equal rights and opportunities for people with all forms of disability.<sup>50</sup> The government has also signed and ratified the International Convention on the Rights of Peoples with Disabilities (ICRPD) which reflects on the need to offer special protection for specific categories of individuals. However, continuing attacks on PWA clearly shows that more needs to be done in order to implement stringent legal provisions. To date, no people accused of killing a person with albinism have been executed, but a total of 17 individuals have received the death sentence for this act, some of them as recently as March 2015. In this instance four individuals, including the husband of a murdered victim, were convicted.<sup>51</sup> The revocation of traditional healers' licenses and officially prohibiting them from consulting with clients is one among some measures taken by the government to deal with this situation. Unfortunately, these measures have been completely ineffective due to the fact that Tanzania is still rooted in tradition and superstitious beliefs. It is estimated that 80 per cent of Tanzanians resort to traditional medicine for primary health care and are afraid of being cursed despite the fact that many adhere to the Islamic and Christian religions.<sup>52</sup> This fact may testify to the gullibility of Tanzanian communities which leaves them vulnerable to beliefs of witchcraft.

Faith healing practices are among the cultural activities that hinder the implementation of women's rights as guaranteed in international instruments. Statistics have shown that most of the people living with albinism who are attacked are women and children who are too weak to

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<sup>47</sup>Wesangula D (note 38) above.

<sup>48</sup>Legal and Human Rights Centre (note 9) above.

<sup>49</sup>Tanzania National Policy on Disability (2001) defines albinism as "lost or limited opportunities to take party in the life of the communities on an equal level with others due to physical, mental or social factors."

<sup>50</sup>Section 5 of the Persons with Ability Act No. 9 of 2010.

<sup>51</sup>Wesangula D (note 38) above. Also IRIN (note 40) above.

<sup>52</sup> WHO Media Centre 'Fact Sheet No. 134: Traditional Medicine' World Health Organization (2003). Available at [www.who.int/mediacentre/factsheets/2003/fs134/en/](http://www.who.int/mediacentre/factsheets/2003/fs134/en/) accessed on 9 September 2015.

protect themselves.<sup>53</sup> The right to life<sup>54</sup> and the security of a person are among the women's rights that are guaranteed in the Maputo Protocol and CEDAW.<sup>55</sup> State parties are also required under Article 23 of the Maputo Protocol to ensure the protection of women with disabilities and to adopt measures to facilitate their access to employment as well as professional and vocational training. Although the Constitution of Tanzania guarantees the right to life, security,<sup>56</sup> freedom from torture or cruelty and protection against inhuman or degrading treatment,<sup>57</sup> people with albinism are still living in fear and concerted actions to protect them remain necessary as the legal framework to protect people with albinism is hardly implemented.<sup>58</sup> The Constitution of the United Republic of Tanzania prohibits discrimination and guarantees protection and equality before the law. It defines discrimination as follows:

“For the purposes of this Article, the expression ‘discriminate’ means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word ‘discriminate’ shall not be construed in a manner that will prohibit the Government from taking *purposeful steps aimed at rectifying disabilities* [my emphasis] in the society.<sup>59</sup>”

This definition of discrimination provided by the Constitution has some deficiencies as it inadvertently does not cover prohibition of discrimination based on age and mental or physical disability.<sup>60</sup> This irregularity was also noted in Tanzania's United Nations Universal Periodic Review Report (UPR).<sup>61</sup> The Constitution expressly prohibits discrimination on the ground of disability. The Bill of Rights in the Constitution does not expressly mention disability in the above quoted non-discrimination Article. The word ‘disabilities’ in the latter part of this provision does not refer to persons with disabilities as a specific category of people subjected to discrimination, but refers to affirmative action to counter oppressive tendencies in general. Other measures taken by Tanzania regarding the rights of people with disabilities include the

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<sup>53</sup>Marcom (note 39) above.

<sup>54</sup>Article 14 of the Constitution.

<sup>55</sup>Article 4 of the Maputo Protocol.

<sup>56</sup>Article 16 of the Constitution.

<sup>57</sup>Article of 13(5) (e) of the Constitution.

<sup>58</sup>Marcom (note 39) above.

<sup>59</sup>Article 13(5) of the Constitution.

<sup>60</sup>Shughuru P J *African Disability Rights Year Book ADRY* Volume 1 (2013) 341–357.

<sup>61</sup>Tanzania's Universal Periodic Review Report to the United Nations (19 July 2011) A/HRC/WG.6/12/TZA/1 (2011).

adoption of the 2004 National Policy on Disability<sup>62</sup> and the continued implementation of the National Action Plan on Care Services, Training and Protection for Vulnerable Children. A further measure was the adoption of the 2011 National Disability Mainstreaming Strategy for the implementation of the African Decade of Disability of which Tanzania is a signatory.<sup>63</sup>

### 3.3 Widows' Inheritance and Cleansing

In common law inheritance practices, a widow may be 'inherited' by another family member. It is often an older or younger brother of the deceased who has to take the mantle of being the widow's new husband.<sup>64</sup> This practice, which is also known as levirate marriage, prevails among the Kinga tribe of Makete in the Njombe region and the Sangu of the Mbeya region.<sup>65</sup> Sometimes widows are forced to undergo a sexual act with one of the husband's relatives for the reason that they have to be 'cleansed' or 'purified'.<sup>66</sup> Widow cleansing is common among the Iraqw of the Mara region and the Kurya and Luo tribes in the Mara region.<sup>67</sup> In the Luo tribe, this tradition specifically dictates that a widow is required to offer her body to a brother of her deceased husband within 40 days of the husband's death to chase away the bad which would otherwise haunt her.<sup>68</sup> In this tribe, if a widow dies before being 'cleansed', she cannot be buried as they consider that her 'uncleanliness' will bring a curse on the clan.<sup>69</sup> They normally hire men by paying them up to ten heads of cattle in addition to the cash amount of up to US\$150 to 'cleanse' a deceased's widow.<sup>70</sup> In the event that a widow refuses to marry or to sleep with the selected man, she is banished from her home and she loses custody of her children and all her inheritance.<sup>71</sup> A woman's consent to remarry is therefore usually coerced or unduly influenced by family members or the community. Most widows agree to marry the

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<sup>62</sup>The Government of Tanzania, National Policy on Disability (2004) available at <http://www.tanzania.go.tz/pdf/NATIONAL%20POLICY%20ON%20DISABILITY.pdf> accessed on 7 May 2015.

<sup>63</sup>Shughuru (note 60) above.

<sup>64</sup>Legal and Human Rights Centre (note 9) above.

<sup>65</sup>Ibid. See also Wambura S & Khaday P 'Sexual Abuse Under Customary Practices' in *Stopping Shaming and Naming: the Abuse of Power for Sexual Exploitation* Tanzania Women Judges Association (TAWJA) (2010) and Legal and Human Rights Centre (note 9) above.

<sup>66</sup>Otiso K 'Custom and culture of Tanzania' in Falola T *Culture and Custom of Africa Series*, Greenwood (2013) 145.

<sup>67</sup>Wambura (note 65) above.

<sup>68</sup>AllAfrica 'Why wives' inheritance should be discouraged?' *Tanzania Daily News* 12 January 2014. Available at <http://allafrica.com/stories/201401130400.html> accessed on 10 accessed September 2015.

<sup>69</sup>Wambura S & Khaday P (note 65) above.

<sup>70</sup>Ibid.

<sup>71</sup>Otiso K (note 66) above.

male relative due to fear of violence and the loss of her children and property. Widow inheritance and cleansing are among the harmful traditions that impact women in Tanzania.<sup>72</sup>

These customs have various forms and functions in different cultures and serve in relative proportions as a social protection for and control over the widow and her children. The tradition has been justified on the basis that it ensures that the deceased's wealth does not leave the patrilineal family.<sup>73</sup> Long ago, this tradition of widow inheritance was a common practice in numerous tribes in Tanzania. The widow used to be taken under the care of a close brother-in-law who was expected to sire children with her to maintain the continuity of his late brother's family.<sup>74</sup> The aim was to protect widows and their children by ensuring that they would not face hardship after losing the family breadwinner. But then there were clear procedures to be followed whenever the practice was to take place, and sometimes remarriage and sexual intercourse were not applicable.<sup>75</sup> The family clan meeting used to appoint a person to help the widow and family members usually raised the matter.<sup>76</sup> This was done on the basis that women were considered to be weak and not involved in economic activities or any decision making, so it was essential for a clan to appoint a man to administer the deceased's family. However, the continuation of this practice is no longer justified because most people who are practising it now ignore the customary values of protection and care and abuse the situation for sexual intercourse with the widow and ownership of her property.

Moreover, this practice exposes widows to the risk of acquiring HIV/AIDS and other sexually transmitted diseases. It also considers a woman as a family property that can be transferred from one man to another and be 'cleansed' without consent. This phenomenon is clearly a consequence of the bride price which is usually negotiated and paid by the groom's family to the bride's family. In most cases the bride-to-be is not involved at all in the negotiations.<sup>77</sup> Families justify the practice of forcing widows to be inherited because all members of the husband's family would have contributed to the payment of the bride price for the widow, thereby turning her into a family property.<sup>78</sup> Once she has been inherited, a widow loses her

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<sup>72</sup> Peter S & Malyi M 'Widow inheritance and cleansing practices widely in Tanzania' *We Write for Rights* (2013).

<sup>73</sup> Legal and Human Rights Centre (Note 9) above.

<sup>74</sup> AllAfrica (note 68) above.

<sup>75</sup> Otiso K (note 66) above.

<sup>76</sup> Ibid.

<sup>77</sup> Legal and Human Rights Centre (note 11) above.

<sup>78</sup> Kimani M 'Taking violence against women in Africa' *Africa Renewal: Special Edition on Women* (2012) 21.



husband's property which goes to the new husband. If a widow seeks separation or divorce, the bridal price has to be reimbursed.<sup>79</sup> Often, many widows' families are unable or unwilling to refund the bride price and their brothers or fathers may beat them to force them back to their in-laws.

The Law of Marriage Act of Tanzania is silent on the payment of bride price and leaves the widows at the mercy of the husband's relatives over inheritance after his death.<sup>80</sup> There is a need to amend the Law of Marriage Act in order to safeguard personal liberties of widows in Tanzania. International human rights norms to which Tanzania is signatory are very clear on this kind of harmful traditions. Article 5 and of CEDAW required state parties to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of harmful customary practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. CEDAW requires state parties also to take into account the particular problems faced by rural women, like those who are suffering from widow inheritance and the 'cleansing' custom, and to take appropriate measures to ensure the application of the provisions of CEDAW specifically in rural areas.<sup>81</sup> This international instrument urges the same marriage rights for men and women.<sup>82</sup> These rights include the right to freely choose a spouse and to enter into marriage only with full and free consent.<sup>83</sup>

The Maputo Protocol, which guarantees the rights of all African women, is likewise very specific on the widow's rights against abusive cultural practices. Article 6 of this instrument provides clearly that no marriage shall take place without the free and full consent of both parties.<sup>84</sup> Thus forcing a widow to remarry a member of her husband's family is totally against this Article. This Protocol precisely provides for widow's rights under Article 20 which state:

“State parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions: a) That widows are not subjected to inhuman, humiliating or degrading treatment; b) That a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to

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<sup>79</sup>Ibid.

<sup>80</sup>Act no. 5 of 1971.

<sup>81</sup>Article 14 of CEDAW.

<sup>82</sup>Article 16 (1) (a) of CEDAW.

<sup>83</sup>Article 16 (1) (a) and (b) of CEDAW.

<sup>84</sup>Article 6(a) of the Maputo Protocol.

the interests and the welfare of the children; c) That a widow shall have the right to remarry and, in that event, to marry the person of her choice.”<sup>85</sup>

In addition to the above, women have been guaranteed the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS.<sup>86</sup> So subjecting widows to inheritance and ‘cleansing’ processes is to deny them this right. The culture of widow inheritance has been reported to exist in other communities in African countries such as in South Africa, particularly in KwaZulu-Natal and the Eastern Cape.<sup>87</sup> Widows in these areas are required to choose a husband by selecting one of a number of sticks which they are given during a clan meeting, without knowing who they are choosing. Consequently, the stick they choose determines who the husband will be.

### **3.4 Domestic Violence**

Domestic violence is broadly defined by the Declaration on the Elimination of Violence against Women to include physical, sexual, and physiological harm or threats of harm in public or private life.<sup>88</sup> It refers to gender-based violence as a violation of human rights and as an instance of sexual discrimination and inequality. This Declaration, which is an auxiliary document to CEDAW, confers the obligation on states to condemn violence against women and not to invoke any customs, traditions or religious considerations in order to avoid their obligations with respect to its elimination.<sup>89</sup> It is reported that 50 per cent of the women who live in a relationship with a man or who are married are experiencing physical or sexual violence at the hands of a partner in Tanzania.<sup>90</sup> The Law of Marriage Act [Cap. 29 R.E. 2002] of Tanzania under section 66 provides a declaration against spousal battery, but it does not make such a practice an offence, nor does it provide any sanctions. Section 107(2)(c) of this law simply recognises cruelty, whether mental or physical, that can be admitted as evidence that the marriage has irreparably broken down.

In 1998, Tanzania amended its Penal Code to add some sexual offences with reference to the Sexual Offences Special Provisions Act. However, those amendments that are gender sensitive

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<sup>85</sup>Article 20 of CEDAW.

<sup>86</sup>Article 14 of the Maputo Protocol.

<sup>87</sup>Maluleke (note 6) above.

<sup>88</sup>Article 1 of the UN Declaration on the Elimination of Violence against Women of 1993.

<sup>89</sup>Ibid Article 4.

<sup>90</sup>The US Department of State ‘Tanzania Country Reports on Human Rights Practices for 2007’ available at <https://www.dol.gov/ilab/reports/child-labor/findings/tda2007/tanzania.pdf> accessed on 8 June 2016.

are also quiet on the matter of domestic violence.<sup>91</sup> Section 5 of the Sexual Offences Special Provisions Act denies that rape is an offence if the victim is married to the assailant and was not separated from him at that time. In essence therefore, marital rape is permissible under the law in Tanzania, as a wife cannot revoke her consent to have sex with her husband until she is legally separated or divorced from him. Despite these laws, there has not been much change of attitude.<sup>92</sup> Incidences of women being beaten to death by their husbands have often been reported.<sup>93</sup> Domestic violence deprives women of their ability to achieve their full potential by threatening their safety, freedom and autonomy. Many African cultures have been considered playing a powerful role in shaping a woman's experience of domestic violence.<sup>94</sup> These cultures have created certain barriers which arise from family, society, and legal system levels, and these barriers significantly impact a woman's ability and willingness to leave an abusive relationship and seek protection under the law.<sup>95</sup>

The majority of women, especially in rural areas, do not have the support of enforcement systems or culture that condemns domestic violence. Tanzanian cultures take abuse as a form of discipline which is instilled in people at an early age in certain contexts.<sup>96</sup> Teachers and parents are using corporal punishment such as caning to discipline students in the classroom and at home. Some children grow up watching their fathers beat their mothers and they grow up believing that men are supposed to abuse their wives.<sup>97</sup> Moreover, some parents require their children to undergo other traditional practices that damage their children's bodies, although they are culturally accepted.<sup>98</sup> Some parents have been reported to cause grievous bodily harm to their children through this abusive way of instilling discipline.<sup>99</sup> These and other traditional practices send the message to girls from a young age that their bodies are not their own to control. Furthermore, it is believed that it is appropriate for men to use violence to

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<sup>91</sup>The 1999 amendments to the Tanzania Penal Code, Criminal Procedure Act, Law of Evidence Act. Minimal Sentence Act and Children and Young Persons Act, Cap 13 R. E. 2002.

<sup>92</sup>Wambura S & Khaday P (note 65) above.

<sup>93</sup>Nyamba F 'Domestic violence rights movements in Tanzania; An exploration. Dissertation submitted to the Faculty of the Graduate College in partial fulfilment of the requirements of the degree of Doctor of Philosophy, Western Michigan University (2009) 81. Another example is the case of *R v. Elvans s/o Cyprian Luvindu Criminal Section No. 48 of 2003*.

<sup>94</sup>Boas H 'Understanding culture and perceptions on domestic violence in Africa' *American Bar Association, Commission on Domestic Violence, African Immigrants Newsletter* 13 (2009).

<sup>95</sup>*Ibid.*

<sup>96</sup>Mtambalike M 'Domestic violence in Tanzania: The never ending story' *We Write for Rights Sauti Human Rights Centre Reports* (2013). Available at <https://wewriteforrights.wordpress.com/2013/08/11/2> accessed on 10 February 2015.

<sup>97</sup>Nyamba (note 93) above.

<sup>98</sup>Practices such as FGM, virginity testing and breast-ironing impose bodily harm.

<sup>99</sup>Legal and Human Rights Centre (note 9) above.

discipline their wives.<sup>100</sup> Domestic abuse has been justified for actions such as leaving the home without informing the husband, arguing with the husband, neglecting the children, refusing sex, not cooking the husband's food on time, and even burning the food.<sup>101</sup> Due to this culture, some women believe that wife beating is justified when a wife misbehaves.<sup>102</sup> Sometimes they feel ashamed or guilty for being abused and, as a result, they feel embarrassed to report domestic violence. In fact, some tribes such as the Kurya of the Musoma Region have some customary rules that allow abusers to justify their acts of violence.<sup>103</sup> In this tribe, a husband may lawfully beat his wife for the purpose of correcting her, as long as the beating does not result in grievous harm.<sup>104</sup> The perception that private domestic disputes are not to be dealt with by public law enforcement and court systems is prevalent in Tanzania.<sup>105</sup>

Domestic violence is regarded as a private matter to be resolved informally by the family or community, rather than by reporting it to the police or the court system.<sup>106</sup> Often, the victims first seek help from their relatives or traditional or religious leaders who discourage them from reporting the abuse to the authorities and subsequently they are encouraged to be more subservient to their husbands in order to avoid further abuse.<sup>107</sup> This culture affects law enforcers as well, because the police are often blamed for not bothering to file reports of a victim's complaint of domestic violence, and they are often reluctant to investigate or prosecute abusers.<sup>108</sup> The practice of polygamy in marriage also exacerbates domestic violence between intimate partners. For example, in some cases where there is an argument between the wives and a husband chooses to take the side of his preferred wife, other wives are abused in an effort to discipline the offender(s) and to please the preferred wife.<sup>109</sup>

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<sup>100</sup>Boas H (note 94) above.

<sup>101</sup>Ibid.

<sup>102</sup>Mtambalike M (note 96) above.

<sup>103</sup>Ibid.

<sup>104</sup>Nyamba (note 93) above.

<sup>105</sup>Sheik L 'Tanzania: Violence against women is a violation of human rights' *Tanzania Daily News* 21 March 2003.

<sup>106</sup>Boas H (note 45) above.

<sup>107</sup>Nyamba (note 93) above.

<sup>108</sup>Legal and Human Rights Centre (note 9) above.

<sup>109</sup>WHO 'Tanzania Domestic violence a serious concern' (2006). Available at <http://www.irinnews.org/report/58788> accessed on 7 September 2015.

Tanzania's laws specifically permit a man to have more than one wife.<sup>110</sup> Conversely, international law encourages monogamy as the preferred form of marriage. Furthermore, it guarantees equal marriage rights for women who are in polygamous marital relationships.

Another factor that contributes to domestic violence practices is the economic imbalance between men and women.<sup>111</sup> This factor also discourages women from leaving abusive relationships. They become reluctant to leave their husbands because of being financially dependent on them.<sup>112</sup> Men are reported to abuse their wives by depriving them of money, food, or other necessities.<sup>113</sup> Likewise, economic dependence precludes women from affording the services they need to effectively prosecute a case against their abusive husbands. As a result, they continue to persevere.<sup>114</sup> There are very few domestic violence shelters in Tanzania and most regions have no such shelters at all.<sup>115</sup> Apart from this, psychological counselling is neither common nor available, especially in rural areas where seeking council is culturally considered unacceptable by some communities.<sup>116</sup>

Domestic violence remains very widespread and is severely under-reported. Pressure from family and the community to remain silent and stigma surrounding gender-based violence prevent many women from reporting spousal violence. A 2005 study found that 15 per cent of women who had ever been married had been physically assaulted in the previous twelve months, while 33 per cent had experienced some form of violence at the hands of their partners. Rape also remains a serious problem. Women's freedom of movement may be restricted on a day-to-day basis, for example 48.9 per cent of married women aged 15-49 questioned for the 2010 Demographic Health Survey (DHS) said that their husbands made the final decision as to whether or not they could travel to visit family.<sup>117</sup> Tanzania needs to abide by its international commitments by adopting clear provisions of law which punish domestic violence and govern

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<sup>110</sup>Section 9(3) of the Law of Marriage Act of 1971 [CAP 29 R.E. 2012].

<sup>111</sup>Human Rights Watch *Domestic Violence in Tanzania: The Experience of Women in Chamwino Rural District in Dodoma*, Erasmus University (2010) 189.

<sup>112</sup>WHO (note 109) above.

<sup>113</sup>Sheik (note 105) above.

<sup>114</sup>Boas (note 94) above.

<sup>115</sup>Yussuf I 'Tanzania: Safe shelters to help gender violence victims' *Daily News* 16 May 2013.

<sup>116</sup>*Ibid.*

<sup>117</sup> The OECD Development Centre's Social Institutions and Gender Index (SIGI) 'United Republic of Tanzania', Social Institution and Gender Index 2012. Available at <http://www.genderindex.org/sites/default/files/datasheets/TZ.pdf> accessed on 17 May 2016.

family affairs holistically. The East African Community Treaty of 1999 to which Tanzania is a party is against gender-based violence. Article 124 of this Treaty states:

“Each member state shall take such other measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every respect...”

Many other African countries have passed laws to outlaw domestic violence. South Africa was the first country to pass the Prevention of Family Violence Act on the continent in 1993, which was revised and replaced with its current Domestic Violence Act of 1998. South Africa was followed by Mauritius in 1997.<sup>118</sup> Other African countries that have enacted legislation against domestic violence include Namibia in 2003, Malawi in 2006, and Ghana in 2007. Zimbabwe and Sierra Leone also managed to pass related bills.<sup>119</sup> Although the Constitution of the United Republic of Tanzania does not expressly provide for the rights of women, in general gender-based violence is a criminal offence, and the legal framework should adhere to restrictions in this regard.<sup>120</sup>

### 3.5 Marriage by Abduction

Marriage abduction is the traditional practice of kidnapping girls for marriage, which is common in Tanzania among the Chagga and Nyamwezi tribes.<sup>121</sup> According to this traditional practice, a man and his friends or peers set out to compel a girl or young woman’s family to endorse marriage negotiations.<sup>122</sup> A girl will be abducted by a man while she may be walking down the road and she is taken somewhere else where she is raped. As a consequence of such a hideous act, the girl’s family is compelled to accept that the man desires the girl’s hand in marriage. The act of rape thus renders the family vulnerable and susceptible to the acceptance of the proposed marriage as they don’t have any other option.<sup>123</sup> Girls as young as 12 years old are grabbed, kicking and screaming, from the street and taken away to the homestead of their

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<sup>118</sup>Bowman C Symposium: Theories of Domestic Violence in the African Context, 11 *Am. U. J. Gender Soc. Pol’y & L.* 847 (2003); Eze-Anaba I ‘Domestic violence and legal reforms in Nigeria: Prospects and challenges, 14 *Cardozo J.L. & Gender* 21 (2007) 78.

<sup>119</sup>*Ibid.*

<sup>120</sup>Chapter xxv of the Penal Code [Cap 16 R.E. 2002].

<sup>121</sup>Wambura S & Khaday P (note 65) above.

<sup>122</sup>*Ibid.*

<sup>123</sup>Lillie M ‘Cultural forms of human trafficking in Africa’ (2003) Available at <http://humantraffickingsearch.net/wp/cultural-forms-of-human-trafficking-in-africa/> accessed on 13 July 2015.

admirers.<sup>124</sup> The abducted girls are apparently given potions to ‘soften them up’, and then they are forced to sleep with the abductor.<sup>125</sup> A girl who was kidnapped and spent a night with a male cannot go back to her parents and cannot protest marriage to her captor. This is because she will not be able to get married to another person, as no one will accept her. So, the girls are not married to the suitors of their own choice, but the suitors of their parents’ choice, or they are simply married to their captors as fallen heroines.<sup>126</sup> A day or two after the rape, the abductor sends a delegation to the abducted girl’s home to offer compensation to the victim’s family.<sup>127</sup>

Some families accept the compensation as a process of dowry to marry their daughter off to the older man. However, many families nowadays fight back by refusing to accept the compensation and further opt to lay charges of abduction and rape against the perpetrators.<sup>128</sup> The same tradition is also prevalent in other African countries such as South Africa where it is known as ‘ukuthwala’, which is practised mainly by the Xhosa tribe, and in some rural areas of KwaZulu-Natal and the Eastern Cape.<sup>129</sup> This culture has been reported to be worse in counties such as Ethiopia and Somalia.<sup>130</sup> Girls are abducted for an illegal practice which turns them into sex slaves.<sup>131</sup> It is notable that although the practice of marriage by abduction has its roots in cultural tradition, it no longer functions within the parameters of its original intended purpose.<sup>132</sup> Instead, it is used to legitimise acts which are at their very core abuses of these girls’ rights.<sup>133</sup> This cultural practice goes back to the days when girls whose parents did not approve of their boyfriends arranged for the abduction so that the families would be forced to allow their marriage.<sup>134</sup> This was done to ensure that parents would be forced not only to accept the relationship, but also the dowry from the unwanted boyfriend, and the girl would then marry

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<sup>124</sup>Freeman M A Rudolf B & Chinkin C (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* Oxford University Press (2012) 426.

<sup>125</sup>Ibid.

<sup>126</sup>Makoye K ‘Reporting of rape, kidnapping in Tanzania rises’ *Thomson Reuters Foundation* 21 November (2014) 2.

<sup>127</sup>Ibid.

<sup>128</sup>Wambura S & Khaday P (note 65) above.

<sup>129</sup>Department of Justice and Constitutional Development: Gender Directorate, South Africa (2010) ‘Ukuthwala – let’s stop stolen childhood’ available at <http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html> accessed on 20 July 2015.

<sup>130</sup>Gena A ‘Ethiopia: Surviving forced marriage’ *IRIN Humanitarian News and Analysis* (2007).

<sup>131</sup>Lillie M (note 123) above.

<sup>132</sup>Freeman M (note 124) above.

<sup>133</sup>Ibid.

<sup>134</sup>Department of Justice Constitutional Development (note 130) above.

the man of her dreams after having given consent in this regard.<sup>135</sup> Initially this culture involved only certain women of marriageable age.

Marriage by abduction burdens the girl child with the responsibility of being a wife to a husband and, in most instances, to bear children and look after the in-laws. This culture also puts the health of young women in danger with the high risk of contracting HIV, sexual transmitted diseases, and other pregnancy-related complications such as infant or maternal mortality and fistula-related diseases. It also deprives girls of opportunities to pursue educational programmes that will enhance their development. Tanzania's government has taken a step to deal with this culture by enacting the Sexual Offences (Special Provisions) Act, which effected amendments in the Penal Code by broadening the definition of the offence of rape to cover a lot of situations in which women are sexually exploited and abused and it created new offences as well. Section 130 of the Penal Code, which defines rape, was redefined to include several features, and provides the following:

“It is an offence for a male person to rape a girl or a woman. A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions: (a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse; (b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention; (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drug, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two; (d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom she is, or believes herself to be, lawfully married; (e) with or without her consent when she is under eighteen years of age, unless the woman is his wife.”<sup>136</sup>

This law has specifically created abduction as an offence under section 133, which stipulates that it is an offense to carnally know a woman of any age with the intention to marry or to cause her to be married or carnally know by any other person, to take her away, or to detain her against her will. The same section provides a penalty of seven years imprisonment for such an offence. Section 134 of the same law addresses the offence of abduction of girls under 16 years. This law also provides for the severe penalty for sexual exploitation of girls under 18 which

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<sup>135</sup>Makoye K (note 126) above.

<sup>136</sup>Cap 16 R. E. 2002.



ranges from a minimum period of imprisonment of 5 years to a maximum of 20 years.<sup>137</sup> The courts of law have also declared the abduction custom obnoxious and against Article 16(1)(b) of CEDAW and convicted the culprits of rape in the case of *Leonard Jonathan v Republic, Criminal Appeal No 53 of 2003 (unreported)*. In this case the Court ruled that the victims of abduction could prosecute their captors for rape in view of the fact that they never consented to sexual relations or to the alleged traditional martial union. Furthermore, Tanzania has incorporated the UN Convention on the Rights of the Child by enacting the Law of the Child Act of 2009, which regards anyone below the age of 18 years as a child. The Act specifically bars acts associated with outdated customs such as abduction marriage to be conducted on the children. Both CEDAW and the Maputo Protocol clearly stipulate the requirement for both parties to express free will in marriage.<sup>138</sup> Nonetheless, these laws alone cannot solve this customary challenge. Training and continuing public awareness campaigns are needed in order to respond well to this challenge for the better implementation of internationally recognised human rights.

### 3.6 Female Genital Mutilation (FGM)

Female genital mutilation refers to all kinds of procedures which involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.<sup>139</sup> FGM is also called female genital cutting.<sup>140</sup> In Tanzania, this culture is mostly practised in the Dodoma, Manyara, Singida, Mara, Kilimanjaro and Arusha regions where 7.9 million women and young girls are estimated to have been victims of this tradition.<sup>141</sup> FGM is usually done to girls/women aged 8 – 25 years as a rite of passage to prepare girls for marriage. It is usually carried out by traditional practitioners in rural areas who are called ‘ngaribas’, while in urban areas it is sometimes performed by midwives and doctors.<sup>142</sup> The idea behind the FGM practice is to be in control of sexual desires of girls so that they will be

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<sup>137</sup>Wambura S & Khaday P (note 65) above.

<sup>138</sup>Article 16(b) of CEDAW and Article (a) of the Maputo Protocol.

<sup>139</sup>WHO ‘Female genital mutilation’ Fact sheet No. 241 (2013). Available at <http://www.who.int/mediacentre/factsheets/fs241/en/> accessed on 24 August 2015.

<sup>140</sup>Ibid.

<sup>141</sup>UNICEF ‘Female genital cutting/mutilation: A statistical overview and exploration of the dynamics of change’ (2013). Available at [https://www.unicef.org/publications/index\\_69875.html](https://www.unicef.org/publications/index_69875.html) accessed on 15 August 2015.

<sup>142</sup>28 Too Many *Country Profile: FGM in Tanzania*. 28 Too Many (2013); also Galukande M ‘Eradicating female genital mutilation and cutting in Tanzania: An observational study’ *BMC Public Health* [10.1186/s12889-015-2439-1](https://doi.org/10.1186/s12889-015-2439-1) accessed November 2015.

satisfied with their husbands only.<sup>143</sup> It is also believed that it paves the way for men to have easy intercourse with their wives.<sup>144</sup> These communities consider FGM important for their family's dignity and glory, and girls who have undergone FGM are treated respectfully and gain higher status and recognition in the community. They are also to marry rich, respected and caring husbands.<sup>145</sup> Some of the tribes such as the Nyaturu, Gogo and Maasai perform FGM believing that it cures 'lawalawa', which is a treatable vaginal or urinary tract infection.<sup>146</sup> In other areas such as the Manjaro district in the Manyara region, it has been associated with business and even women of an older age have been reported to undergo FGM as part of a business deal.<sup>147</sup> After undergoing FGM, the removed flesh is dried and sold as charms to mining traders and other merchants.<sup>148</sup>

The FGM culture adversely affects women and girls in 28 African and some Middle Eastern and Asian countries. It is estimated that more than 125 million women and girls have undergone FGM, and a further three million girls in Africa will undergo FGM annually if current trends continue.<sup>149</sup> Tanzanian communities which practise this culture put girls under strong social pressure, including pressure from their peers, and they risk victimisation and stigma if they refuse to undergo FGM.<sup>150</sup> Girls and women who refuse to undergo FGM are neither respected nor married and one can be divorced if, after marriage, it is found out that she was not circumcised.<sup>151</sup> The taboos surrounding girls who have not undergone FGM are affecting their daily activities within their communities. For example, girls who have refused circumcision are prohibited from cooking for in-laws, opening the doors of the cow shelters, and washing in the river with girls who have undergone FGM to prevent their bad luck being brought upon anyone who may enter the shelter after them.<sup>152</sup> Some women are subjected to FGM after marriage when they experience problems conceiving children or if the husband's family faced difficulties or misfortune believing that the wife is responsible for their ill fate. This kind of

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<sup>143</sup>Ibid.

<sup>144</sup>Wambura S & Khaday P (note 65) above.

<sup>145</sup>28 Too Many (note 142) above.

<sup>146</sup>Internationale Zusammenarbeit (GIZ) 'Female genital mutilation in Tanzania' *Country Fact-Sheet Ending Female Genital Mutilation* (2011)

<sup>147</sup>UNICEF (note 141) above.

<sup>148</sup>Ibid.

<sup>149</sup>28 Too Many (note 142) above.

<sup>150</sup>Ibid.

<sup>151</sup>Galukande M *Female Genital Mutilation: Treating the Tears* Middlesex University Press (2004) 85

<sup>152</sup>Children's Dignity Forum 'Voices of child brides and child mothers in Tanzania' Peer Research Report on Child Marriage in the Tarime District, Mara Region, Tanzania (2010). Available at [www.forwarduk.org.uk/download/194](http://www.forwarduk.org.uk/download/194) accessed on 8 November 2015.

social exclusion adversely affects women's ability to marry.<sup>153</sup> This traditional practice, which affects the physical and psychological health of girls, impacts their right to equality as it affects their performance and attendance at school by up to 25 per cent; hence many young girls become impotent to engage in economic or educational endeavours which in turn leads to their feelings of insecurity and further potential for abuse.<sup>154</sup>

Additionally, the FGM process is conducted not only under very unhealthy conditions, but also in an unsafe manner causing some children to die due to excessive bleeding.<sup>155</sup> Most of the time circumcisers use sharp equipment such as stones, local knives, and razor blades which are at times rusty and are used jointly on the initiates, thus subjecting victims to tetanus and HIV.<sup>156</sup> Other complications which are the result of this traumatic traditional practice include severe pain, haemorrhaging, shock, urine retention, bacterial infection, open sores in the genital region, and permanent injury to nearby genital tissue.<sup>157</sup> Recurrent bladder and urinary tract infections, infertility, cysts and childbirth complications are among the long-term complications which can be caused by the surgical alteration of female genitalia.<sup>158</sup>

FGM as a kind of gender-based violence has been recognised as a harmful practice and a violation of the human rights of girls and women by the Maputo Protocol. Article 5(b) of the Maputo Protocol specifically requires state parties to prohibit and eradicate all forms of FGM. International norms also require state parties to prohibit and condemn FGM by taking all measures, including legislative measures which are backed up by sanctions; the creation of public awareness in the society; providing necessary support to the victims of FGM; and protecting women who are at risk of being subjected to harmful cultures.<sup>159</sup> The FGM culture hinders the free development of the victims and degrades their dignity and self-respect as guaranteed by Article 3 of Maputo Protocol and Article 3 of CEDAW. The practice is also against international instruments which assure women's right to health and which include

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<sup>153</sup>Ibid.

<sup>154</sup>WHO 'Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries' Lancet (2006). Available at <http://www.ncbi.nlm.nih.gov/pubmed/16753486> accessed on 8 November 2015.

<sup>155</sup>Internationale Zusammenarbeit (GIZ) (note 146) above.

<sup>156</sup>Galukande M (note 152) above.

<sup>157</sup>Ibid.

<sup>158</sup>WHO (note 154) above.

<sup>159</sup>Articles 1(b), 2 and 5 of the Maputo Protocol and Article 5 of CEDAW.

sexual and reproductive health and rights to protect women against sexually transmitted infections and HIV.<sup>160</sup>

Tanzania is among the countries that have managed to incorporate CEDAW and the Maputo Protocol in terms of FGM. Its Penal Code was amended in 1998 to prohibit FGM of girls under the age of 18. In Tanzania, FGM has been prohibited since 1998 with the adoption of SOSPA, which amended the Penal Code CAP 16. Section 21 of the Act criminalises FGM upon anyone under the age of 18 and provides the punishment for that offence which is imprisonment of 5 to 15 years or a fine not exceeding TShs. 300 000/= or both. The FGM problem is also covered by section 199A of the Penal Code in relation to the offence of cruelty to children. Tanzania is one of the countries that have managed to incorporate international laws against FGM, although it was among the traditional practices which were guarded by customs, traditions and cultural practices of different societies in the country. However, this law does not include women over the age of 18 years and there is no minimum sentence. The FGM problem is also covered by section 199A of the Penal Code in relation to the offence of cruelty to children. The established Gender Desks in police stations have also reduced the occurrence of FGM practices by responding to survivors of FGM. Some of the communities which used to practise this culture have abandoned it and their girls are undergoing alternative rites of passage (ARP) ceremonies instead.<sup>161</sup> Although there have been some arrests under this law, the prosecution of the perpetrators has been slow.<sup>162</sup> This is because the law enforcers are unaware of the law and its intention, which causes them not to take the said matter seriously.<sup>163</sup> This situation was evident in the case of *Zakayo Katungo v Selemani Ningoli*,<sup>164</sup> in which an accused was acquitted after the police failed to proceed with the case due to a lack of credible evidence which was supposed to be collected by the police themselves.<sup>165</sup> The evidence involved a doctor's report which was supposed to have been taken at the time the matter was reported to the police. However, the police did not take any measures to take the victim to the hospital for that purpose. The law has

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<sup>160</sup>Article 14 of the Maputo Protocol and Article 12 of CEDAW.

<sup>161</sup>Waritay & Wilson 'Working to end female genital mutilation and cutting in Tanzania: The role and response of the church' *Tearfund* (2012).

<sup>162</sup>Legal and Human Rights Centre *The Legal Process: Can it Save Children from FGM? A Case of Three Maasai Girls in Morogoro* Report on the Enforcement of FGM Law (2004) LHRC.

<sup>163</sup>Legal and Human Rights Centre (note 11) above.

<sup>164</sup>Disrtict Court of Morogoro, Miscellaneous Criminal Case No. 1 of 2002.

<sup>165</sup>Legal and Human Rights Centre (note 162) above.

not been effectively enforced since then. There have been some arrests under this law but, as stated before, prosecution of the perpetrators has been slow.<sup>166</sup>

The ineffective enforcement of this law does not only occur because of law enforcers' ignorance of the law, but because of ignorance within the society at large, as there are a lot of challenges on enforcement of this law due to the fact that FGM occurs in secret which makes detection difficult.<sup>167</sup> The fear of prosecution is driving the practice underground in some regions, while in some areas such as Mara, mass FGM still takes place with little or no law enforcement.<sup>168</sup> It is notable that nowadays in some areas such as Kilimanjaro and Manayara, FGM victims are baby girls between the ages of 1 month to 1 year old to avoid detection while initially it was practised on girls and women between the ages of 8 and 30 years.<sup>169</sup> Some girls have been reported to be taken across the border to Kenya to be circumcised.<sup>170</sup> Various NGOs in Tanzania are working to combat FGM through different strategies, including the human rights approach, health risk approach and women's empowerment.<sup>171</sup> There is a need to introduce ethnic heritage in the Tanzanian school curriculum to help young girls to develop self-realisation and to achieve freedom from external coercion, including cultural expectations and political and economic oppression. Girls should be empowered from a young age to be able to stand firm against negative cultural practices and to make their own constructive decisions.

### **3.7 Child Marriages and Payment of Dowry**

Child marriage, also known as early marriage, is defined by the Committee on Elimination of All forms of Discriminations against Women under General Recommendation 21 as "marriage of a child below 18 years".<sup>172</sup> Such early marriages are expected of girls before they are physically, physiologically, and psychologically ready to shoulder the responsibilities of

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<sup>166</sup>Legal and Human Rights Centre (note 11) above.

<sup>167</sup>Msuya S E 'Female genital cutting in Kilimanjaro, Tanzania: Changing attitudes?' *Tropical Medicine and International Health* 7(2) (2002) 159–165.

<sup>168</sup>28 Too Many (note 242) above.

<sup>169</sup>Msuya (note 167) above.

<sup>170</sup>Waritay & Wilson (note 161) above.

<sup>171</sup>Ibid.

<sup>172</sup>Committee on the Elimination of All forms of Discriminations against Women, General Recommendation No. 2. Equality in Marriage and Family Relation UN GAORG (1994) Doc. No. A/47/38.

marriage and childbearing.<sup>173</sup> Tanzania has one of the highest child marriage prevalence rates in the world. This is a culture which is more prevalent in rural areas, especially in the coastal regions, than in urban areas.<sup>174</sup> Government statistics demonstrate that 4 in 10 Tanzanian women got married before turning 18.<sup>175</sup> This culture mainly affects girls and women in Tanzania as women on average get married more than five years earlier than men.<sup>176</sup> Girls are generally considered ready for marriage when they reach puberty and marriage is viewed as a way to protect them from pre-marital sex and pregnancy that undermine family honour and may decrease the amount of dowry a family may receive.<sup>177</sup> Girls as young as 9 and up to 17 years have been forced into marriages by their parents, guardians or relatives.<sup>178</sup>

Furthermore, there are cases where girl children were forced to marry men who were old enough to be their grandfathers.<sup>179</sup> The traditional practice of paying bridal price also allows older men who are rich to persuade greedy or desperate parents and guardians to exchange their daughters for financial advantage.<sup>180</sup> Girls are forced against their will to marry men who may be much older and far more experienced than they are as long as they are rich and capable of paying a high dowry.<sup>181</sup> Girls who reject or resist marriage are usually assaulted, verbally abused, or evicted from their homes by their families.<sup>182</sup> Most of these child marriages end up in divorce and separation when one or both partners realise that they are not ready for the matrimonial responsibilities with partners who were forced upon them. Younger spouses are usually not able to sustain their families financially and are not ready to take parental responsibilities.<sup>183</sup> In addition, most girls in forced marriages end up experiencing domestic violence and abuse from their husbands or/and their in-laws.<sup>184</sup> They experience assault, rape and some of them are abandoned by their husbands and are left to care for their children without

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<sup>173</sup>Human Rights Watch *No Way Out: Child Marriage and Human Rights Abuses in Tanzania* (2014) Human Rights Watch.

<sup>174</sup> UNFP ‘Marrying too young: Ending child marriage in Tanzania’ (2012). Available at [countryoffice.unfpa.org](http://countryoffice.unfpa.org) accessed on 28 September 2015.

<sup>175</sup>Human Rights Watch ‘Tanzania: Child marriage harms girls’ 29 October 2014. Available at <https://www.hrw.org/news/2014/10/29/tanzania-child-marriage-harms-girls>; See also Legal and Human Rights Centre *Tanzania Human Rights Report 2014* LHRC (2015) 380.

<sup>176</sup>UNFP (note 174) above.

<sup>177</sup>Human Rights Watch (note 173 above).

<sup>178</sup> Girls not Brides ‘Child marriage around the world: Tanzania’ (2014). Available at <http://www.girlsnotbrides.org/child-marriage/tanzania/> accessed on 27 September 2015.

<sup>179</sup>Ibid.

<sup>180</sup>Ibid.

<sup>181</sup>UNFP (note 174) above.

<sup>182</sup>Girls not brides (note 178) above.

<sup>183</sup>Human Rights Watch (note 173 above).

<sup>184</sup>Ibid.

any financial support.<sup>185</sup> Many of them end up living in a lonely and isolated marriage, confined to the house by domestic and child rearing duties because their husbands and in-laws restrict their movements.<sup>186</sup> Many arranged marriages of young girls condemn these brides to a life of near slavery.<sup>187</sup> Some girls are forced to flee their homes and family to escape forced marriages and they end up running away to urban areas for cheap and forced labour for their survival.<sup>188</sup>

This culture stunts the social development of girls as they are forced to drop out of school to get married.<sup>189</sup> They also forfeit their chance of growing to maturity before marriage or making their own decisions about their lives. Child marriage undermines girls' opportunities and resources and this leads to stunted community development at large. Community development depends on its people; this includes the level of health, knowledge, education, skills and resources that are controlled by those people. Thus, there is a proven link between the lack of education, underdevelopment and poverty and this means that these factors contribute to the cycle of poverty in the communities.<sup>190</sup> Child marriage also affects girls as adverse social and biological factors make them more vulnerable to sexually transmitted infections (STIs) and child bearing complications.

The child marriage culture is a symptom of and exacerbates gender inequality. The subordinate position of these young girls is strengthened by the fact that, in most cases, these girls are forced to marry men who are old enough to be their parents. Therefore child marriages are also contrary to Article 2 of both CEDAW and the Maputo Protocol, which require state parties to embody the principle of the equality of men and women and to condemn discrimination against women (and by implication girls) in all forms. The tradition of child marriage is also contrary to Article 10(f) of CEDAW and Article 12(2)(c) of the Maputo Protocol. These Articles require state parties to take appropriate measures to eliminate discrimination in the field of education through the reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely. Child marriage blocks young female people's right to education. The child marriage practice is also in contravention of Articles 2(b)

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<sup>185</sup>Akia B *No Way Out: Child Marriage and Human Rights Abuses in Tanzania* Human Rights Watch Short Reports (2014) 45.

<sup>186</sup>Girls not Brides (note 178) above.

<sup>187</sup>Akia B (note 185) above.

<sup>188</sup>Warner E 'Behind the wedding veil: Child marriage as a form of trafficking' (2011) *Journal of Gender, Social Policy & the Law* 12(2) 233–271.

<sup>189</sup>Girls not Brides (note 178) above.

<sup>190</sup>Akia (note 185) above.

and 14 of the Maputo Protocol and Articles 12 and 13 of CEDAW, which condemn harmful practices that endanger the health and general well-being of women.

Additionally, Article 16 (1) (b) of CEDAW and Article 1(c) (I) of the UN Supplementary Convention on the Abolition of Slavery and the Slave Trade and Institution and Practices Similar to Slavery of 1956 prohibit any institution or practices whereby a woman, without the right to refuse, is promised in marriage on payment of money or in kind to her parents or another person. The law recognises traditions and culture in Tanzania so it is not an offence to give or receive a dowry in consideration of or on the occasion of that marriage.<sup>191</sup> The dowry received by a parent who consents to the marriage of a girl under 18 years old is a contravention of this Convention. Parents, especially in coastal regions in Tanzania, have been using this practice for earning money for themselves by forcing their young daughters to get married to rich old men.<sup>192</sup> The government of Tanzania has been trying to make some effort to deal with this harmful traditional practice of child marriages. It has domesticated the African Charter on the Rights and Welfare of the Child by enacting the Law of the Child Act, which defines the age of a child as under 18 years.<sup>193</sup>

In addition to this, the Ministry of Community Development, Gender and Children, in partnership with UNFPA Tanzania, the Graca Machel Trust, the Children's Dignity Forum and the Tanzania Media Women Association, initiated a campaign to combat child marriages.<sup>194</sup> It has been difficult to end this culture of child marriage because of its current legality allowed by the Law of Marriage Act as discussed above.<sup>195</sup> Parents have been using this law to push their young daughters into early marriages.<sup>196</sup> Furthermore, disadvantaged children and families that have been affected by this culture need to be exposed to educational programmes to help them cope with the effects.<sup>197</sup> Communities that hold child marriage as a tradition and culture also need to be advised to abandon this custom because the effects it has on child spouses, their families, the community and the government are harmful.<sup>198</sup>

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<sup>191</sup>Warner (note 188) above.

<sup>192</sup>Girls not Brides (note 178) above.

<sup>193</sup>Section 4(1) of the Law of the Child Act of 2009.

<sup>194</sup>Girls not Brides (note 178) above.

<sup>195</sup>Sections 13 and 14 of the Law of Marriage Act allow girls to get married from the age of 14 years.

<sup>196</sup>UNFP (note 174) above.

<sup>197</sup>Ibid.

<sup>198</sup>Human Rights Watch (note 173) above.



### 3.8 Virginty Testing

The cultural practice of virginty testing is still considered a virtue in some of the communities in Tanzania, especially among those along the coastal regions such as Mtwara, Lindi and Tanga.<sup>199</sup> These communities place a great premium on virginty for religious, social and economic reasons.<sup>200</sup> Virginty testing is a cultural practice that involves the process of determining whether a girl is a virgin and that she has never engaged in sexual intercourse.<sup>201</sup> The test procedures are done in various forms within those societies. For instance, in Mtwara and Lindi, girls as young as 8 years old and before their first menstruation are taken into a camp in the bush by traditional elders and they stay there for about two to three weeks.<sup>202</sup> In this camp, which is known as *unyago*, they are taught sexual practices and how to live with a husband.<sup>203</sup> The traditional healers and community elders check their virginty and break their hymen to make them ready for their first intercourse.<sup>204</sup>

It has been revealed that in ‘unyago’ camps girls are encouraged to practise their newly acquired knowledge with boys of their age as well as with older men despite their young age.<sup>205</sup> They are also trained not to rely on one man alone, but they have three men so that they can gain economic security and sexual satisfaction. This cultural custom is known to possess ‘mafiga matatu’ (i.e., three pillars or stones that hold up a traditional stove).<sup>206</sup> ‘Unyago’ is a ritual which takes place in a very secretive manner and girls are normally taught not to speak about what they experienced in the camp.<sup>207</sup> They are threatened that they might die on the spot if they tell anyone the secrets of the camp. These societies claim to teach young girls about their role in the community as girls, how to dance traditional dances, to respect their elders, and how to perform their household duties.<sup>208</sup> Forms of this culture of ‘unyago’ are also practised by other ethnic groups in Tanzania such as the Gogo and Lugulu.<sup>209</sup> The societies that

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<sup>199</sup>Sakamoto K ‘Social development, culture, and participation: Toward theorizing endogenous development in Tanzania’ PhD thesis submitted to the Graduate School of Asia-Pacific Studies, Waseda University (2002) 47.

<sup>200</sup>Ibid.

<sup>201</sup>Mbogoni L *Aspects of Colonial Tanzania History* African Books Collective (2013) 151.

<sup>202</sup>Erhardt S, Leichtwei S & Temu A ‘Towards gender sensitive and transformative HIV programming in the Mtwara region, Tanzania: Critical gender issues in Mtwara region, Tanzania’ Findings of a qualitative study for the project (2011) 30.

<sup>203</sup>Ibid.

<sup>204</sup>Mbogoni L (note 201) above.

<sup>205</sup>Ibid.

<sup>206</sup>Sakamoto K (note 201).

<sup>207</sup>Erhardt (note 202) above.

<sup>208</sup>UNICEF *Adolescence in Tanzania* UNICEF (2011)12.

<sup>209</sup>Ibid.

practise this culture are proud of it, believing that it is a principal method to relay important social messages of self-respect and the strength of women to the community.<sup>210</sup> However, ‘unyago’ has been singled out as a key cause of early pregnancy as it is perceived to be a highly sexualised social event which takes place at a very young age.<sup>211</sup> This practice of social permission-giving for girls to have sex presents serious threats not only to their health, but to the public as well. This culture affects young girls who are compelled to become sexually active before they attain the age of majority.<sup>212</sup>

Another form of virginity testing which has prevailed in the Tanga region is the presence of an intact hymen to be tested on one’s wedding day.<sup>213</sup> It is believed that the hymen will break at first intercourse causing bleeding.<sup>214</sup> After the marriage ceremony, the bride and groom are given a white sheet on which they must consummate their marriage and this sheet is presented to groups of family members and friends who usually wait outside.<sup>215</sup> The groups outside the consummating room customarily take the white sheet and examine it for bloodstains as proof of virginity.<sup>216</sup> The whole process humiliates brides and failing virginity tests lead to stigmatisation and mocking by the community as it is done in public.<sup>217</sup> Virginity is also an important attribute in many Muslim societies where girls are frequently observed.<sup>218</sup> Reportedly, most girls in the Muslim faith in areas such as Tanga and Zanzibar resort to anal sex instead to make sure that they keep their virginity for their wedding day and hence they become more vulnerable to sexually transmitted infections including HIV.<sup>219</sup> The fear of shaming one’s family and failing the test cause young girls to do things that put their health at risk. For example, some girls resort to inserting different kinds of objects into their private parts, such as toothpaste or freshly cut meat, to make their vagina appear tight and to mimic virginity.<sup>220</sup>

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<sup>210</sup>Erhardt (note 202) above.

<sup>211</sup>Bangser M ‘Falling through the cracks - Girls in Tanzania: insights from Mtwara’ *Juárez and Associates, Inc. 12139 National Boulevard, Los Angeles* (2010)170.

<sup>212</sup>*Ibid.*

<sup>213</sup>UNICEF (note 208) above.

<sup>214</sup>Haram L ‘Prostitutes or modern women? Negotiating respectability in northern Tanzania’ in Arnfred S (ed) *Re-thinking Sexualities in African Sexuality, Gender and Society in Africa research programme* Nordic Africa Institute (2004) 211–233.

<sup>215</sup>*Ibid.*

<sup>216</sup>Bangser (note 211) above.

<sup>217</sup>*Ibid.*

<sup>218</sup>Haram L (note 214).

<sup>219</sup>*Ibid.*

<sup>220</sup>Sakamoto K (note 199) above.

Other societies in Tanzania are practising the virginity test on girls by examining their hymen and the tightness of the muscles behind the knees. Girls who are discovered not to be a virgin are beaten and forced to disclose the names of their sexual partners, who are then required to pay the bride's parents a sum of money and to marry them.<sup>221</sup> The society believes that girls will abstain from sex because they fear being shamed.<sup>222</sup> They also believe that the culture of virginity testing substantially reduces the spread of sexually transmitted disease and teenage and unplanned pregnancies that lead to school dropouts. The intention of this cultural practice might be good, but its flip side is gender bias as it does not treat the boy and girl child equally. This culture is also unhealthy and it increases violence against women and girls who fail these unreliable tests. It is mostly done at home where a mother, grandmother or elder relative insert a finger in the vagina of the girl to check if the hymen is still intact.<sup>223</sup> Girls who are found not to be virgins are also ostracized, labelled prostitutes, and beaten by their parents. This affects them psychologically.<sup>224</sup> Lack of virginity also affects their marriages and the size of the bride price that their parents are entitled to receive.<sup>225</sup> Virginity testing constitutes a clear violation of women's and girls' right to privacy and bodily integrity. It is among the harmful traditional practices and originated from a deeply rooted discriminatory belief system and views about the role and position of women in society.<sup>226</sup>

The virginity test practice violates several rights of girls, including the right to privacy, dignity and bodily integrity, as was stated above.<sup>227</sup> It also exposes girls to sexual abuses as the practice of inserting a finger in the vagina of women is recognised as digital penetration and it amounts to sexual abuse.<sup>228</sup> This culture, which is mainly applicable to women only, infringes on girls' right to equality that is guaranteed by the Constitution and several international human rights instruments.<sup>229</sup> Virginity testing burdens women as they are expected to maintain a very high level of morality to be married to honourable men who might have deflowered or impregnated a string of girl victims, and might possibly even be HIV positive. Furthermore, this culture poses the threat of discrimination against girls who are not virgins and who, in some instances,

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<sup>221</sup>UNICEF (note 208) above.

<sup>222</sup>Mbogoni L (note 201) above.

<sup>223</sup>Ibid.

<sup>224</sup>UNICEF (note 208) above.

<sup>225</sup> Ibid.

<sup>226</sup>Bangser (note 211) above.

<sup>227</sup>Those rights are guaranteed by Articles 12(2) and 13 of the Constitution, Article 3 of the Maputo Protocol, and Article 3 of CEDAW.

<sup>228</sup>Bangser (note 211) above.

<sup>229</sup>Ibid.

may have been raped. Performing indecent acts with young persons is considered a crime by the Penal Code in Tanzania, though the Act is silent on virginity testing.<sup>230</sup> Currently, there is no other law that addresses virginity testing in Tanzania. This traditional practice perpetuates the submissive position of women in the Tanzanian society. It also aggravates the existence of ignorance, illiteracy and poverty. Tanzania's government needs to take different measures to outlaw traditional and cultural practices that violate the rights of women. Other African countries such as Swaziland, Zimbabwe, South Africa and Malawi have also been reported to practise this culture,<sup>231</sup> despite having laws which are prohibiting it such as the Children Act, 2005 of South Africa.<sup>232</sup>

The vaginitis testing culture apparently died out in South Africa in the middle of the twentieth century, but re-emerged in the 1990s, probably as a defence against the spread of HIV/AIDS.<sup>233</sup> This culture which is known as 'ukuhlolwa' in South Africa is believed to enjoy support in some quarters, including higher levels of government.<sup>234</sup> Though procedures of virginity testing in South Africa may vary from one tester to another and from one community to another, it is mostly performed older females.<sup>235</sup> They perform a physical examination of a girl's genitalia in order to determine whether a small membrane that stretches across part of the vaginal opening (the hymen) is intact. A girl whose hymen is found broken will have failed the test.<sup>236</sup> In the past, the tests were usually performed privately by a mother, grandmother or aunt, but nowadays virginity testers are usually elderly women who are recognized in the community as such. The testing is usually conducted in public celebratory events at big venues.<sup>237</sup> Girls who are found to still be virgins are usually awarded a formal certificate. Girls who undergo 'ukuhlolwa' and found not to be virgins are required to pay a certain number of cows to the

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<sup>230</sup>Section 135 of the Penal Code of Tanzania CAP 16 [R.E. 2002].

<sup>231</sup>Erhardt (note 202) above.

<sup>232</sup> Section 12(4) of the Children's Act of 2005 prohibits virginity testing of children under the age of 16, while Section 12(5) allows virginity testing provided that: the child has given consent to the testing, it is done in the prescribed manner, and after proper counseling of the child and in the manner prescribed. Section 12(6) of the same Act prohibits disclosure of a virginity test without the consent of the affected child.

<sup>233</sup>Mubangizi J C 'A South African perspective on the clash between culture and human rights, with particular reference to gender-related cultural practices and traditions' *Journal of International Women's Studies* 13(3) (2012) 33–48.

<sup>234</sup>George E 'Virginity testing and South Africa's HIV/AIDS crisis: beyond rights universalism and cultural relativism toward health capabilities' *96 California Law Review* 1447 (2008). Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol96/iss6/2> accessed on 14 September 2016.

<sup>235</sup>Mubangizi (note 233) above.

<sup>236</sup>Gqirana T 'Virginity tests for bursaries are unconstitutional - Gender Equality Commission' *News24*, 17 June 2016. Available at <http://www.news24.com/SouthAfrica/News/virginity-tests-for-bursaries-are-unconstitutional-gender-equality-commission-20160617> accessed on 16 September 2016.

<sup>237</sup>Merten M 'Virginity testing: Gender Equality Commission bans "maiden bursaries"' *Daily Maverick* 16 September 2016. Available at [http://www.dailymaverick.co.za/article/2016-06-16-virginity-testing-gender-equality-commission-bans-maiden-bursaries/#.V9yf6\\_nnako](http://www.dailymaverick.co.za/article/2016-06-16-virginity-testing-gender-equality-commission-bans-maiden-bursaries/#.V9yf6_nnako) accessed on 16 September 2016.

chief and they are forbidden to participate in any traditional activities on top of that.<sup>238</sup> This culture does not take into account circumstances beyond the control of the recipients, such as rape or heavy physical activity, that may lead to damage to the hymen.<sup>239</sup>

The scuffle over virginity testing in South Africa is unique, as it promotes a recurrence to traditional culture as a preventative public health measure to combat HIV as a modern plague.<sup>240</sup> This concept has exposed the legislation that creates tension between human rights universalism and cultural relativism.<sup>241</sup> This is among the cultures that require a pragmatic, open-minded and multi-faceted approach to deal with in order to attain a meaningful measure of success. Some municipal councils, such as uThukela in KwaZulu-Natal, have been reported to provide bursaries to young women on the grounds of virginity.<sup>242</sup> Girls who are awarded these bursaries are also required to prove that they remained virgins during their studies by undergoing virginity testing every holiday to ensure they are not sexually active.<sup>243</sup> The award, which is known as ‘the uThukela District Municipality’s Maidens Bursary Award’ has been condemned by the media, lawyers, gender activists, civil society and political parties such as the Economic Freedom Fighters (EFF).<sup>244</sup> Although legislative and constitutional measures are of paramount importance, complete reliance on them will not end this clash between the virginity test practice and human rights. A good example of this is the ineffectiveness of legislation against FGM in Tanzania, which was discussed earlier, where criminalizing FGM has pushed the practice underground and has encouraged tests on younger children instead.

The traditional culture of testing virginity has recently been suspected of spreading HIV to more than 100 young girls in Malawi, where tradition forces girls to have sex with a paid sex worker known as a ‘hyena’ once they reach puberty. This act is not seen by the community as rape but as a form of ritual ‘cleansing’.<sup>245</sup> After their first period, girls as young as 12 to 14 years are compelled to have sex with the ‘hyena’ over a three-day period to mark their passage

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<sup>238</sup> LeClerc-Madlala S ‘Virginity testing: Managing sexuality in a maturing HIV/AIDS epidemic’ *15 Med. Anthropology Q.* (2001) 533–34.

<sup>239</sup> Woods J M ‘Justiciable social rights as a critique of the liberal paradigm’ *38 Texas International Law Journal* (2003) 763–785.

<sup>240</sup> George (note 234) above.

<sup>241</sup> Mubangizi J C ‘An African perspective on some gender-related cultural practices that violate human rights and perpetuate women’s poverty’ *Journal of Social Science* 47(1) (2016) 68–78.

<sup>242</sup> Gqirana (note 236) above.

<sup>243</sup> Merten M ‘Virginity testing: Gender Equality Commission bans “maiden bursaries”’ *Daily Maverick* 16 September 2016. Available at [http://www.dailymaverick.co.za/article/2016-06-16-virginity-testing-gender-equality-commission-bans-maiden-bursaries/#.V9vf6\\_nnako](http://www.dailymaverick.co.za/article/2016-06-16-virginity-testing-gender-equality-commission-bans-maiden-bursaries/#.V9vf6_nnako) accessed on 16 September 2016.

<sup>244</sup> Ibid. See also Gqirana (note 236) above.

<sup>245</sup> Butler E ‘The man hired to have sex with children’ *BBC News Malawi* 21 July 2016. Available at <http://www.bbc.com/news/magazine-36843769> accessed on 27 July 2016.

from childhood to womanhood. If the girl refuses, it is believed that disease or some fatal misfortune could befall her family or the village as a whole.<sup>246</sup> One of these ‘hyenas’, Eric Aniva, declared himself to be HIV positive since 2012. He said he had been paid by the parents to have sex with their young girls though he had not disclosed his HIV status to for many years.<sup>247</sup> This shocking revelation is a case in point in terms of the danger that young girls are exposed to because of outdated and unconstitutional cultural practices.

### 3.9 Male Dominance and Preference of Sons

In many regions in Tanzania, the preference for sons (‘son preference’) is a powerful tradition.<sup>248</sup> Societies generally view females as inferior and subordinate to males.<sup>249</sup> Historically, the social structure reflected the subordination of females and this subordination occurred within the origin and conduct of warfare, the hierarchical ordering of influential religions, institutions, political power, the authority of the judiciary, and influences that shaped the content of the law.<sup>250</sup> The male preference tradition in Tanzania begins early in life at the first sign of pregnancy where a woman receives unsolicited prayers from her husband and the husband’s family for the safe delivery of a baby boy.<sup>251</sup> Usually the birth of a son is welcomed with celebration as an asset, whereas that of a girl is seen as a liability and an impending economic drain. It is commonly said that “bringing up girls is like watering a neighbour’s garden”, which means that eventually a girl will be married and considered a member of another family, so investing in her is like working hard for others.<sup>252</sup> Thus, in response to the attitudes and behaviours that reinforce women’s subordination, the expectant woman would also wish for a male child as her first born.<sup>253</sup> Women are likely to keep on bearing more children than initially planned hoping to have a son, with the attendant consequences of high

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<sup>246</sup>Browne J ‘Meet the man hired to have sex with children’ *UNLAD News* 21 July 2016. Available at <http://www.unlad.co.uk/news/meet-the-man-hired-to-have-sex-with-children/> accessed on 27 July 2016.

<sup>247</sup>Eric Aniya was arrested on 26 July 2016 following orders by Malawian President, Peter Mutharika, and he could be charged with defiling children and exposing them to HIV. See Butler E (note 247) above.

<sup>248</sup>Save the Children ‘Children’s situation in Tanzania’ (2003). Available at <http://resourcecentre.savethechildren.se/start/countries/tanzania> accessed on August 2015.

<sup>249</sup>Ibid.

<sup>250</sup>Osarenren L ‘Tradition at the heart of violence against women and girls in Africa’ Inter-African Committee on Traditional Practices (IAC) *Issue 351* (2008) available at <http://pambazuka.org/en/category/comment/46520> accessed on 17 May 2015.

<sup>251</sup>Mulema J ‘Son preference, childbearing behavior and respondent socio-demographic characteristics in Morogoro, Tanzania’ *ABC Journal of Advanced Research*, 3(1) (2014) 9–13.

<sup>252</sup>Save the Children (note 248) above.

<sup>253</sup>Ibid.

parity on mother and siblings.<sup>254</sup> This culture has prompted some men to marry a second or a third wife so that they can have a male child.<sup>255</sup> The culture manifests itself in deprivation, neglect and discriminatory treatment of daughters to the detriment of their mental and physical health.<sup>256</sup>

The original causes of this culture among many families in Tanzania include the social roles ascribed to men and to women.<sup>257</sup> Sons are preferred because they perpetuate the family name while girls lose their identity upon marriage by adopting their husbands' names. Many families wish to have a son so that they cannot lose their family names.<sup>258</sup> Sons are usually taking the responsibility for the care of aging parents and perform their parents' burial rites.<sup>259</sup> The economic obligations of sons towards parents are greater, thus a son is considered to be the family pillar, which ensures continuity and protection of the family property. They are supposed to provide the workforce and have to bring a bride to the family as an extra pair of hands. Sons are also preferred because of inheritance. Unlike daughters, they are expected to inherit their fathers' property. In most traditional societies, women are not allowed to inherit property so male members retain and control the right to use the property. Families in Tanzania also consider the burden of grandchildren born to unmarried daughters as among the reasons for preferring sons. Many daughters who become mothers without stable partners continue to live with their parents.<sup>260</sup> Unable to achieve economic independence, they become a financial burden. Therefore, not having a son is viewed as a source of vulnerability for parents in Tanzania and having daughters only attracts social stigma.

The practice of son preference is one of the principal forms of discrimination which has far-reaching implications for women. It denies the girl child good health, education, recreation, economic opportunities and the right to choose her partner.<sup>261</sup> A female child is disadvantaged from birth due to the lack of quality and frequency of parental care and the limited extent of

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<sup>254</sup>Osarenren (note 250) above.

<sup>255</sup>Mulema J (note 251) above.

<sup>256</sup>Ibid.

<sup>257</sup>Save the Children (note 248) above.

<sup>258</sup>Ibid.

<sup>259</sup>Osarenren (note 250) above.

<sup>260</sup>Mwangeni A Ankomah A & Powell R 'Sex preference and contraceptive behaviors among men in Mbeya Region' *Journal of Family Planning and Reproductive Health Care* 22(2) (2001) 85–86.

<sup>261</sup>The culture of preference for sons violates Articles 3, 4, 10 and 12 of CEDAW, Articles 2, 3, 12, 13, 14 and 15 of the Maputo Protocol, and Articles 2, 6, 12, 19, 24, 27 and 28 of the Convention on the Rights of the Child.

investment in her development.<sup>262</sup> Son preference also affects other spheres such as nutrition and education. In most homes, sons are given bigger portions of food than daughters and are more likely to be enrolled in better schools and encouraged to complete their studies.<sup>263</sup> When funds are short, girls are normally withdrawn from schools so as to make allowance for sons to be educated irrespective of whether the girls are naturally intelligent and the sons are dull.<sup>264</sup> Son preference has thus led to acute discrimination, particularly in resource constrained societies where extreme cases prompt selective abortion and female infanticide in these days of technology.<sup>265</sup> Thus, pre-natal sex determination and disclosure are not illegal in Tanzania and there is no law that criminalizes abortion for gender preference.<sup>266</sup> The educational and economic implications of son preference are huge.<sup>267</sup> There are far fewer females than males enrolled in secondary schools in Tanzania despite substantial increases in the number of women who have attained at least seven years' primary education.<sup>268</sup>

The inequality between opportunities for males and females to access education causes lifelong economic and social disadvantage for women.<sup>269</sup> However, access to education by itself is not enough to eliminate derogatory values that are held by society because some of these values seem to have been transmitted into educational curricula and textbooks.<sup>270</sup> Women are portrayed as passive and domestically oriented, whereas men are portrayed as dominant and the breadwinners of families.<sup>271</sup> Girls of a young age in rural and poor urban homes are burdened with domestic tasks and child care, which leaves them with no time to play, while young boys have fewer demands made on them and are allowed to engage in activities outside the home.<sup>272</sup> The Convention on the Rights of the Child guarantees the right to rest for all children and requires state parties to recognise children's right to rest and to leisure and to engage in play and recreational activities because recreation plays a vital part in a child's emotional and mental development.<sup>273</sup> The status of girls is linked to that of women and a

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<sup>262</sup>UNICEF 'Son preference perpetuates discrimination and violations of women's rights: It must and can end' UNICEF press release, Geneva, 14 June 2011.

<sup>263</sup>Ibid.

<sup>264</sup>Save the Children (note 248) above.

<sup>265</sup> Ibid.

<sup>266</sup> UNICEF (note 262) above.

<sup>267</sup>Ibid.

<sup>268</sup>Mulema J (note 251) above.

<sup>269</sup>Ibid.

<sup>270</sup>Osarenren (note 250) above.

<sup>271</sup>Ibid.

<sup>272</sup>Mwangeni (note 260) above.

<sup>273</sup>Article 31(1) of the Constitution.



woman's work never ends, especially in rural areas and in poor urban households.<sup>274</sup> In Tanzania, women have fewer livelihood options, particularly as they are less likely to own land and capital. Childhood experiences of discrimination have a strong bearing on adult men and women's attitudes and behaviour with regard to masculinity and control. Son preference thus reinforces a girl's low self-worth, low self-esteem, depression and eventual low productivity in adulthood.

Moreover, this culture has a negative impact upon women's social development in societies where son preference is strong, and therefore women's status is generally low as women's security and status depend upon producing sons.<sup>275</sup> The more sons a woman produces, the higher is her security and status among her in-laws and her community. This culture does not only affect women's social development potential within the immediate family and community, but also impacts her potential for development at national level. Lower proportions of women than men are found in educational institutions, high status occupations, and top managerial and administrative positions in Tanzania.<sup>276</sup> Because childbearing is directly a woman's concern, son preference among men may also be deleterious to women's reproductive health.<sup>277</sup> Efforts to fulfil a husband's desire for sons may compel a woman to bear additional children. Consistent child bearings may not only affect a woman's physiological well-being, but may also increase her morbidity and mortality risk.<sup>278</sup> This culture that puts huge pressure on women to produce sons not only directly affects women's reproductive decisions with implications for their health and survival, but also puts women in a position where they must perpetuate the lower status of girls.<sup>279</sup> Some women have been bearing the consequences of giving birth to an unwanted girl child, which include abandonment, divorce, violence and even death.<sup>280</sup> Men continue to be the primary decision-makers both in public and domestic life and they are also the income earners, and therefore attitudes towards reproductive matters are substantially influenced by their preferences.<sup>281</sup>

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<sup>274</sup>UNICEF (note 262) above.

<sup>275</sup>Mulema (note 251) above.

<sup>276</sup>Osarenren (note 250) above.

<sup>277</sup>Alan Guttmacher Institute. *Hopes and Realities: Closing the Gap between Women's Aspirations and Their Reproductive Experiences*. New York, NY: The Institute (1995) 127.

<sup>278</sup>*Ibid.*

<sup>279</sup>Mwangeni (note 260) above.

<sup>280</sup>*Ibid.*

<sup>281</sup>Save the Children (note 248) above.

Although the Constitution of the United Republic of Tanzania is clear on the right to equality for all human beings, the culture of male preference is still prevailing in Tanzania.<sup>282</sup> CEDAW and the Maputo Protocol guarantee equality for all and condemn all forms of discrimination.<sup>283</sup> Tanzania is required to take every possible measure to eliminate all forms of discrimination against women, including that of son preference. Tanzania therefore needs to reform some of its domestic legislations which put preference on male children. However, to successfully address the underlying issues that impact son preference is hugely challenging and will require a multifaceted approach. The Tanzanian government needs to initiate programmes to challenge men's attitudes towards a one-sex family composition. Men should be educated about and persuaded that having male and female children are equally important. Such measures can assist men to consider reducing their bias against girls, minimise marital problems, and improve women's status. Supportive measures for girls and women, such as incentives for families with only daughters, and other legal and awareness-raising actions are also needed. States should support advocacy and awareness-raising activities that stimulate discussion and debate on the concept of the equal value of boys and girls. The practice of preference for sons also prevails in other African countries such as Algeria, Egypt, Libya, Morocco, Tunisia, Cameroon, Liberia, Senegal and Madagascar.<sup>284</sup>

### **3.10 Ghost Marriage ('nyumba-ntobhu')**

Ghost marriage is a common cultural practice in Kurya, Ikoma and Iraqw societies in Tanzania.<sup>285</sup> This practice is known as 'nyumba-ntobhu' in western Tanzania.<sup>286</sup> It is a traditional cultural of same-sex marriage according to which a lady takes a young girl to her home as a 'ghost' in-law.<sup>287</sup> A woman in this marriage will find a younger woman to 'marry' her husband and bear her children. She will become a female 'husband' by giving bride-wealth and observing all the other rituals required of a suitor by the bride's family.<sup>288</sup> A 'nyumba-ntobhu' marriage in this context is not the same as lesbian marriage as the nature of the relationship between the women who are married to each other is legal and social but not

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<sup>282</sup>Article 12(1) & (2) of the Constitution.

<sup>283</sup>Article 3 of CEDAW and Article 2 of the Maputo Protocol.

<sup>284</sup>Osarenren (note 250) above.

<sup>285</sup>Wambura (note 65) above.

<sup>286</sup>Ibid.

<sup>287</sup>Mwangeni (note 260) above.

<sup>288</sup>Nyanungo H 'Female husbands without male wives: Women, culture and marriage in Africa' Open Society Initiative for Southern Africa (OSISA) (2014).

sexual, as there is no sexual attraction or any sexual involvement between the female ‘husband’ and her ‘wife’.<sup>289</sup> The two women share a bed as a couple, they live together, and bear children in their union. They do everything a married couple would do, except having sex.<sup>290</sup> Older women marry younger women in order to have children of their own and to have someone who assists with the household chores.<sup>291</sup> The girl who is taken as a wife bears the children of a man chosen by the female husband, but the legal and social father of the children will be the female husband.<sup>292</sup>

The giving and receiving of bride-wealth accords the female husband the same rights over the children as any other father. The female husband usually supports the children as a social and legal father, regardless of who the biological father may be.<sup>293</sup> The biological father will have neither legal nor social rights over the children. A female husband is considered culturally male and is thus allowed to take on male roles.<sup>294</sup> For example, she may be allowed to take on political roles that women are typically not allowed to adopt or she is unlikely to carry things on her head, and so forth.<sup>295</sup> This kind of marriage is influenced by traditional cultures which do not allow women to inherit property, so the practice serves as an avenue through which women exercise social influence and patronage in societies where inheritance and succession pass through the male line.<sup>296</sup> In these societies, daughters or their offspring cannot carry on the family line. Thus a woman who only has daughters fears risking everything due to the absence of male heirs to perpetuate the family name and inherit the family wealth.<sup>297</sup> To resolve this dilemma, women without sons marry a young woman who will bear sons for their families.<sup>298</sup>

This type of marriage is also practised by a couple who has wealth but does not have a child of their own. Women who are older beyond childbearing age, who were never married and have

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<sup>289</sup>Nyanungo (note 288) above.

<sup>290</sup>Ibid.

<sup>291</sup>Legal and Human Rights Centre *Tanzania Human Rights Report 2011* LHRC (2012) 107.

<sup>292</sup>Ibid.

<sup>293</sup>Sotolani L ‘Nyumba-nthobu’: Marriage in Tanzania and the role of women’ *Critical Private Law Studies* (2015) 4.

<sup>294</sup>Ibid.

<sup>295</sup>May P *The Ghost Marriage: Collection Paper Planes; Paper Plane* Didier (2010) 37.

<sup>296</sup>Ibid.

<sup>297</sup>Children’s Dignity Forum (CDF) & Foundation for Women’s Health Research and Development (FOWARD) *Voice of a Child Brides and Child Mothers in Tanzania: A Peer Report on Child Marriage* CDF & FORWARD (2010).

<sup>298</sup>Ibid.

no children, are also major candidates to become female husbands because they will want an heir to inherit their name, wealth and property.<sup>299</sup> The purpose of the union is therefore to provide a male heir to the family. In most cases, when the older female's husband dies, the young girl wives are left alone to support the children.<sup>300</sup> The married girl is usually forced to bear the children of any man chosen by her female husband and is not allowed to get married to a particular man.<sup>301</sup> Sometimes girls are forced by their female husbands to have sex with men who give their in-laws token gifts such as salt, money, soap, kerosene, cigarettes and locally brewed beer.<sup>302</sup> The men who are chosen to sleep with wives are told not to use condoms as the idea is to have children from the ghost daughters-in-law.<sup>303</sup> Apart from being denied to marry a man of their choice, ghost wives are forced to take care of their children and the ghost in-laws single handed.<sup>304</sup> Sometimes they are forced into prostitution as they cannot leave the home to seek for or engage in other economic activities.<sup>305</sup>

The female husband sometimes forces the wife to sleep with a man off the streets who is unreliable or men who are not known in the village so that they are assured that those men will not return to claim their child.<sup>306</sup> Most of these ghost wives face hard work and abuse at the hands of their older female husbands. They normally have no rights over the children they give birth to and are unable to return to their parents, who can't afford to repay the bride price to the female husbands if their marriage fails.<sup>307</sup> Some ghost wives who have managed to get out of this traditional marriage claimed that they had lived a life of imprisonment as they had been forced to serve and take care of the older women, bear children, do domestic work, cultivate the land, and feed the household. This was well narrated by 25-year -old Jessica Peter, who had been married to Nyambura, a 63-year-old woman:

“Nyambura paid a dowry of six cattle and I moved into her compound. Within a few years of that marriage, Nyambura demanded that I had to look for our food. My union with Nyambura was unhappy as she was using me. She wanted children from me, and I bore her children, but

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<sup>299</sup>May P (note 295) above.

<sup>300</sup>Ibid.

<sup>301</sup>Nyanungo H (note 288) above.

<sup>302</sup>Wambura S (note 65) above.

<sup>303</sup>Ibid.

<sup>304</sup>Majani F. 'Tanzania Marriages of Convenience' Mail and Guardian, 14 November 2014. Available at <http://mg.co.za/article/2014-11-13-tanzania-marriages-of-convenience> visited on 27 September 2015.

<sup>305</sup>Bohela T 'Why some Tanzanian women are marrying women' *BBC News* 26 August 2015.

<sup>306</sup>Ibid

<sup>307</sup>Children's Dignity of Forum (note 297) above.

the relationship was unfriendly. I was a slave to just work and produce on her farm and look after her cattle. We lived like a cat and dog. I was simply a slave for her.”<sup>308</sup>

This culture of ghost marriages is harmful in light of Article 1(g) of the Maputo Protocol, which provides that harmful practices include all practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity. Girls who are caught up in ghost marriages lose their dignity and integrity by being forced to sleep with different men without any love and affection. They are denied any decision-making capacity in terms of sexual issues and this culture endangers the health of those girls. Moreover, in terms of Article 12 of CEDAW and Article 14 of the Maputo Protocol this practice is unlawful as they are force into sexual intercourse with different men without protection and they are subjected to the risk of contracting sexually transmitted diseases. The wives are sold like commodities for the purpose of bearing children for someone else and many become involved in prostitution. They serve as slaves who take care of their female husbands, which is against Article 6 of CEDAW and Article 3(3) of the Maputo Protocol. Although the Law of Marriage Act of Tanzania is clear on the meaning of marriage to the exclusion of same sex marriages, nothing has been done so far to condemn ghost marriages.<sup>309</sup>

Society seems to accept this kind of tradition and no legal action is taken against this culture. Thus, this is one of the most inhuman and degrading cultural practices that affect women and there is a need for society to abandon it as it is an outcome of a patriarchal system which degrades women without male children or without children at all. The government of Tanzania needs to take measures to deal with this culture which affects the rights of women as required by Article 4(4) of the Maputo Protocol, which provides that state parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and the protection of women from all forms of violence, particularly sexual and verbal violence.

The culture of ghost marriages also prevails in countries such as Kenya, where it is practised by the Nandi and Abagusii people of Western Kenya.<sup>310</sup> The same kind of ghost marriage is allegedly practised by the Lovedu people of South Africa and the Igbo of Benin and Nigeria,

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<sup>308</sup>Majani F (note 304) above.

<sup>309</sup>Section 9(1) of the Law of Marriage Act defines marriage as the voluntary union of a man and a woman which is intended to last for their joint lives.

<sup>310</sup>Nyanungo H (note 288) above.

where a woman is simultaneously a wife and a female husband.<sup>311</sup> In these tribes married women who are independently wealthy choose to set up a compound of their own, separate from their husbands', and to marry one or more women to be their wives and to bear them children.<sup>312</sup> Such a woman becomes a female husband in her own compound while remaining the wife in her husband's compound. The Lovedu people are known to be the only African society that still has a female monarch, often referred to as the Rain Queen who herself has been known to be a female husband to many wives.<sup>313</sup> Some women who prefer a 'nyumbantobhu' marriage say that it helps them overcome problems of gender-based domestic violence.<sup>314</sup> There seems to be a lesser possibility of abuse in woman marriage models, and female husbands are often likely to give a bride-price of higher value than men because they are more anxious to marry a young girl.<sup>315</sup> However, this remains a form of gender violence, as it was termed by Tanzania's former Minister of Information and Culture, Fenela Mukandara.<sup>316</sup>

### 3.11 Conclusion

This chapter considered some of the cultural and traditional practices in Tanzania that violate women's rights. It was outlined how and why these cultures are harmful to women. Regardless of their harmful nature and their violation of international and national human rights laws, such cultures persist because they are not questioned enough and they have taken on an aura of morality in the eyes of those who practise them. It can be contended that the spirit and purpose of international instruments that should safeguard societies have not been put into practice in Tanzania, particularly at grassroots level. Most of the pieces of legislation in use are those that were enacted during colonial times. It is pitiful to note that some customary practices that are perpetuated by culture and religion and that are harmful to women are still protected by law. A large number of harmful traditional practices are based on a perception of male superiority and women suffer many human rights abuses in the name of culture. The situation as it is does not accommodate culture as it was used to be practised. The need for cultural practices to reviewed

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<sup>311</sup>Nyanungo H (note 288) above

<sup>312</sup>Bohela T (note 305) above.

<sup>313</sup>Ibid.

<sup>314</sup>Sotolani L (note 293) above.

<sup>315</sup>Children's Dignity Forum (note 297) above.

<sup>316</sup>Majani F (note 304) above.

and abolished in line with human rights requirements cannot be avoided. This means that there has to be a limit to the practice of some customs so that they can accommodate gender equality.

It has been observed that it is often not easy to implement new legislation, as many cultural practices no longer reflect their origin or the original customs that provoked them. Rather, many customs have been revolutionised into harmful practices by individuals who use culture as a scapegoat when it benefits their intentions. The reality is that harmful traditional practices that women are subjected to benefit male perpetrators to a large extent. Female sexual control by men and the economic and political subordination of women perpetuate the inferior status of women and inhibit structural and attitudinal changes that are necessary to eliminate gender inequality. Blind adherence to these harmful cultures, combined with the government's inaction to curb or eradicate these practices, has made large-scale violence against women possible. Most women in Tanzania are not aware of their basic human rights and the state's inaction ensures their acceptance of 'the way it is'; consequently, the perpetuation of harmful traditional practices affects and corrodes women's well-being. This situation affects even educated women in the country who also feel powerless to bring about the changes necessary to eliminate gender inequality.<sup>317</sup> There is a stubborn persistence of negative cultural norms that are in conflict with and undermine the implementation of provisions of the Constitution, national legislation, and international human rights standards. It must be accepted that cultural considerations will have to yield whenever a clear conflict with human rights norms becomes apparent.<sup>318</sup>

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<sup>317</sup>Children's Dignity Forum (CDF) (note 297) above.

<sup>318</sup>Alston P *The Best Interest of a Child: Reconciling Culture and Human Rights* Oxford University Press, Oxford (1994) 86.

## CHAPTER FOUR

### THE JUDICIAL APPLICATION OF CEDAW AND THE MAPUTO PROTOCOL IN TANZANIA

#### 4.1 Introduction

This chapter discusses the jurisprudence of the Tanzania domestic court in enforcing women's rights as enshrined in international instruments in relation to existing customary laws and practices in Tanzania. It further examines how domestic courts have used international human rights law to interpret domestic human rights provisions in the Constitution. In addition, the chapter considers case laws from other jurisdictions that relate to the study at hand and other extrajudicial efforts on promoting and protecting women's rights in Tanzania. Women's rights litigations have produced mixed results in a number of African jurisdictions.<sup>1</sup> In spite of the fact that courts have looked at laws that discriminate against women with varying degrees of success, some issues such as tradition and culture continue to be the most unpredictable terrain when subject to litigation.<sup>2</sup> In Tanzania and other African countries, the courts have progressively begun to understand that discrimination on a prohibited ground cannot be justified.<sup>3</sup> However, this principle has not stopped some judges from insisting that gender discrimination on the basis of customary rules can still be justified, despite the existence of internal, regional and national human rights law which prohibits such practices.<sup>4</sup> It is when courts seek to justify the unjustifiable that the judicial precedent and recognised standards on non-discrimination fall foul of the law, as will be discussed in this chapter.<sup>5</sup>

#### 4.2 The General Application of International Human Rights Law in Tanzania

Although the focus of this chapter is on the enforcement of women rights that are enshrined in international instruments, it is crucial to look at the position of international law principles and

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<sup>1</sup> Ndashe S & Solomon S 'Watch the courts dance: Litigating the right to non-discrimination on the ground of sex' *Equal Rights Review* 4 (2009) 26.

<sup>2</sup> Maluleke M J & Mandonsela T *Women and Law in South Africa: Gender Equality in Landmark Court Decisions* Department of Justice and Constitutional Development, Republic of South Africa (2004) 3.

<sup>3</sup> Reid G 'The trouble with tradition when value tramples over rights' *Human Rights Watch World Report of 2012* Human Rights Watch (2013) 20–29.

<sup>4</sup> Ndashe (note 1) above.

<sup>5</sup> *Ibid.*



norms before domestic courts and quasi-judicial bodies in Tanzania for a better background of the study at hand. International human rights instruments, particularly those that Tanzania has ratified but has not yet incorporated into domestic legislation, are applied as a guide to constitutional interpretation in Tanzania.<sup>6</sup> The courts use international treaties as an interpretative tool to establish whether they are consistent with the Constitution for purposes of being guided and persuaded by such authorities. However, judges in Tanzania believe that it is within the proper nature of the judicial process and that it is a well-established judicial function for national courts to have regard for the international and regional Conventions which the country has ratified, whether or not they have been incorporated into domestic law, for the purpose of removing ambiguity or uncertainty from national, constitutional, or common law.<sup>7</sup> There is generally ample scope for judges to have regard for the international norms for deciding cases where the domestic law is uncertain or incomplete. This was affirmed by the former Chief Justice of Tanzania, Hon. Francis L. Nyalali, in a paper presented on the question of the Bill of Rights:

“It can be said that the failure by any person or state organ to observe any of the provisions of the Universal Declaration of Human Rights will not attract legal censure or invalidation by the Courts. I have no doubt that the Courts are required to be guided by it in applying and interpreting the enforceable provisions of the Constitution and all other laws.”<sup>8</sup>

The Harare Declaration on Human Rights,<sup>9</sup> issued by a high-level judicial colloquium on the domestic application of international human rights norms, is part of the Tanzania Courts’ Motto.<sup>10</sup> The colloquium endorsed the Bangalore principles of 1988, which called upon national courts to have regard for international norms in deciding cases where the domestic law, whether constitutional, statutory or common law, is uncertain or incomplete. The former chief justice of Tanzania made clear the role of international human rights instruments in adjudication, even before the introduction of the Bill of Rights, when he referred to the reference to the UDHR in Article 9 of the Constitution:

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<sup>6</sup>Killender M (ed) *International Law and Domestic Human Rights Litigation in Africa* Pretoria University Press (2010) 60.

<sup>7</sup> Kijokisimba H & Chris P ‘Justice and rule of law in Tanzania: Selected judgments and writings of Justice James L Mwalusanya and commentaries LHRC (2005) 382.

<sup>8</sup>Nyalali F L Paper presented on the Harare Declaration on Human Rights, issued by a high-level judicial colloquium on the domestic application of international human rights norms on 19<sup>th</sup> and 22<sup>nd</sup> April 1989 in Harare, Zimbabwe.

<sup>9</sup> The Declaration was issued on 20 October 1991 in Harare, Zimbabwe.

<sup>10</sup>Kijokisimba (note 7) above.

“Although the failure by any person or state organ to observe any of the provisions of the Universal Declaration of Human Rights will not attract legal censure or invalidation by the courts, I have no doubt that the courts are required to be guided by it in applying and interpreting the enforceable provisions of the Constitution and all other laws.”<sup>11</sup>

The former Tanzania Chief Justice Nyalali interpreted the constitutional right to property in the case of *John Byombalirwa v Regional Commissioner, Kagera and Regional Police Commander, Bukoba and Another*<sup>12</sup> and held that the provisions of UDHR should be consulted. He stated:

“If there is any doubt as to the obligation of the law enforcement agencies and other members of the executive branch of the Government in returning the seized goods to the suspects who have been cleared by the courts, I wish to point to Article 17(2) of the Universal Declaration of Human Rights of 1948, which provides that no one shall be arbitrarily deprived of his property.”

The *John Byombalirwa* case was decided right before the Bill of Rights was entered into force in 1988. In this case, the judge found that the authorities should perform their duties in accordance with the provisions of the UDHR, which include the duty not to arbitrarily deprive someone of his property. The role of international human rights instruments was well discussed by the Court of Appeal in 1993 in one of the leading human rights cases of *Director of Public Prosecutions v Daudi Pete*.<sup>13</sup> The Court of Appeal, while interpreting the constitutional right to bail, held that when interpreting the Bill of Rights, regard must be given to the African Charter:

“This view is supported by the principles underlying the African Charter on Human and People’s Rights, which was adopted by the Organisation of African Unity in 1981 and came into force on 21 October 1986 after the necessary ratifications. Tanzania signed the Charter on 31 May 1982 and ratified it on 18 February 1984. Since our Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of that Charter in interpreting our Bill of Rights and Duties.”

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<sup>11</sup>Paper presented at the University of Dar es Salaam Law Society on the question of the Bill of Rights, quoted in *John Mwombeki Byombalirwa v Regional Commissioner and Regional Police Commander, Bukoba and Another* [1986] TLR 73, 84. See Also Murungu C ‘The place of international Law in Human Rights litigations in Tanzania’ in Killander M *International Law and Domestic Human Rights Litigation in Africa*. Pretoria University Law Press (2010) 57–69.

<sup>12</sup>Ibid.

<sup>13</sup>[1993] TLR 22

The Court in this case declared denial of bail under section 148(5) (e) of the Criminal Procedure Act unconstitutional and struck it out of the statute book. Judges in this case went further by considering the Preamble to the African Charter, and held the following:

“It seems evident in our view that the Bill of Rights and Duties embodied in our Constitution is consistent with the concepts underlying the African Charter on Human and People’s Rights as stated in the Preamble to the Charter.”

In the case of *Paschal Makombanya Rufutu v The Director of Public Prosecutions*,<sup>14</sup> the High Court offered the following remark, which is in line with the approach in many other common law countries:

“If there is any ambiguity or uncertainty in our law, then the courts can look at the international instruments as an aid to clear up the ambiguity and uncertainty seeking always to bring it into harmony with the international conventions.”

Tanzanian Court gave international human rights instruments a more prominent role in the case of *Munuo Ng’uni*.<sup>15</sup> In this case the High Court struck down a legislative provision with reference to international human rights law. The particulars of the case were that a judge had instructed the petitioner, who was an attorney, to take a dock brief for an accused person as part of the free legal aid scheme engaged in by attorneys. The petitioner refused, stating that such legal services amounted to forced labour as prohibited by Article 25(2) of the Constitution. He further argued that the fee payable was so inadequate as to constitute an infringement of the right to just remuneration under Article 23(2) of the Constitution. The judge directed that the petitioner be suspended from legal practising. The petitioner challenged this directive contending also that the directive of the judge was in contradiction of the right to be heard as protected under Article 13(6) of the Constitution, because he had not been served with a show-cause notice. On pleading, the petitioner argued that the right to a hearing is a matter of natural justice and is guaranteed by Article 13(6) (b) of the Constitution as well as the UDHR and the African Charter. He further argued that the provisions of the law that were relied upon by the judge to suspend him were contrary to Articles 23(2) and 25(2) of the Constitution as well as Article 14(3) of the UDHR and article 7(1)(c) of the African Charter. In the judgement, the High Court stated the following:

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<sup>14</sup>Miscellaneous Civil Case No. 3 of 1990(unreported).

<sup>15</sup>*NIN Munuo Ng’uni v Judge-in-Charge and the Attorney General* [1998] TLR 464.

“It seems to us that the petitioner actually intends to invoke Article 23(1) of the Universal Declaration [of Human Rights], of which our Constitution’s Article 23(1) is a replica, and Article 15 of the African Charter....”

It was observed that Article 15 of the African Charter was in *pari materia* with Article 23(2) of the Constitution. The Court added that by Article 1 of the Charter, Tanzania has undertaken to adopt legislative or other international instruments, ratified by Tanzania, which comprise similar articles. The Court then repeated the practical significance of applying international human rights instruments and foreign judicial decisions by stating:

“We feel permitted to call in aid comparative case law from foreign courts and international Bills of Rights. That is precisely the path those eminent jurists who attended the judicial colloquium at Bangalore in India in 1988 have exhorted us to tread, in the famous statement they issued known as the Bangalore Principles. These principles have been confirmed, endorsed and re-affirmed in subsequent colloquia at Harare (1989), Banjul (1990), Abuja (1991), attended by some justices of our Court of Appeal. As correctly observed in the Bangalore Principles, there is [sic] now plenty of judicial decisions and an impressive corpus of international and national jurisprudence in the commonwealth concerning the interpretation and application of human rights and freedoms which is [sic] of practical value to judges and lawyers generally.”

The Court held that section 13(2)(a) of the Basic Rights and Duties Enforcement Act is against the spirit of the UDHR and other human rights treaties to which Tanzania had subscribed, such as the ICCPR. It concluded by stating that Article 8 of the UDHR and Article 2(3) of the ICCPR provide that everyone has the right to an effective remedy by the competent national tribunals for violation of human rights. The High Court therefore awarded damages to the petitioner. In many cases in which the judiciary in Tanzania took notice of international human rights instruments, it was confirmed that a right similar to one recognised in the Constitution is also provided for in international human rights law. This is also evident in the case of *Chiku Lidah v Adamu Omari*,<sup>16</sup> which concerned the rights of the child born out of wedlock to his upkeep and maintenance by his putative father. The Court observed the following in respect of the Convention on the Rights of the Child:

“The conclusion reached in this case is in line with ... UN international human rights norms as contained in the Convention of [sic] the Rights of the Child. A child born out of wedlock has the right to be maintained by his or her putative father.”

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<sup>16</sup>*High Court of Tanzania at Singida* Civil Appeal No. 34 of 1991 (unreported).

Apart from referring to international human rights instruments, Tanzanian courts have gone beyond these provisions in some cases and used case law from international courts in interpreting constitutional provisions. A good example is in the case of *Peter Ng'omango v Gerson MK Mwangwa and the Attorney-General*,<sup>17</sup> in which the Court interpreted that the right to access to justice was guaranteed under Article 13 of the Constitution in light of the case law of the European Court of Human Rights. Also, in the case of *Reverend Christopher Mtikila and Others v the Republic*,<sup>18</sup> the High Court invoked and accepted decisions of regional human rights bodies. The facts of this case are that in 1993 Reverend Mtikila filed a petition in the High Court at Dodoma, seeking a declaration that the citizens of Tanzania have a right to contest for the posts of president, Member of Parliament, and local government councillor without being forced to join any political party as independent candidates. The High Court decided in his favour and interpreted the exclusion clauses in the Bill of Rights under the Constitution, stating that restrictions which the exclusion clauses impose with regard to the enjoyment and enforcement of basic rights must be accompanied by adequate safeguards and effective control against arbitrary interference. The High Court observed that the European Court of Human Rights also takes this view. The Court also supported its position by referring to Article 19(3) of the ICCPR.

The government filed an appeal against the above High Court decision and Reverend Mtikila cross-appealed against certain decisions; at the same time, the government tabled a Bill in parliament to legislate in anticipation against that decision of the Court. The government later withdrew its appeal but the law was passed amending the Constitution in 1994.<sup>19</sup> Reverend Mtikila sought declarations that the amendment of Articles 39 and 67 of the Constitution was unconstitutional and that he had a constitutional right to contest for the post of President or Member of Parliament as a private candidate. In the submission by his advocate, he submitted that the amendments violated Articles 21(1) and 9(a) and (f) of the Constitution and also violated international human rights treaties to which Tanzania is a state party, particularly Articles 20(1) and (2) and 21(1) of the UDHR and Articles 10(2) and 29 of the African Charter. The respondent, who was the State Attorney, did not dispute that Tanzania was a signatory to the Universal Declaration of Human Rights and that it had ratified the African Charter, but invoked Article 29(2) of the UDHR that places limitations on the enjoyment of rights. Rev.

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<sup>17</sup>[1993] TLR 77.

<sup>18</sup>*High Court of Tanzania at Dodoma*, Criminal Appeal No. 90 of 1990 (unreported).

<sup>19</sup>Act 34 of 1994.

Mtikila's advocates cited cases from South Africa as persuasive authorities, arguing that the amendments were arbitrary in that they fell short of the proportionality test as enunciated in *S v Makwanyane*<sup>20</sup> and *S v Bhuwana*.<sup>21</sup> The High Court agreed that those South African cases were persuasive authorities and held that the amendments to Article 21 of the Constitution under Act 34 of 1994 were unnecessary and unreasonable and did not meet the test of proportionality, and declared that amendments to Articles 21(1), 39(1)(c) and 67(1)(b) were unconstitutional. The High Court further held the following:

“We have no doubt that international conventions must be taken into account in interpreting not only our Constitution, but also other laws, because Tanzania does not exist in isolation. It is part of a comity of nations. In fact, the whole of the Bill of Rights was adopted from those promulgated in the Universal Declaration of Human Rights. To come nearer to the case at hand, Articles 20 and 21 (as originally drafted before the amendments) of the Constitution are replicas of Articles 20(1) and (2) and 21 of the Declaration. The Covenant of [sic] Civil and Political Rights which followed the Declaration and that was ratified by Tanzania in June 1976 provides in its Article 25 thus...Article 2 of the Convention enshrines the right of an individual without any distinction of any kind as political or other opinion. Article 29(2) of the Universal Declaration of Human Rights, relied upon by Mr Mwaimu, has the same effect as Article 30(1) of the Constitution of the United Republic of Tanzania ... And so, in our opinion, the impugned provisions are not saved even under Article 29 of the Universal Declaration of Human Rights. In the event, we agree with the learned Counsel for the petitioner that amendments to Articles 21(1), 39(1)(c) and 67(1)(b) of the Constitution also contravene the International Conventions ... We therefore proceed to declare the alleged amendments unconstitutional and contrary to the International Covenants to which Tanzania is a party.”

In some cases, Tanzanian courts also referred to other international ‘soft law’ provisions. For instance, the case of *Republic v Mbushuu alias Dominic Mnyaroje and Others*<sup>22</sup> involved the issue of the constitutionality of the death penalty. The High Court interpreted the provisions of the Constitution in light of the provisions of international human rights instruments and the decisions from foreign countries<sup>23</sup> and regional human rights bodies in the course of the discussion on the right to life and the prohibition against torture. The High Court, apart from referring to international human rights instruments and case law, also referred to the Bangalore Principles, the Declaration of Stockholm (1977) — which declares the death penalty an inhuman, degrading and cruel form of punishment — and the Resolution adopted by the United Nations Human Rights Commission at its 1989 session which confirmed the previous finding.

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<sup>20</sup>(1995) (3) SA 391 (CC).

<sup>21</sup>(1996) (1) SA 388 (CC).

<sup>22</sup> [1994] TLR 146.

<sup>23</sup> For instance, *Soering v UK* [1989] EHRR 439; *Riley and Others v AG of Jamaica* [1982] 3 All ER 469; *Catholic Commission for Justice and Peace v AG and Others* [1993] (1) ZLR 242.

The High Court adjudicated that the death penalty was unconstitutional because it is inhuman, degrading and cruel. In the appeal, the Court of Appeal did not dispute the international reference made by High Court in the *Mbushuu* case, but it was held that the death penalty was constitutional because of the exclusion clause in Article 30 of the Constitution.<sup>24</sup>

It may be argued that the above assenting attitude of the Tanzania High Court toward the protection of human rights in the country might have displeased government authorities, as they eventually ensured the enactment of the Basic Rights and Duties Enforcement Act in 1994.<sup>25</sup> Instead of assisting in enforcement of basic rights and duties, this Act makes it hard if not impossible for an individual to enforce his or her rights in a court of law.<sup>26</sup> For example, the Act introduced the new procedures for hearing petitions in terms of basic rights and duties as guaranteed in the Constitution, but the court is required to be presided over by three judges.<sup>27</sup> Furthermore, the law requires that, before a petition for basic rights can be allowed for hearing, a single high court judge needs to determine if such an application is frivolous, vexatious or otherwise not fit for hearing.<sup>28</sup> This is unlike before, when a single judge could hear and determine the issue relating to fundamental rights and freedom under the Constitution. It has now become mandatory to have three judges. This provision is cumbersome and costly as not all of the regions in Tanzania have a High Court, so the petitioners are required to travel to regions where High Courts are available to file their cases.<sup>29</sup> Moreover, most of the up-country regions that do have High Courts have only one judge; subsequently hearings of basic rights as guaranteed in the Constitution need to wait for visiting judges to comprise a full bench and this delays the course of justice.

Additionally, the Basic Rights and Duties Enforcement Act interferes with the High Court's power to declare any law which is inconsistent with the Constitution invalid or unconstitutional. The provision of section 13 of this law requires the court to allow parliaments or the concerned government legislatures the authority to correct that defective law or action within a specified period of time. The provision of this section has been inserted into Article

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<sup>24</sup>The *Mbushu* case (note 22) above.

<sup>25</sup>Act No. 33 of 1994. See James S 'Tanzanian judges and the protection of human rights' *Tanzanian Affairs Issue 51, Miscellany* (1995) available at <https://www.tzaffairs.org/1995/05/tanzanian-judges-and-the-protection-of-human-rights/> accessed on 18 July 2016.

<sup>26</sup>Ellet R *Pathway to Judicial Power in Transnational State: Perceptive from Africa* Routledge (2013) 171.

<sup>27</sup>Section 10 of the Basic Rights and Duties Enforcement Act of 1994.

<sup>28</sup>Ibid.

<sup>29</sup>Ellet (note26) above.

30(5) of the Constitution, which was enacted simultaneously with the Basic Rights and Duties Enforcements Act. It can also be observed from the above cases that the judiciary in Tanzania refereed international human rights instruments and case laws even when they were not determinative for the outcome of a case. However, not all judges used that spirit of interpreting the law along the lines of international instruments. Different schools of thought seem to exist; some judges believe that as long as the country has ratified a treaty the court must recognize it and perceive it as persuasive but not binding.<sup>30</sup> Others are of the view that as long as the country has agreed to be voluntarily bound by those treaties, the courts must interpret and apply our derogation law extremely strictly.<sup>31</sup> These different schools of thought among the judges disturb the common law stand of judiciary precedence, especially in cases that involved women's rights, as will be discussed below.

#### **4.3 The Adjudication of Women's Rights Relating to the Evolution of The Principles of Customary Law in Tanzania**

This part draws attention to selected cases in Tanzania and other African countries, and highlights the forward and backward steps that the courts have been taking with respect to the application of women's rights as guaranteed in international instruments and existing customary laws and practices in Tanzania. An overview of some of the struggles associated with litigation in this field of women's rights and the courts' reaction to these issues in the national contexts is provided.

The application of customary law is the most problematic legal area in Tanzania as far as equality of human beings is concerned.<sup>32</sup> Women have been seriously affected in both areas, particularly in relation to ownership of property, inheritance, and custody of children.<sup>33</sup> Most cases that went before a court of law mainly rotated around the controversial right of land ownership, the right to matrimonial property, and the right of female members of the clan to inherit land.<sup>34</sup> Some courts in Tanzania have produced random and varied judgments which

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<sup>30</sup>Kijokisimba (note 7) above.

<sup>31</sup>Justice Augustino Ramadhani in the case of *Transport Equipment Ltd and Reginald John Nolan v Devran P. Valambhia*, Civil Application No. 19 of 1993(unreported).

<sup>32</sup>Peter C M *Human Rights in Tanzania: Selected Cases and Materials* Rüdiger Köpppe (1997); Also Kijokisimba H & Peter C P (note 7) above.

<sup>33</sup>Ibid.

<sup>34</sup>Ndulo M 'African customary law, customs and women's rights' *Cornell Faculty of Law Publication* (2011) 87–120.



have led to misdirection, inconsistency and unclear jurisprudence in this area.<sup>35</sup> The on-going enforcement of Tanzania's customary laws which prohibit females from inheriting land has sometimes led to the questioning of the relevance of customary law in modern society. The position of customary laws was well cemented by the Court of Appeal of Tanzania in *Maagwi Kinito v Gibeno Warema*<sup>36</sup> in the following finding:

“The customary laws of this country have the same status in our courts as any other law, subject to the Constitution and any other statutory law that may provide to the contrary.”

Despite open discriminative provisions of customary law that are against CEDAW and the Maputo Protocol, the Court of Appeal in Tanzania continues using it. For instance, this court denied a widow's the right to inherit matrimonial property in the case of *Scholastica Benedict v Martine Benedict*.<sup>37</sup> In this case a widow and her stepson disputed the ownership of the matrimonial home, which was part of the deceased's estate. The widow sought the right to remain in the house where she and her husband had lived until her husband died intestate. She argued that the home was a matrimonial home and thus she was entitled to reside in it regardless of her husband's death. The Court ruled according to the Haya customary law, which makes no provision for a widow to remain in the matrimonial home after a husband's death. The Haya customary law requires a widow to choose to leave the matrimonial house and to reside somewhere else, to be supported by her children, or to select a male relative of her husband who will inherit her and who thereby assumes the responsibility for supporting her. The Court held that a widow has no right to inherit from her husband lest he is the last surviving member of his clan and therefore had no inheritors when he died. The court advised the widow to leave the house to live with her daughter who had inherited a less developed rural shack or to choose to be 'inherited' by a suitable member of her husband's relatives who was willing to 'inherit' her. The court clearly showed gender bias when it failed to consider that Scholastica's daughter was the only child from that marriage and was more entitled to the property than the stepson who only came to the property by virtue of his ties to the deceased. Moreover, he had no role in creating the wealth of the family nor was his father in possession of any wealth when he married Scholastica.

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<sup>35</sup>Ndulo (note 34) above.

<sup>36</sup>Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 20 of 1984 (unreported).

<sup>37</sup>(1993) TLR 1.

Unlike the Court of Appeal, the High Court of Tanzania has at times exhibited boldness over some of the issues relating to customary law, as it was in the case of *Rubuka Nteme v Bi. Jalia Hassan & Another*.<sup>38</sup> In this case the Court of Appeal overturned the decision of the High Court that had held that a female member of the clan could not sell clan land to a stranger, which is prohibited under Haya customary law. Despite the existence of previous binding decisions from the highest court in the land (which is the Court of Appeal), the High Court did not stop the fight for equality. Instead, it cemented the new way in the case of *Ndewawiosia Ndeamtzo v Emannuel Malasia*.<sup>39</sup> In this case the judge, the late Said J, declared that a customary law that bars daughters from inheritance has no place in the current Tanzania as it is discriminatory.

The High Court continued in this spirit in case of *Bernardo Ephrahim v Holaria Pastory and Another*.<sup>40</sup> Judge Mwalusanya declared that the Haya customary law that bars female clan members from disposing of land is discriminatory and inconsistent with Article 13(4) of the Constitution which provides for non-discrimination and that the customary law was thus null and void. This appeal case involved a woman, one Holaria Pastory, who inherited some clan land from her father by a valid will. Finding that she was getting old and senile and had no one to take care of her, she sold the clan land to a stranger who was not a clan member. Her nephew, one Bernardo Ephrahim, filed a suit at the Primary Court requesting a declaration that the sale of the clan land by his aunt to a non-clan member was void, as females under Haya customary law have no power to sell clan land. The Primary Court agreed with the appellant and the sale was declared void, and Holaria Pastory was ordered to refund the purchase price to the purchaser. Holaria Pastory appealed to the District Court where the learned Magistrate quashed the decision of the Primary Court and took a different stand in favour of women. He said in his judgment:

“What I can say here is that the respondent’s claim is to bar female clan members on clan holdings in respect of inheritance and sale [and that] female clan members are only to benefit or enjoy the fruits from the clan holdings. I may say that this was the old proposition. With the Bill of Rights of [1984], female clan members have the same rights as male clan members.”

Unsatisfied with the decision of the District court, Bernardo Ephrahim Appealed to the high court where the late Mwalusanya J affirmed the decision of the District Court. The Haya

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<sup>38</sup>Court of Appeal of Tanzania at Mwanza, Civil Case No. 19 of 1986 (unreported).

<sup>39</sup>High Court of Tanzania, Civil Appeal No. 80 of 1966 (HCD 127 of 1968).

<sup>40</sup>High Court of Tanzania at Mwanza (PC), Civil Appeal No. 70 of 1989 (unreported).

customary law that is contained in the Laws of Inheritance of the Declaration of Customary Law of 1963 provides the following in paragraph 20:

“Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership”.

This customary law requires that females inherit clan land for use in *usufruct*, which means for their lifetime only and it denies them the power to sell it, otherwise the sale would be null and void. The same law provides a different position for male members of the clan. A male member of the clan can sell land but if he sells it without consent of the clan members, other clan members can redeem that clan land. So this law openly discriminates against women, as Hamlyn J was heard to say in the case of *Verdiana Kyabuje and Others v Gregory Kyabuje*<sup>41</sup> He quoted Mwalusanya J in the following decision:

“However, as much as this court may sympathise with these very natural sentiments, it is cases of this nature [that are] bound by the customary law applicable to these matters. It has frequently been said that it is not for courts to overrule customary law. Any variations in such law as takes [sic] place must be variations initiated by the altering customs of the community where they originate. Thus, if a customary law draws a distinction in a matter of this nature between males and females, it does not fall to this court to decide that such law is inappropriate to modern development and conditions. That must be done elsewhere than in the courts of law.”

It is any court's duty to determine the validity of any statute which is alleged to be unconstitutional, because no law that contravenes the Constitution can be suffered to survive, and the authority to determine whether the legislature has acted within the powers conferred upon it by the Constitution is vested in the courts of Tanzania. Any court's primary concern, therefore, in any case where a contravention of the Constitution is invoked, is to ensure that it is redressed as conveniently and speedily as possible. Despite the provisions of the Constitution to be clear in prohibiting any form of discrimination<sup>42</sup> through recognition of the equality of all human beings<sup>43</sup> and guaranteeing equality and protection of all before the law without any discrimination,<sup>44</sup> it is clear that some judges do not find it unjust to make decisions based on discriminative legislation, even in current social and economic developments. This was portrayed in the case of *Elizabeth Steven and Another v A.G.*<sup>45</sup> as was discussed in the previous

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<sup>41</sup>(1968) HCD No. 459.

<sup>42</sup>Article 13(4).

<sup>43</sup>Article 12.

<sup>44</sup>Article 13 (1).

<sup>45</sup>High Court of Tanzania at Dar es Salaam: Miscellaneous Civil Case No. 82 of 2005 (unreported)

chapter. In this case the court failed to reach a decision based on the Articles of the Constitution or on international instruments pleaded by the petitioner. The petitioner's right to inherit was denied despite the fact that there was precedent available, where a Court of Appeal judge interpreted and applied international law and <sup>46</sup> the former Chief Justice of Tanzania, Agustino Ramadhani, affirmed the following:

“Our Constitutional protection falls short of that which is provided by the International Covenant on Civil and Political Rights. But since we are party to that Covenant, then it is my conviction that we have at least to interpret and apply our derogation law extremely strictly.”<sup>47</sup>

To justify its decision, the High Court in Elizabeth's case maintained that customs evolve and change with time. It was argued that this process does not end, nor can it be ended, so the court should not interfere. However, the judiciary needs to abide by the principle of precedence. On behalf of Elizabeth, WLAC filed an appeal in the Court of Appeal in 2010 as case No. 4 against the High Court decision, and that appeal was awaiting determination at the time of this study. However, most judges and magistrates in Tanzania seem to have male dominance mind-sets and are not gender sensitive, as they sometimes appear to make decisions based on customary rules without even considering the principle of human rights as enshrined in the Constitution of the United Republic of Tanzania. In many instances they presented divergent views on the interpretation of the rules, and their literal application of legislation has resulted in many women being left destitute. Nowadays, society does not even reflect the values that customary law were based on. A society where family members work together, respect time-honoured customs and maintain each other no longer exists in urban areas and sometimes not even in rural areas either.<sup>48</sup>

Despite the fact that discriminative customary laws have been quashed by the High Court in numerous cases, such laws still exist in the legislation of the land and the judiciary is left with the discretionary power to decide whether to apply customary law and forget the principle of precedent. It has been proved that many women continue to suffer because of this loophole, which the government clearly needs to expunge.<sup>49</sup> This tug-of-war between the decision of the

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<sup>46</sup>In the case of *Transport Equipment Ltd and Reginald John Nolan v Deviran P. Valambhia* (note 31) above.

<sup>47</sup>*Ibid.*

<sup>48</sup>For instance, male heirs appointed in terms of applying customary law no longer adhere to their customary duty of maintaining those family members left by a deceased.

<sup>49</sup>Mwakyembe H G Member of Parliament in the URT *Parliamentary Debate (Hansard) National Assembly Official Report*, 11<sup>th</sup> meeting sitting from 6-19 April 2008.

High Court and the Court of Appeal is also due to the dissimilar schools of thought held by judges. Some of them believe that they are not bound to decide based on unincorporated international instruments, which results in a tug-of-war. More specifically, concerning the High Court's failure to follow the precedence available in the case of *Elizabeth Steven*, Rutakagwa J. was of the view that it was due to lack of communication, as sometimes judges do not have the opportunity to come across all the decisions of other courts. He divulged that it was the first time that he came across such a decision by the Court of Appeal in the case of *Transport Equipment Ltd and Reginald John Nolan v Devran P. Valambhia*, although it had been a decision by the same court over which he was presiding.<sup>50</sup>

Recently, the UN CEDAW Committee decided on a landmark case in terms of the Tanzanian Customary Law of Inheritance.<sup>51</sup> The case involved two widows who were left homeless because they were prevented from inheriting their late husband's estate. The two widows who were presented by three legal aid clinics argued that many women in Tanzania were experiencing similar violations whether as mothers, widows, daughters or other female relatives of the deceased. The Committee observed that the two widows were left economically vulnerable as they had no property, no home to live in with their children and no form of financial support. This was a state of vulnerability and insecurity which restricted their economic autonomy and prevented them from enjoying equal economic opportunities. The CEDAW Committee highlighted that state parties have an obligation to adopt laws of inheritance that comply with the principles of CEDAW and to ensure equal treatment of surviving females and males. In this decision, the Committee specifically called upon the General Recommendation No. 29 of Article 16 of CEDAW on the economic consequences of marriage, family relations and their dissolution, which expressly mentions that state parties are required to ensure that disinheritance of the surviving spouse is prohibited.<sup>52</sup> The committee also referred to its General Recommendation No. 21 on equality in marriage and family relations, which notes that state parties are required to give women equal rights to administer property. It emphasises that the right of women to own, manage, enjoy and dispose of property is central to their financial independence and may be critical to their ability to earn a livelihood

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<sup>50</sup> Kijokisimba H & Peter C M (note 7) above.

<sup>51</sup> Committee on the Elimination of Discrimination against Women Communication No. 48/2013, Views adopted by the Committee at its 60<sup>th</sup> session on 16 February to 6 March 2015. In the case of E. S. and S. C.

<sup>52</sup> Committee on the Elimination of Discrimination against Women, General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (economic consequences of marriage, family relations and their dissolution) 30 October 2013.

and to provide adequate housing and nutrition for themselves and for their children, especially in the event of the death of their spouse. The Committee ruled as follows:

“Tanzania’s legal framework which treats widows and widowers differently in terms of ownership, acquisition, management, administration, enjoyment and disposition of property, is discriminatory and thereby amounts to a violation of Article 2(f) in conjunction with Articles 5, 15 and 16 of the Convention. Tanzania should grant the two widows appropriate reparation and adequate compensation commensurate with the seriousness of the infringement of their rights, and Tanzania should ensure that all discriminatory customary laws limiting women’s equal inheritance rights are repealed or amended and brought into full compliance with the Convention.”

It seems that the application of legislation that is inconsistent with human rights depends on the decision maker. Most judges and magistrates are aware that those rights are guaranteed in the Constitution and international instruments, but they just have a stereotypical mind-set of the role of men and women in society, which makes them decide even against the Constitution.<sup>53</sup> Article 13(1) of the Constitution which reflects Article 7 of UDHR is very clear on this matter. It reads:

“All persons are equal before the law and are entitled, without discrimination, to protection and equality before the law.”

It was also stated that Article 13(4) of the Constitution provides clearly that:

“No person shall discriminate against any person or any authority acting under any law or in the discharge of the function or business of any state office.”

The Constitution is very clear concerning discrimination between human beings, and it is the duty of the court of law to deal justly with such issues. The judiciary usually contributes to law making as judges make laws through judicial review. The court can usually depend on the astuteness of judges to find interpretations for enactments which will promote rather than destroy the rights of the individual, and this is quite apart from declaring them bad or good laws, as was acknowledged by Mwalusanya J in the following words;

“The shape in which the statute is imposed on the community as a guide for conduct is that the statute is interpreted by the courts. The court puts life into the dead words of the statutes. By the statutory interpretation, the courts make judge-made laws that affect the fundamental rights of the citizen.”<sup>54</sup>

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<sup>53</sup>Committee on the Elimination of Discrimination against Women, General (note 51) above.

<sup>54</sup>Mwalusanya J in the case of *Ephrahim v Pastory* (note 40) above.

Furthermore, section 5(1) of the Constitution (Consequential, Transitional & Temporal Provisions) that came into effect in March 1988 states that the court should construe the existing law, including customary law, with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity to the provisions of the “Fifth Constitution Amendments Act; i.e., the Bill of Rights.”<sup>55</sup> The section invites all courts in Tanzania to interpret the Constitution in the course of their duties. There is no doubt that Parliament’s intention here is to do away with the oppressive and unjust laws of the past. It wanted all the existing laws, which were inconsistent with the Bill of Rights, to be inapplicable in the new era or be treated as modified so that they were in line with the Bill of Rights.<sup>56</sup>

In light of this, some Tanzanian High Court and Court of Appeal judges have been at the forefront in making sure that women are not oppressed but enjoy their rights as guaranteed by the Constitution and other international instruments that were ratified by Tanzania.<sup>57</sup> The following cases are examples of the firm stance of the judiciary against oppression, not only to do justice, but also to make sure that justice would be seen to be done. For example, in the case of *Chiku Lidah v Adam Omary*,<sup>58</sup> the applicant Chiku Lidah filed an affiliation proceeding at Ikungi Primary Court in Singida District requesting the court to adjudge the respondent Adam s/o Omar as the putative father of the child born out of wedlock. The claimant demanded a maintenance allowance for the said child. The trial court adjudged the respondent to be the putative father of the child and ordered payment as claimed. The respondent appealed to the District Court, which set aside the trial court ruling. Chiku Lidah filed an appeal at the High Court. The High Court found for the appellant, adjudging the respondent Adam Omar as the child’s putative father and issuing an affiliation order. An award of a lump sum was also made in favour of the appellant to cover expenses connected with the pregnancy and childbirth. In justifying its finding, the court stated:

“The conclusion reached in this case is in line with the international human rights norms as contained in the Convention on the Rights of the Child of 1989: a child born out of wedlock has the right to be maintained by his or her putative father.”

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<sup>55</sup>Mwalusanya J in the case of *Ephraim v Pastory* (note 40) above.

<sup>56</sup>*Ibid.*

<sup>57</sup>Shivji I ‘Contradictory developments in the teaching and practice of human rights law in Tanzania’ *Journal of African Law* 35 (1991) 116–127.

<sup>58</sup>(PC) Civil Appeal No. 34 of 1991 (unreported).

The rights of the female child to inherit a parent's land was considered in the case of *Jason Tinkazaile Katalihwa v Halima Balthazar Ngaiza*,<sup>59</sup> where the respondent was appointed the administrator of the estate of her deceased son who had died intestate and distributed the property to the child of the deceased who, according to records, was HIV-positive. The widow of the deceased, who survived the death of her husband, later died and then one Jonathan Ngaiza, who had been appointed as the administrator of the widow's estate, sold the house to the appellant. The house had already been distributed to the child of the deceased prior to the death of the widow. Madam Justice Kileo, considering the welfare and interests of the child, ordered the appellant to forthwith give vacant possession of the house to the respondent who, apart from being the administrator of the estate of the deceased, which included the house, also now had custody of the child.

On account of *Ndossi v Ndossi*,<sup>60</sup> where a dispute involved the widow and the brother of a deceased man's estate, the Tanzanian High Court confirmed a lower court decision to replace the deceased's brother with the deceased's widow as the administrator of the deceased's estate. The High Court affirmed that the Tanzanian Constitution provided that "every person is entitled to own property and has a right to the protection of that property held in accordance of the law", and that Article 9(a) and (f) of the Constitution generally domesticated human rights instruments as ratified by Tanzania, including the anti-discrimination principles contained in Article 2(b) and (f) of CEDAW.<sup>61</sup> This High Court decision in effect found that these principles of international law were directly applicable in Tanzania, which is a decision that could have very far-reaching consequences for the Tanzanian legal system. Conversely, in the later case of *Elizabeth Stephen and Another v the Attorney General*,<sup>62</sup> the High Court held that the customary law that restricted women from acquiring and offering clan land was discriminatory and unconstitutional, but it declined to strike down the law. In arriving at this decision, the High Court applied a version of constitutional avoidance and approved the dictum set out in *Attorney General v W. K. Butambala* where the court stated:

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<sup>59</sup>High Court of Tanzania, Land Division case at Dar es Salaam, Land Appeal No. 8 of 2006 (unreported).

<sup>60</sup>Civil Appeal No. 13 of 2001, High Court of Tanzania at Dar es Salaam, 13 February 2002.

<sup>61</sup>Article 2 states: "State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (...) (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women. (...) (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

<sup>62</sup>*Elizabeth Stephen and Another v the Attorney General* (note 45) above.



“We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and momentous occasions. Things which can easily be taken up by administration initiative are best pursued in that manner.”<sup>63</sup>

The High Court in the case of *Elizabeth Stephen and Another* held that customary law, which was in violation of the Constitution, could not be struck down because it was protecting the “sacrosanct nature of the Constitution” in ensuring that “only matters of great importance” were brought to the Court.<sup>64</sup> The Court also relied on section 8(2) of the Basic Rights and Duties Enforcement Act [cap 3 R.E. 2002] that provides the following:

“The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.”

A political process cannot be considered as a satisfactory means of redress for the purposes of this section. To hold so would make the enjoyment and enforcement of all rights subject purely to the democratic process. The enjoyment of all rights on a non-discriminatory basis is a matter of the greatest importance and constitutional avoidance is not supposed to be an accepted principle on the availability of other legal avenues to protect one’s constitutional rights. The Court in this case provided a remedy by arguing that the district councils should lobby the responsible Minister to change the law, consequently leaving the solution purely in the hands of the political process. However, it would appear that the real reason for the decision was a reluctance to interfere with customary law. The Court clearly indicated this by stating:

“It is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality.”<sup>65</sup>

Here the decision of the High Court was that it would not make a judicial pronouncement on the constitutionality of the admittedly unconstitutional provision. In the case of *Naftal Joseph Kalalu v Angela Mashirima*,<sup>66</sup> the respondent, Angela Mashirima, had petitioned the Primary

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<sup>63</sup>[1993] TLR 46.

<sup>64</sup>The Court also relied on section 8(2) of the Basic Rights and Duties Enforcement Act [cap 3 R.E. 2002] which provides that: “The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned...”

<sup>65</sup>*Elizabeth Stephen* case (note 45) above.

<sup>66</sup>High Court of Tanzania at Dar es Salaam P.C. Civil Appeal No. 145 of 2001.

Court for granting her letters of administration in respect of her deceased husband's estate. She was duly appointed an administratrix after the hearing of some of the beneficiaries and after an assessment by the court on her suitability for the appointment. The respondent presented before the court that she was the wife of the deceased as they had a customary marriage and their marriage was blessed with three children. The father of the deceased objected to the appointment of his son's wife as an administratrix of the will and claimed that there was no evidence that a customary marriage had taken place between his son and the respondent or that the couple had not been divorced in the interim. The appellant also reminded the court that Chagga customary law on succession and inheritance barred women from administering wills and the law that is applicable in administration matters in the Primary Court is either Customary Law or Islamic Law. He insisted that since both the deceased and the respondent were of a Chagga origin, para 20 of the Laws of Inheritance GN 436 of 1963 was applicable as it provides that:

“A Chagga widow cannot inherit the estate of a deceased husband unless clan members do not survive the deceased and the widow has only usufructuary rights over the deceased's properties.”

The High Court highlighted that even if there had not been a customary marriage between the deceased and the respondent, the duration and nature of their relationship satisfied the requirements for a presumed marriage. Furthermore, the Court cited Articles 12 and 13 of the Constitution and Article 1 of CEDAW to emphasize its commitment to ending gender-based discrimination and held that the mentioned Chagga customary law would be discriminatory and that the deceased's wife would remain as an administratrix of the will. The High Court's decision that was delivered by Madam Justice Kamaro took into account the provisions of CEDAW in the followings words:

“Tanzania is a party to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). It ratified the Convention on 17 July 1980. The Convention requires state parties to abolish discrimination against women by embodying the principle of equality between men and women in the National Constitution and this has been done by Tanzania. The term discrimination against women is defined in Article 1 of the Convention. It is: ‘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 the basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. Under Article 15(2) state parties are required to accord to women in civil matters a legal capacity identical to that of men and same opportunities to exercise that capacity. In particular, state parties are required to give women equal rights to conclude contracts and to administer property and to treat women

equally in all states of procedure in courts and tribunals. If a husband is allowed to administer the estate of his deceased wife without any conditions whatsoever, there is no good reason why a surviving wife should be denied such a right. It is gender discrimination which is barred by the Constitution of the United Republic of Tanzania.”

Furthermore, some members of the judiciary have stood firm to see that disposition of matrimonial property is granted without any discrimination. In the case of *Leila Jalaludin Haji Jamal v Sharif Jalaludin Haji Jamal*,<sup>67</sup> the respondent was sued in the High Court as executor of the will of his deceased brother, who was the husband of the appellant. The appellant who was not resident in Tanzania asked the court to order the respondent to give her Koranic share of 1/8 of the estate of her deceased husband immediately. The High Court ordered the appellant to pay an amount of TShs. 2,216,250,000/= as security for the costs incurred and likely to be incurred by the respondent in the processes of dealing with that suit, because the appellant was neither a resident of Tanzania nor had she any immovable properties in the country. The panel comprising Justice Madam Kimaro, Justice Rutakangwa and Justice Kaji held that the motive for paying such a large amount of money, which the Court knew that the appellant could in no way afford as it was colossal, was bad. It barred the appellant from accessing justice, which is against Article 13(1) of the Constitution. The Court of Appeal found that the right to a hearing is fundamental and that is the reason why the doors of the court should remain wide open for all who come to seek justice. Despite the existence of the above derogative piece of legislation, the Court of Appeal did not hesitate in safeguarding the human rights provisions of the Constitution as basic rights including Article 13(1) which is among the Articles of the Constitution of the United Republic which were incorporated from UDHR, which is the mother law of other international instruments dealing with human rights.

In the case of *Mwajuma Mohamed Njopeka v Juma Said Mkorogoro*,<sup>68</sup> the appellant was aggrieved with the decision of the trial court which ordered the respondent to pay the appellant TSh 500,000/= (which is equivalent to US\$230) only for the division of matrimonial property after issuing a decree of divorce to the appellant. The respondent who was the husband of the appellant was left with the two houses which they had acquired during their marriage. On appeal Madam Judge Kimaro held that the decision of the Lower Court did not take into

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<sup>67</sup>Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 55 of 2003 (unreported).

<sup>68</sup>High Court of Tanzania at Dar es Salaam, Civil Appeal No. 6 of 2001 (unreported).

consideration the right to equal protection before the law. She granted the appellant one of the matrimonial houses and observed the following:

“The decision of the Primary Court is discriminatory and offends Article 13(1) of the Constitution of the United Republic of Tanzania.... Article 7 of the Universal Declaration of Human Rights provides for equal protection before the law. This is what is provided for in Article 13(1) of the Constitution of the United Republic of Tanzania. UDHR is a source of subsequent International Conventions Dealing with Human Rights. The Convention on the Elimination of All Forms of Discrimination against Women in its Article 2 requires state parties to embody the principle of equality before the law in their national constitution and to ensure through law the realization of this principle.”

In the above decision, Madam Judge Kimaro interpreted domestic legislation in conformity to the jurisprudence of CEDAW and the Maputo Protocol by providing equal rights before the law. It had been submitted previously that women judges were at the forefront to ensure that their fellow women received equal rights before the law. In the case of *Gulya Mohamed v Ahmed Makamo*<sup>69</sup> the appellant was aggrieved with the decision of the District Court which granted her only 5% of the matrimonial property that had been jointly acquired, and she appealed to the High Court for an order of division equivalent to her contribution. It had been the finding of the District Court that the appellant had made a contribution towards the acquisition of the matrimonial property but she had been awarded only 5% because she had failed to elaborate the extent of the contribution she had made toward the acquisition of the matrimonial house. It was the finding of the High Court that there was no justification for the trial Court to grant the respondent a 95% share and the appellant only 5%, as the evidence given by the respondent had shown that he had never mentioned anywhere the extent of his contribution toward the acquisition of the matrimonial assets. The appellant’s evidence, on the other hand, was that she was helping her husband through a small business of selling food. She was earning about US\$.5 to US\$1 per day. In her decision, Madam Justice Kimaro stated:

“The decision [by the trial court] was discriminatory .... There is no explanation that can be given to justify the decision of the trial magistrate. The appellant was given 5% division because she is a woman and women are taken to be inferior in all aspects to men. The Constitution of United Republic of Tanzania bars discrimination in Article 13(1).... CEDAW, which was ratified by Tanzania in 1980, requires state parties to abolish discrimination against women by embodying the principle of equality between men and women in the National Constitution.... Again, Article 15 of the CEDAW requires state parties to accord women and men equality before the law.”

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<sup>69</sup>High Court of Tanzania at Dar es Salaam, Civil Appeal No. 45 of 2001 (unreported).

The High Court substituted the order of 5% with an order of 50% division of the matrimonial assets. The earlier decision by the District Court clearly demonstrates that there is a need to incorporate international human rights into domestic statutes rather than declaring them in the Constitution in order to strengthen the hands of decision makers and the judiciary. Some decision makers have closed their eyes to the provisions of the Constitution and perpetuate derogatory legislation in their decision, which offends women. If the appellant in the above-mentioned case had not had the courage to appeal, she could have ended up losing her matrimonial property through the violation of her rights.

The High Court of Tanzania also once barred the customary practice of denying the rights of women in respect of matrimonial property.<sup>70</sup> In this case the appellant, who was the husband of the respondent, challenged the decision of the trial court which had distributed the matrimonial property equally and ordered the appellant to pay the respondent an amount of money which was equivalent to US\$5 per month for maintenance. The grounds of the challenge was to the effect that, according to Chagga custom, the respondent should not have been given a share of the two matrimonial houses constructed in Moshi because they were built on clan land. It was argued that it was not allowed to alienate such property and that section 114(2) of the Law of Marriage Act required the court to take into consideration the custom of the community to which the parties belonged while determining matrimonial cases. The Advocate of the appellant submitted that the respondent was a housewife so she had not contributed anything in terms of money or property towards the construction of the house. The only contribution she had made was ‘housekeeping’ which amounted to purely conjugal obligations, which did not entitle the applicant to the division of the other matrimonial house, which was in Tandika, Dar es Salaam. Again, Madam Justice Kimaro ruled as follows:

“The submission by Mr. Mbuya [Advocate for the applicant], to say the least, is a clear reflection of the violence and discrimination which a woman has lived with in the society for years. Services by women which require recognition and compensation are termed conjugal obligations on the part of the woman. This is so even where they are not reciprocated and the woman ends up being an exploited loser...”

In this judgment, Kimaro J again cited some Articles of the Constitution and international human rights instruments which are against discrimination, and concluded:

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<sup>70</sup> *Laurence Mtefu v Germana Mtefu*, High Court of Tanzania at Dar es Salaam, Civil Appeal No. 214 of 2000 (unreported).

“...The only thing which I fear may make the respondent fail to get the remedy is the grant of the division of the houses in Moshi. Customary rites may be an obstacle toward realization of what was granted to her. Under such circumstances I quash and set aside the order of the trial court on the division of matrimonial assets: instead, I will replace it with an order that the respondent is given the house at Tandika as her share in matrimonial assets.”

In regard to the above decision, the High Court’s celebrated ruling, among other things, recognized domestic services rendered by a homemaker as a contribution towards the acquisition of matrimonial property.<sup>71</sup> The quorum of justice of the Court of Appeal in the *Bi Hawa Mohamed* case made a ground-breaking decision by recognising domestic duties as having sufficient monetary value for the division of matrimonial asserts. However, the Court of Appeal in this case did not provide clear guidelines on the value of the contribution made by virtue of doing domestic work or efforts in this regard. In addition, section 114(2)(b) of the Law of Marriage Act, which requires partners in marriage to prove the extent to which they have contributed to the matrimonial property, creates the possibility that parties may become vulnerable upon divorce or separation. Although the requirement to prove the extent of one’s contribution to the matrimonial property is applicable to both parties in marriage, it has more negative consequences for women who are, in most instances, in a weaker position. Many women have ended up losing their property for failure to prove the extent of their contribution,<sup>72</sup> due to the fact that in a patriarchal system women are not expected to own property as they are limited by cultural norms such as the one which requires them to ask for permission from their husbands if they want to involve themselves in any activities. Also, they are subordinated by a culture that excludes women from participating in public life. Many are illiterate as they are often denied access to education. The effects of this culture amount to economic violence as defined in Article 1(j) of the Maputo Protocol. Many husbands forbid their wives to work and force them to stay at home. They withhold money for food and other necessities from their wives to ‘keep them in line’ as a punishment or simply because they don’t want to fulfil their obligation to support the family.

Incidences of economic violence and the issue of sexual harassment of women within the working place still occur widely in Tanzania. For example, a woman who is trying to earn a living and to keep her family fed and her children in school may be subjected to sexual

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<sup>71</sup>*Bi. Hawa Mohamed v Ally Sefu* (1983) TLR 32.

<sup>72</sup>Tanzania Women Association (TAWLA) *Position Paper on Gender Mainstreaming of the Constitution Review Process of Tanzania, Revised Edition*, TAWLA February 2013.

harassment. The Prevention and Combating of Corruption Act of 2007 addresses all types of corrupt incidents, including those which are gender related such as the demand for or offer of sexual favours in exchange for official services in Tanzania.<sup>73</sup> This legislation has strengthened the legal regime on violence against women and children by expanding the scope of sexual offences as provided in the Penal Code, Cap 16. The demand or imposition of sexual favours on subordinate staff or those who need a person in authority to exercise that authority in their favour either for services, employment, or promotion, is a common complaint at the workplace and in the community at large. This violation which is technically known as ‘sextortion’ was exposed in the case of *Mussa Zanzibar v Republic*<sup>74</sup> where the appellant, a traditional healer, raped one Siwema Rusumba on the premise that he could restore her menstrual period which had disappeared for some time. He led the victim to a secluded area, ordered her to undress, held her by the neck and inserted his penis into her private parts. The appellant gave a sworn testimony claiming that the complainant had consented to sexual intercourse. The issue before the court was whether the complainant had consented to the sexual intercourse by the traditional healer. It was held by the court that the victim had not consented to sexual intercourse with the appellant and that the appellant had abused his position of authority as a traditional healer in extorting sex.

In the case of *Seif Mohamed El-Abadan v the Republic*,<sup>75</sup> a woman was raped by a medical doctor on the examination table at Magunga Hospital in Korogwe District. The court of appeal dismissed the appeal and asserted that the witness in the trial was not credible. The Appellate Court held that it was unable to find grounds for denting the credibility of the complainant. The Court thus recognized the offense of sextortion and provided as follows:

“We agree with the learned judge that it is treacherous for one to stray away from a professional calling and turn against one amongst the very lot who bestowed their trust unto the person. In this case, it was treacherous for the appellant doctor to rape his patient...”

Similarly, in the case of *John Martin Marwa v the Republic*,<sup>76</sup> a secondary school teacher was convicted of raping his student and sentenced to thirty years imprisonment. The appellant was

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<sup>73</sup>Section 125 of the Prevention and Combating of Corruption Act which states that “any person being of position or authority, who in the exercise of his authority, demands or imposes sexual favours or any other person as a condition for giving employment, a promotion, a right, a privilege or any preferential treatment, commits an offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years or both.”

<sup>74</sup>Criminal Appeal No. 287 of 2012, Court of Appeal of Tanzania (unreported).

<sup>75</sup>Criminal Appeal No. 320 of 2009, Court of Appeal of Tanzania at Tanga (unreported).

<sup>76</sup>Court of Appeal of Tanzania at Tabora, Criminal Appeal No. 22 of 2008.

a teacher at Puge Secondary school and on the material day he called and asked the victim, who was also the head girl, to assist him in locating absentee students. The appellant left together with the victim and on the way back, the appellant raped the victim. The appellant was convicted by the court and he appealed for the second time on the grounds that he had been framed. The Court of Appeal found no justification for doubting the evidence of the witness, especially as the results of the medical examination corroborated her testimony. The court affirmed the trial court's conviction, dismissed the appeal and ordered the appellant to pay compensation to the victim, which had not been ruled by the trial court. Users of legal services, particularly young men and poor elderly people, have been the victims of those who need a person in authority to exercise the authority in their favour, which is also something that is an obstacle to access justice.

Women have faced sexual harassment as service users and employees in the legal system where they have been exposed to demands for sexual favours as a precondition for obtaining bail, favourable judgment, or employment benefits. For example, in the case of *Onesphory Materu v the Republic*,<sup>77</sup> a police officer on duty at a police station raped a young girl of 14 years inside a police remand cell on a written promise that he would release her from custody. He also allowed her freedom to sit on a bench outside and get a glimpse of sunshine. When he refused to release her as promised, the girl filed charges giving the release note as part of her evidence of the illicit, unfulfilled promise. The court found the appellant guilty and he was convicted and sentenced to thirty years imprisonment, twenty four strokes with a cane, and he was ordered to pay US\$350 as compensation to the complainant.<sup>78</sup>

The Tanzania police database shows that the highest number of sexual victims among female and males below the age of 15 years doubled between 2004 and 2008 countrywide.<sup>79</sup> In the criminal case of *Leonard Jonadhan v R*<sup>80</sup> that was heard at trial court, the appellant admitted that he had raped the complainant because he was in love with her. He had wanted to marry her but the complainant had insisted on a Christian marriage which he could not afford. He then decided to ambush, catch and marry her under Chagga customary marriage norms. On appeal, he insisted that, on that material day, he married the complainant under customary

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<sup>77</sup>Criminal Appeal at Tanga, Criminal Appeal No. 334 of 2009.

<sup>78</sup>TAWJA 'Stopping the Abuse of Power for Purposes of Sexual Exploitation: Naming, Shaming and Ending Sextortion' Millennium Development Goal 3 Program Tanzania: 2009 - 2011 Country Report (2012) 57.

<sup>79</sup>Ibid.

<sup>80</sup>High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 53 of 2001 (unreported).



norms, so he had committed no offense. In judgment, Madam Justice Mnunuo stated that the defence of contracting Chagga customary marriage through rape was improbable and fallacious in fact and in law. The complainant was protected by the domestic Law of Marriage Act, for without volition there can be no marriage between parties intending or contracting a marriage. Mnunuo J further stated:

“She [complainant] is further protected by international norms, notably under the provisions of Article 4 of the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW) which calls on states to protect and offer adequate relief to women victims of violence.... The complainant is also protected by Article 14 of the 1948 Universal Declaration of Human Rights which gives an adult the right to choose one’s spouse and the right to voluntary [sic] marry the particular spouse.”

The High Court also cited Articles 2 and 16(b) of CEDAW and Article 23 of the CCPR of 1966, and concluded that the appellant seriously offended the complainant’s fundamental rights to choose her spouse and marry of her own volition.

In another criminal case (*Republic v Elvan S/O Cyprian Luvindu*)<sup>81</sup> the accused physically assaulted the woman whom he was living with as her lover. While he was drunk, he hit and kicked his partner to death. In the trial he pleaded guilty to manslaughter. The trial judge sentenced the accused to twenty years imprisonment and highlighted that the offence had been committed in the course of domestic violence and made note of Tanzania’s commitment to CEDAW and the eradication of violence against women as follows:

“The Convention on the Elimination of All Forms of Violence against Women (CEDAW) requires that violence against women should be eradicated. Tanzania is a party to the Convention. There has been a lot of public outcry to stop domestic violence. In this case, apart from the accused kicking the deceased, he strangled her. This court cannot accept the excuse of drunkenness because the accused was once warned not to kick the deceased and he stopped. Later on he strangled the deceased to death. Considering this fact that the offence was committed in the course of domestic violence, I sentence the accused to imprisonment for twenty years.”

The High Court of Tanzania finally nullified and declared sections 13 and 17 of the Tanzania Law of Marriage Act unconstitutional as these sections allowed girls to marry at the age of 15 with parental permission and at age 14 with the permission of a court. This recent landmark

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<sup>81</sup>High Court of Tanzania Dar es Salaam District Registry 2015

case (*Rebeca Gyumi v Attorney General*)<sup>82</sup> occurred early in 2017. The ruling was filed early in that year by the founder and director of Msichana Initiative, an organization advocating for girls' right to education in Tanzania. The case was a critical step forward in the struggle to end child marriages in Tanzania, which is a country with one of the highest rates of child marriages in the world.<sup>83</sup> The three High Court judges in this case argued that the Marriage Act violated girls' essential right to equality, dignity, and access to education, and contravened Tanzania's Law of the Child Act. The High Court pointed out that while the Law of Marriages Act might have been enacted with good intentions in 1971, this intention was no longer relevant because the effects of the Act now discriminated against girls by depriving them of opportunities that are vital for all Tanzanians. The Attorney General was given one year from the date of the decision to make arrangements for amendments of that law, and to put 18 years as the minimum age for one to contract a marriage.

However, the light at the end of the tunnel of a long straggle that was lit by this High Court ruling that was delivered on 8 July 2016 was dimmed by the Tanzanian government, as they filed a notice of intention to appeal against this decision by the High Court on 20 July 2016.<sup>84</sup> Although the grounds for appeal had yet to be reviled at the time of this study, the action of challenging this ruling portrays the Tanzanian government's political unwillingness to repeal this law. Many citizens expressed their shock over the government's intention to appeal and found it difficult to understand why the government sought to overturn this historic ruling.<sup>85</sup> Additional confusion reigned among citizens considering the fact that the government had made it an offence to marry girls of primary and secondary school age just a week before this High Court's decision.<sup>86</sup> This offence was punishable by up to 30 years' imprisonment. Tanzania has one of the highest rates of child marriage in the world as on average two of five girls are married before the age of 18 and 39% fall pregnant by the age of 19.<sup>87</sup> Although human

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<sup>82</sup>High Court of Tanzania at Dar es Salaam Main Registry. Miscellaneous Civil Case No. 5 of 2016.

<sup>83</sup>Martinez E & Kotowski A 'Dispatches: Tanzanian High Court Rules Against Child Marriage in a Victory for Girls' Rights, Marrying Age Raised to 18' *Human Rights Watch* 8 July 2016 available at <https://www.hrw.org/news/2016/07/08/dispatches-tanzanian-high-court-rules-against-child-marriage> accessed on 7 August 2016.

<sup>84</sup>Mhagama H 'Tanzania: Network Asks Government to Rethink Decision on Early Child Marriages' *allAfrica Report* 5 August 2016. Available at <http://allafrica.com/stories/201608050234.html> accessed on 7 August 2016.

<sup>85</sup>Maddison K 'Tanzania's Government Opposes Child Marriage Ban' *Leanwords* 05 August 2016. Available at [http://leanwords.com/text\\_posts/119-tanzania-s-government-opposes-child-marriage-ban](http://leanwords.com/text_posts/119-tanzania-s-government-opposes-child-marriage-ban) accessed on 7 August 2016.

<sup>86</sup>Ibid.

<sup>87</sup>Parsons J & McCleary-Sills J 'Preventing Child Marriage: Lessons from World Bank Group Gender Impact Evaluations' *World Bank Gender Group Impact Data Base* (2015) 17 available at

rights groups and civil societies applauded the ruling, there are a mixed feelings in the country, as the ban of this law is said to primarily affect Muslim and traditional tribal communities.<sup>88</sup>

In most of the above cases in which women's rights were strictly enforced, most of the adjudicating judges were women. In the Court of Appeal case there was a woman judge on the panel of three judges. Women judges have been playing a major role in ensuring that the rights of their fellow women are granted according to national and international human rights instruments. In addressing this issue, the Hon. Madam E N Mnunuo of the Court of Appeal is of the view that women need to be bold themselves in the first place and fight in order to force men to grant them their rights.<sup>89</sup> It is not easy for a man who is steeped in stereotyped thinking and who is enjoying the benefits of oppressing women to recognize women's rights.<sup>90</sup> On their part, women judges in Tanzania have realized the importance of the judiciary having a broad mind in respect of human rights. They use their association called Tanzania Women Judges' Association as a platform to address the issue of human rights for women and they conduct human rights seminars for judges and magistrates once a year, where they specifically discuss national and international precedents and legislation which safeguard human rights and which specifically protect women and children.<sup>91</sup>

Nowadays judiciaries in many countries regularly include women in judicial appointments. Women make up half or more of the population in many African countries. Between 2000 and 2015, women ascended to the top of judiciaries across Africa, most notably as chief justices of supreme courts in common law countries like Ghana, Nigeria, Sierra Leone, Gambia, Malawi, Lesotho and Zambia, but also as presidents of constitutional courts in civil law countries such as Benin, Burundi, Gabon, Niger and Senegal.<sup>92</sup> At the same time, women are being appointed in record numbers as magistrates, judges and justices across the continent. This trend is of benefit to gender equality and, more specifically, for creating understanding and compassionate handling of cases in courts when women's issues are under consideration or when their rights

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<http://www.worldbank.org/content/dam/Worldbank/document/Gender/enGENDER%20IMPACT%20-%20Research%20Br> accessed on 8 November 2015.

<sup>88</sup>Mhagama H (note 84) above.

<sup>89</sup>Madame Justice Mnunuo of the Court of Appeal of Tanzania in her paper presented at the Legal Implications of Professional Associations' Conference in Maputo, Mozambique on 28 May 2014 available at [www.iccaworld.com/.../africanchapter/.../Maputo%20Presentation%20-%20Legal%20](http://www.iccaworld.com/.../africanchapter/.../Maputo%20Presentation%20-%20Legal%20) accessed on 28 February 2016.

<sup>90</sup>Ibid.

<sup>91</sup>TAWJA (note 78) above.

<sup>92</sup>Bauer G & Dawuni J *Gender and Judiciary in Africa: From Obscurity to Parity* Routledge (2016) 87.

are at stake. Women judges promote gender equality and female rights in general. A court presided over by a woman judge produces judgements and rulings that give regards to real world implications and their impact on the lives of female members of the community. The constitution of South Africa under Section 174(2) also specifically declares the need for the judiciary to broadly reflect the gender composition of South when judicial officers are appointed. It has been argued that women judges approach the issues of law and case management with a different perspective and with a different way of thinking that would help correct the biases of culture and tradition.

However, the challenge of accepting female judges still exists in society and among many male members of the legal profession. Prevailing gender stereotypes, norms and roles often play a significant role in preventing women's full and equal participation in the judiciary. In some contexts, these manifest in serious opposition to women's participation in the judiciary. Religious interpretations as to women's roles in society or specifically in the judiciary continue to exclude women from the judiciary or from particular courts in Africa. Sometimes conservative religious beliefs regarding women's roles in society provide authorities with pretexts to restrict women's participation.<sup>93</sup> Gendered assumptions based on the culture of women's submissive role in society also affect the way in which female judicial members are treated by male colleagues and authority figures. It is also noted that women's appointment or promotion within the judiciary is often discussed in terms of assumptions that women are children's primary caregivers and will stop working or reduce work levels when they become mothers.<sup>94</sup> There is also a wide assumption among the public that judges are, or should be, men.<sup>95</sup> Sometimes people who appeared in a court presided over by a female judge asked where the judge was.<sup>96</sup> Some female judicial members experienced that men and women refused to appear before them or sought to have their cases transferred. Some of the judiciaries in Africa still use a male form of address for female judges<sup>97</sup> as they address them as "My Lord" or "Your Lordship" instead of "My Lady" or "Her Ladyship".<sup>98</sup>

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<sup>93</sup>Office of the United Nations High Commissioner for Human Rights (OHCHR) Commissioned Report: Gender Stereotyping as a Human Rights Violation, October 2013.

<sup>94</sup>International Commission of Jurists *Women and the Judiciary Geneva Forum Series No. 1* International Commission of Jurists, (2014) 23.

<sup>95</sup>Ibid.

<sup>96</sup>Ibid.

<sup>97</sup>Ibid.

<sup>98</sup>Fourth International Commission of Jurists (ICJ) Geneva Forum of Judges and Lawyers 5 & 6 December 2013 Women and the Judiciary.

Despite the major challenges for the enforcement of women's rights in Tanzania due to traditional and cultural practices, other factors determine the limited use of international human rights instruments for the protection of women's rights in this country. One such factor is insufficient publication and lack of awareness of cases for precedence. This problem not only affects legal practitioners, but also the officials of the court, thus hindering the entire administration of justice.<sup>99</sup> For instance, cases were published for the last time in the Tanzanian Law Report series in 2006, although it has been said that an initiative has been launched to compile and make available the reported cases of the years that have followed 2006. This state of affairs have caused some judges not to follow available precedents, with the result that they have to use their own initiative to come up with decisions that are often inconsistent.<sup>100</sup> Although judges are bound by the rule of precedence horizontally and vertically, they are not liable for whatever decisions they make in the course of their work. The only remedy available to the affected parties is to appeal. In these circumstances, the incorporation of international treaties is of paramount importance, because if the judiciary is left just to take into consideration only ratified instruments, the rights of many will be denied.

Other challenges for the enforcement of CEDAW and the Maputo Protocol in Tanzania include, but are not limited to, access to relevant international human rights documents both at national and international levels, as well as poorly drafted pleadings that do not illuminate the relevant issues.<sup>101</sup> Lack of access to justice due to, among others, the high cost of litigation and cumbersome procedural rules is also among the factors which hinder the implementation of CEDAW and the Maputo Protocol in Tanzania.<sup>102</sup> The role that national judges are expected to play by international instruments is important, but the behaviour of legal practitioners and judges' attitudes cannot be disconnected with regard to the enforcement of women's rights as enshrined in the Constitution and international instruments.<sup>103</sup> Both judges and legal professionals are from the same background and go through the same initial legal training, thus they share similar legal and procedural knowledge.<sup>104</sup> It is obvious that for parties and their attorneys to use the provisions for women's rights as enshrined in international treaties in

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<sup>99</sup>TAWJA (note 78) above; also Office of the United Nations High Commissioner for Human Rights (OHCHR) (note 93) above.

<sup>100</sup>Ibid.

<sup>101</sup>Kombo B Mohamed F J & Sow R (eds) *Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa* Equality Now (2013) 77.

<sup>102</sup>Ibid.

<sup>103</sup>Hallward-Driemeier M & Hasan T 'Women's rights in practice: Constraints to accessing justice' In *Empowering Women*, International Bank for Reconstruction and Development (2012) 121–134.

<sup>104</sup>Killander (note 6) above.

litigation, they must first be aware of existing treaties, case law, etc. This pertains to the extent to which international human rights law forms part of legal training. Human rights law is currently commonly part of the curriculum of law faculties in Tanzania, but international law as such is often offered as an optional subject.<sup>105</sup> The lack of the courts' reliance on international human rights law in relevant cases may also be attributed to the fact that attorneys know from experience that judges will not accept international law arguments.

However, efforts have been made in Tanzania to ensure that law enforcers are getting up-to-date knowledge that is required in the field of human rights. Significant initiatives have been implemented with a view to influencing judges to become friendlier to international human rights law in Tanzania, such as the training sessions that are organised by the Women Judges' Association. The East African Magistrates' and Judges' Association has its headquarters in Arusha, Tanzania, and this body aims to promote and protect human rights, among other issues. The Southern African Chief Justices' Forum, of which Tanzania is a member, holds annual conferences which, among other things, include discussions on women's human rights issues.<sup>106</sup> Additionally, the establishment of the Law School of Tanzania in May 2007 has contributed significantly in giving lawyers practical legal training and human rights is among the courses offered by this institution.<sup>107</sup> There are more than 15 universities in Tanzania that offer a law degree. The standard of education at these institutions varies, so the one-year program at the Law School of Tanzania intends to supplement the law degree.<sup>108</sup> Completion of the Law School of Tanzania qualification is compulsory in order to practise law as a public or private attorney, and it is also compulsory for magistrates.<sup>109</sup> Other countries such as Uganda have gone far in establishing law institutes for further studies. The Judicial Studies Institute of Uganda has been providing human rights training under the auspices of the judiciary since 2004.<sup>110</sup>

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<sup>105</sup>Faculty of Law, University of Dar es Salaam, on file with the McGeorge Law Review. Available at [http://www.lawafrica.com/LegalEducation/go.asp?sectionID=DAR\\_FAC](http://www.lawafrica.com/LegalEducation/go.asp?sectionID=DAR_FAC) accessed on 8 April 2016.

<sup>106</sup>Ibid.

<sup>107</sup>Buhai S L, Kumari V, Omaka C A and Rosenbaum S A 'The Role of Law Schools in Educating Judges to Increase Access to Justice' *24 Berkeley Law Scholarship Repository* (2011) 161-199.

<sup>108</sup>Manteaw S O 'Legal Education in Africa: What Type of Lawyer Does Africa need?' *McGeorge Law Review* 39 (2008) 905–976.

<sup>109</sup>Section 2 of the Law School of Tanzania Act of 2007.

<sup>110</sup>Judicial Studies Institute of Uganda. Available at <http://www.judicature.go.ug/Uganda/index.html> accessed on 16 May 2016.

International instruments that protect women's rights need to be published and widely disseminated to judicial officers and lawyers to provide them with knowledge and skills, which in turn would help change attitudes and improve the quality of pleadings and judgments to ensure more reliance on international laws. A constitutional or legislative mandate for courts to consider international human rights law in addition to implementing legislation consistent with their international obligations is also needed. The Constitution of Seychelles is a good example, as it provides a clear mandate to the court to consider international human rights instruments. Article 48 of the Constitution of the Seychelles provides the following:

“The Bill of Rights shall be interpreted in such a way as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provisions of this Chapter, take judicial note of – (a) the international instruments containing these obligations; (b) the reports and expression of views of bodies administering or enforcing these instruments; (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms; (d) the Constitutions of other democratic states or nations and decisions of the courts of the states or nations in respect of their Constitutions.”

#### **4.4 Extra Judicial Enforcement of Women's Rights in Tanzania**

Some extra-judicial institutions in Tanzania have been in the forefront for the promotion and protection of women's rights. Most of the institutions that are directly involved in the promotion and protection of human rights at domestic level are civil societies and NGOs with few institutions established by the government.<sup>111</sup> The main government institutions which specifically deal with the promotion and protection of human rights are the Commission for Human Rights and Good Governance (CHRGG), which introduced a gender desk to deal with the rights of women, and the Law Reform Commission of Tanzania which was discussed in Chapter one. The Ministry of Health, Community Development, Gender, Seniors and Children (formerly the Ministry of Community Development of Women's Affairs and Children) is the national gender machinery responsible for policy formulation, coordination and monitoring of matters affecting women.<sup>112</sup> In an effort to bring about gender equality, the government put in place the National Development Vision 2025 that provides, among other things, that Tanzania

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<sup>111</sup>Okudzeto S 'Civil Society and National Human Rights Institutions' *International Journal* 13(4) December (2011).

<sup>112</sup>The United Republic of Tanzania: A National Gender Diagnostic Study in Tanzania Final Report (2012) available at <file:///C:/Users/214585778/Downloads/Gender%20Diagnostic%20Study-Final.pdf> accessed on 8 June 2016.

should ensure the attainment of gender equality and the empowerment of women in all socio-economic and political relations as well as culture by the year 2025.<sup>113</sup> Consequently, plans have been prepared to realize the Vision 2025 goals, which include the Poverty Reduction Strategy (PRS) that has identified gender as crosscutting in all sectors.

The Tanzanian government has also reviewed the Women Development Policy of 1992 in line with the Gender Development Policy, which was adopted in 2000. This initiative has been operationalized through the National Strategy for Gender Development (NSGD) of 2005.<sup>114</sup> The Policy highlights the integration of gender equality in policies, development strategies, plans and actions in all sectors at all levels in the development process.<sup>115</sup> Furthermore, the Policy provides for women's empowerment by giving more opportunity to women in all spheres, including politics, leadership positions, management and economic development.<sup>116</sup> The implementation of this policy is carried out through the normal government structures by sectoral ministries and local government authorities, whereas the NGOs, community-based organisations, the private sector and communities at large complement these efforts.<sup>117</sup> The Policy has increased awareness of issues related to women's empowerment and gender equality.<sup>118</sup> A popular version of the Policy on Women and Gender Development was prepared in 2003 and disseminated widely in the country. In addition, the Policy was translated from Kiswahili into English to facilitate easy understanding by development partners and non-Swahili speakers. In addition to that, the Ministry translated some international human rights provisions that address the rights of women and CEDAW into the Swahili as well.<sup>119</sup>

Furthermore, the government has laid down gender mainstreaming approaches towards building the foundation to promote gender equality in the country through NSGD. The Ministry

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<sup>113</sup>Ministry for Community Development, Gender and Children; United Republic of Tanzania, Country Report on the Implementation of the Beijing Platform for Action and the Outcome of the Twenty-Third Special Session of the General Assembly - Beijing +10 (2005). Available at <http://www.un.org/womenwatch/daw/Review/responses/UNITEDREPUBLICOF TANZANIA-English.pdf> accessed on 22 June 2016.

<sup>114</sup>The United Republic of Tanzania Ministry of Community Development, Gender and Children National Strategy for Gender Development (undated). Available at [http://www.mcdgc.go.tz/data/Tanzania\\_-\\_National\\_Strategy\\_for\\_Gender\\_Development.pdf](http://www.mcdgc.go.tz/data/Tanzania_-_National_Strategy_for_Gender_Development.pdf) accessed on 8 June 2016.

<sup>115</sup>Tanzania Women and Gender Development Policy of 2000.

<sup>116</sup>The United Republic of Tanzania President's Office Public Service Management Tanzania Public Service College; Gender Policy and Operational Guidelines (2014) 4.

<sup>117</sup>Blackden M C & Rwebangira M: Tanzania Strategic Country Gender Assessment Report, Office of the Sector Director Poverty Reduction and Economic Management Network Africa Region World Bank 2014.

<sup>118</sup>Ibid.

<sup>119</sup>Minister for Community Development, Gender and Children (note 113) above.



of Health, Community Development, Gender, Seniors and Children is the mandated institution for coordinating the implementation of national policy on gender equality and it is the custodian of NSGD.<sup>120</sup> Tanzania's female members of parliament established a parliamentarians' caucus, called the Tanzania Women Parliamentary Group (TWPG). This body comprises women wings of political parties and unite them irrespective of their political affiliation in order to address gender issues and women's rights in a more focused way in Parliament.<sup>121</sup> The TWPG aims to facilitate strategies to help members become effective legislators and demonstrate leadership on national policy issues and law making, and to increase awareness on gender equality and women's rights issues as well as gender responsive budgets.<sup>122</sup> However, the government through the women's ministry was exposed to an institutional capacity assessment review called the Forward Looking Strategies Study (FLS) in 2010. This study voiced the concern that the ministry's institutional capacity, including its inadequate human, financial and technical resources, need enhancement along with a stronger engagement in policy work.<sup>123</sup> The ministry also hosted the Gender Mainstreaming Working Group – a Macro Policy (GMWG – MP) that was co-chaired with UN Women as a leading development programme. The GMWG – MP delivers a multi-stakeholder space for dialogue, priority setting, analysis, and strategic interventions on policy processes and programs to enhance gender equality and women's empowerment in the context of development effectiveness and dialogue. The GMWG – MP brings together the national women's machinery with sector ministries along with development partners, civil society and academia.<sup>124</sup>

Moreover, the government of Tanzania has also initiated the National Strategy for Growth and Reduction of Poverty (NSGRP II – MKUKUTA) for 2025 which aspires to measurable broad outcomes that are organized under three clusters.

- Cluster 1: Growth for Reduction of Income Poverty;
- Cluster 2: Improvement of Quality of Life and Social Well-being;

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<sup>120</sup>The United Republic of Tanzania (note 114) above.

<sup>121</sup> Strachan A L 'Women in politics and the public sector in Tanzania' GSDRC Helpdesk Research Report (2015). Available at <http://www.gsdr.org/wp-content/uploads/2015/10/1286-Women-in-politics-and-the-public-sector-in-Tanzania.pdf> accessed on 8 July 2016.

<sup>122</sup>Ibid.

<sup>123</sup>Ministry for Community Development, Gender and Children, United Republic of Tanzania, Country Report on the Implementation of the Beijing Platform for Action and the Outcome of the Twenty-Third Special Session of the General Assembly - Beijing +20 (2014) 11.

<sup>124</sup>Ibid.

- Cluster 3: Governance and Accountability.<sup>125</sup>

The NSGRP II is linked to sector policies and strategies through operational targets and it has strengthened the mainstreaming of gender into all sectors as it is a crosscutting issue in the strategic plans of all ministries.<sup>126</sup> This breakthrough in the gender equality agenda requires each sector to align its strategic plans with NSGRP II, to develop a Priority Action Program, and to cost them.<sup>127</sup> The ministry has been facing many challenges in terms of the implementation of these gender programs and plans. These challenges include funding, matching policy priorities and budget allocations in the annual budget process, and incorporating emerging policy changes.<sup>128</sup> Lack of funding is reflected in the varying priorities in different sectors in terms of gender issues as the major funders of gender interventions remain development partners.<sup>129</sup> In addition, it has been proved difficult to quantify and track investments made to gender interventions in most institutions. However, as of recently, this problem has been addressed through public financial management reform. A completed rapid gender budget analysis was carried out on the 2014 national budget and highlighted key recommendations for the way forward.<sup>130</sup> Likewise, over a decade now, the Law Reform Commission has suggested a number of amendments to present discriminating laws which, if they were to be adopted, would offer significant value to reduce discrimination against women in the country. However, the ministry has failed to lobby for their amendments.<sup>131</sup> The ministry does not have a comprehensive system of monitoring and evaluation (M & E) across all levels of implementation and a corresponding reporting system.<sup>132</sup> Subsequently, it lacks a regular and coherent system of M & E for enabling up-dates and reviews to be conducted on a regular basis or routine data to be compiled continuously and periodically.<sup>133</sup>

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<sup>125</sup>United Republic of Tanzania, Country Report on the Implementation of the Beijing Platform (note 113) above.

<sup>126</sup>International Monetary Fund (IMF) Tanzania: Poverty Reduction Strategy Paper, IMF Country Report No. 11/17 (2011).

<sup>127</sup>Strachan A L (note 121) above.

<sup>128</sup>Ibid.

<sup>129</sup>IMF Country Report (note 126) above.

<sup>130</sup>National Report for the United Nations Conference on Sustainable Development, Rio+20, United Republic of Tanzania. Published by the Vice President's Office, Division of Environment, United Republic of Tanzania, Dar es Salaam, 2012.

<sup>131</sup>Ibid.

<sup>132</sup>Blackden (note 117) above.

<sup>133</sup>National Report for the United Nations Conference on Sustainable Development (note 130) above.

On the other hand, civil societies in Tanzania have been providing a critical foundation for holding the government accountable, ensuring good governance, and promoting all human rights, including the economic, social and cultural rights of women. There are currently more than 6 173 NGOs registered under the Ministry of Health, Community Development, Gender, Seniors and Children. Activists, organizations, congregations, writers, journalists and reporters are playing a vital role in encouraging the government to respect human rights.<sup>134</sup> There are a number of prominent civil society organizations working on women's rights issues in Tanzania, including the Tanzania Gender Networking Programme (TGNP), Legal and Human Rights Centre (LHRC), Tanzania Women's Lawyer Association (TAWLA), the Msichana Initiative, Women's Legal Aid Centre (WLAC), and Tanzania Media Women's Association (TAMWA).<sup>135</sup> Most of these organizations provide legal services, civic education, human rights training, and research and advocacy work.<sup>136</sup>

The vast majority of these institutions are based in big cities such as Dar es Salaam, Arusha and Mwanza and they tend to be dominated by urban, middle-class professionals such as lawyers and journalists.<sup>137</sup> However, some of these organizations have made serious attempts to expand their activities to the regions and to develop the capacity of grassroots organizations that engage in human rights activities. For instance, the Tanzania Gender Networking Programme (TGNP) has actively encouraged the establishment of Intermediate Gender Networks (IGNs) at local level in ten districts of the country. These networks aim at enhancing the capacity of the IGNs to articulate clear visions and strategy skills in areas such as financial management and project design.<sup>138</sup> Envirocare is also another human rights NGO that has been instrumental in the creation of a network of Gender Legal Committees in hundreds of villages across the Kilimanjaro region. These committees have to raise awareness of rights issues, support victims of gender violence, and monitor human rights abuses at community level.<sup>139</sup>

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<sup>134</sup>Ministry of Community Development, Gender and Children website <http://www.mcdgc.go.tz/>

<sup>135</sup>28 Too Much, Country Profile: FGM in Tanzania December 2013. Available at [http://www.28toomany.org/media/uploads/tanzania\\_final\\_final\\_final.pdf](http://www.28toomany.org/media/uploads/tanzania_final_final_final.pdf) accessed on 17 July 2016.

<sup>136</sup>Mkwazu C 'Civil Society and Non-Governmental Organizations in Tanzania are development partners and not opposition' Paper submitted in partial fulfilment of the requirements for a Master's Degree in Community Economic Development, Southern New Hampshire University and Open University of Tanzania Community Economy Development Programme (2009) 5.

<sup>137</sup>28 Too Much (note 135) above.

<sup>138</sup>Ibid.

<sup>139</sup>Tanzania Country Report on the Implementation of the Beijing Platform (note 113) above.

All of these organizations have been actively involved in raising awareness of a number of women's rights issues such as gender-based violence and female genital mutilation.<sup>140</sup> They have also been working collectively in the lobbying and advocacy fields and their collective efforts have had a notable influence on government policy in a number of key areas.<sup>141</sup> The TAWLA-led Gender Land Task Force, for example, was successful in introducing several amendments into the Land Act,<sup>142</sup> which ensured that the final legislation was far more gender progressive on the questions of land inheritance and other issues than might have been expected. In addition, a TAMWA-led coalition helped to amend the Sexual Offences Act<sup>143</sup> so that it now provides greater protection and legal recourse to victims of rape and sexual violence.<sup>144</sup>

In order to consolidate these achievements, TGNP has been instrumental in the formation of a coalition of women's rights organizations and a civil society organisation called Feminists Activities (FEMACT), which initiates joint initiatives on issues of common concern. The establishment of CHRGG was a result of intensive lobbying of these non-governmental civil societies of the government on its proposals for its establishment.<sup>145</sup> Their intervention ensured that the CHRGG's powers to investigate abuses are enhanced. The success of the aforementioned coalition has been derived mainly from its willingness to engage in a constructive dialogue with the government rather than simply criticizing its stance on contentious issues. For its part, the government has reciprocated by allowing civil society a greater role in the policy-making process.<sup>146</sup> For example, the government invited women's civil societies into the gender budgeting initiative where the NGOs participated in four key ministries to monitor current budget allocations from a gender perspective and to develop gender guidelines to ensure future good practice.

The Tanzanian government has also developed a National Plan of Action for the Prevention and Eradication of Violence against Women and Children (2001-2015) along with a

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<sup>140</sup>Mkwazu C (note 136) above.

<sup>141</sup>Ibid.

<sup>142</sup>Land Act and Village Land Act No. 4 of 1999 and the Village Land Act No. 5 of 1999.

<sup>143</sup>Sexual Offences Special Provisions Act of 1998 (SOSPA).

<sup>144</sup>Tsikata D 'Land tenure reforms and women's land rights: recent debates in Tanzania' United Nations Research Institute for Social Development (2001) 17.

<sup>145</sup>Ibid.

<sup>146</sup>Meena, R 'The state and civil society in Tanzania: The state of the Art' *Political Culture and Political Participation in Tanzania*, Dar es Salaam: REDET (1997):33-47.

communications strategy.<sup>147</sup> This National Plan of Action provides strategies and activities to be implemented by various stakeholders and it has been widely disseminated and is being implemented. Moreover, the government has established a National Committee on Violence against Women, Children and People with Albinism. The then President of Tanzania, Jakaya Mrisho Kikwete, also signed the UNIFEM's 'Say NO to Violence against Women' campaign in 2008 to combat violence against women. He alluded to the inadequacy of existing legal mechanisms to protect women from violence, and declared that the government was ready to collaborate with development partners in revising legislation and to take measures to prevent and eliminate violence against women.

Moreover, the Tanzania Police Force launched a three-year Action Plan as a symbol of their commitment to respond to gender-based violence issues through proper planning and allocated resources.<sup>148</sup> The Action Plan was designed to guide the efforts of the Tanzania Police Force to enhance the effectiveness and efficiency of their response to cases of gender-based violence and child abuse. It sets out clear outcomes, activities and targets and provides a clear baseline against which progress can be monitored. Six regions were identified as priority areas for implementing the plan using newly devised national guidelines for establishing a Gender and Children's Desks for FY 2013/16. The police force also established a Tanzania Police Female Network (TPFNET), which is an association that sensitizes women on laws that support their rights. In addition to this initiative, the police force established a Gender and Children's Desk at 417 police stations to receive complaints, and to investigate and prosecute cases in 2012.<sup>149</sup> However, the quality of the service delivered by the Gender and Children's Desk units, the environment, and the skills and knowledge of the police officers staffing these Desks were found to vary greatly and did not generally meet the standards set out in the Guidelines or the laws on the prevention and response to gender based-violence and child abuse of 2012.<sup>150</sup> So far, there is only one established shelter for victims of gender violence in Tanzania, which complicates the enforcement of gender-based violence. Most of

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<sup>147</sup>The National Bureau of Statistics (NBS) and the Office of the Chief Government Statistician -Zanzibar (OCGS) in collaboration with the Ministry of Health and Social Welfare (MoHSW), carried out the 2010 Tanzania Demographic and Health Survey.

<sup>148</sup>Multi Sector National Plan of Action to prevent and respond to violence against children of 2013-2016 United Republic of Tanzania April 2013. Available at [http://www.togetherforgirls.org/wp-content/uploads/Tanzania\\_FINAL3\\_year\\_national\\_plan.pdf](http://www.togetherforgirls.org/wp-content/uploads/Tanzania_FINAL3_year_national_plan.pdf) accessed on 10 July 2016.

<sup>149</sup>UNICEF *Tanzania Annual Report* funded by UN Women & UNICEF (2013) 21. Available at [http://www.unicef.org/tanzania/TCO\\_Annual\\_Report\\_2012\\_-\\_FINAL\\_June\\_18\\_2013.pdf](http://www.unicef.org/tanzania/TCO_Annual_Report_2012_-_FINAL_June_18_2013.pdf) accessed on 17 July 2016.

<sup>150</sup>Tanzania Country Report on the Implementation of the Beijing Platform (note 126) above at 19.

the victims who run to the police station and report their cases end up with nowhere to go and are consequently forced to reconcile with their attackers in order to survive. The police training institution's curriculum was reviewed to include women's rights issues, and this has enabled more police graduates to carry out gender sensitive law enforcement. In addition, gender desks have been established in the police centres, which assist women to access their rights.

Likewise, civil organisations in Tanzania have been involved in training government personnel such as police officers, prison officials and magistrates on human rights issues, which has opened up a space for civil society and government to engage collaboratively within the justice system.<sup>151</sup> The LHRC for instance has recently developed a training manual for police to augment the official training curriculum for new recruits. A number of civil societies have also been involved in the provision of legal aid services. There is no statutory legal aid service in Tanzania except in the cases of murder and treason.<sup>152</sup> Most women cannot afford to hire the services of advocates or legal advisers, which has resulted in unfairness and injustices in the administration of legal provision for the poorest members of the community and other vulnerable groups such as children.<sup>153</sup> To address this problem, a number of NGOs has been providing free court representation to women and those in most need. Most civil societies concentrate mainly on civil cases, particularly in relation to property, inheritance, matrimonial, child custody and labour issues. They also initiate public interest cases where a successful outcome might result in changes to the law for the benefit of women and other vulnerable groups as in the case of *Rebeca Gyumi v Attorney General*.<sup>154</sup> Although most of the cases end up in court, the organizations concerned usually seek mediation and out of court settlements rather than litigation through the formal legal system, which can be an extremely labour intensive and time consuming process.

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<sup>151</sup>Danish Institute for Human Rights 'A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors a report' Danish Institute for Human Rights based on a cooperation with the East Africa Law Society December 2015. Available at [http://www.humanrights.dk/files/media/billeder/udgivelser/legal\\_aid\\_east\\_africa\\_dec\\_2011\\_dihr\\_study\\_final.pdf](http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihr_study_final.pdf) accessed on 29 July 2016.

<sup>152</sup>The government has started a process of developing paralegals systems in order to enable paralegals to provide legal services for people in rural areas. The Legal Aid Bill has been finalized and is pending Cabinet approval. See Danish Institute for Human Rights (note 151)

<sup>153</sup>Mkwazu C (note 136) above.

<sup>154</sup>US Bureau of Democracy, Human Rights and Labor: Tanzania 2010 Country Reports on Human Rights Practices (2011). Available at <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154373.htm> accessed on 6 July 2016.

Even though most of the organisations involved in the legal aid sector are based in big cities such as Dar es Salaam, several have established legal aid clinics in the more rural regions. These include LHRC and the Women's Legal Aid Centre (WLAC) that have trained volunteer paralegals to provide advice in their clinics, although most others continue to rely on the services of qualified lawyers.<sup>155</sup> They also provide legal broader awareness of the litigation procedures and human rights through weekly radio or television programmes. Civil societies which are involved in the provision of legal services have been striving individually to mobilize resources from different donors and agencies for the support of their activities and this, in some cases, has led to unnecessary duplication of efforts and funds.<sup>156</sup> Consequently seven of these organizations, TAWLA, TAMWA, LHRC, WLAC, Tanganyika Law Society (TLS), the Legal Aid Committee of the Faculty of Law, University of Dar es Salaam and Envirocare decided in 1999 to establish a Legal Aid and Human Rights Network. This initiative is funded by the Danish Development Agency (DANIDA) to support greater co-ordination.<sup>157</sup> The network aims to minimize duplicity of efforts in legal aid and legal literacy activities through a well-coordinated network organisation, to act as a lobby group for relevant public interest issues, and to provide litigation services on various human rights issues, in particular test cases with the potential for changing the legal and human rights situation of women and other vulnerable groups, among other things.<sup>158</sup> However, there have been some strains in relationships among the participating organisations, and this has led to delays in funding and project activities. One challenge has been a lack of developing a comprehensive strategic plan for a clear institutional set-up of the Network.<sup>159</sup>

#### **4.5 African Domestic Court and Enforcement of Women's Rights**

This part discusses examples of how courts in Africa have ensured gender equality and have contributed to the eradication of harmful customary practices. It further considers the extent to which courts, in domestic litigation, have sought to benefit from developments in women's rights at international level through the application of international human rights law when

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<sup>155</sup>Tanzania Ministry of Justice and Constitutional Affairs, Tanzania Paralegal Baseline Survey (2010) 4. Available at <http://las.or.tz/wp-content/uploads/2012/11/Paralegal-Baseline-Report.pdf> accessed on 7 July 2016.

<sup>156</sup>Ibid.

<sup>157</sup>LHRC *Legal Aid Cases and Materials* LHRC (2014) 8. Available at <http://www.humanrights.or.tz/downloads/Legal%20Aid%20Law%20Book%20B5.pdf> accessed on 7 July 2016

<sup>158</sup>Mkwazu (note 136) above.

<sup>159</sup>Ibid.

interpreting constitutional rights provisions. Increased recognition of women's rights in many African countries started just after the United Nations Women's Conference in Beijing, China, in 1995.<sup>160</sup> Women in many African countries have been taking stock of progress and asking to what extent promised reforms have been implemented as for their counterparts elsewhere.<sup>161</sup> They have been keen to know why progress has been limited in many countries and are seeking ways to overcome the obstacles.<sup>162</sup>

Domestic courts in a number of African countries are currently at the forefront of applying women's rights as guaranteed in international instruments, with a concerted movement away from discriminating traditional laws. The difference in terms of the impact of this practice depends on the way sections of Bill of Rights have been crafted in the constitution of a particular country, as some constitutions of African countries protect women against the negative impact of harmful cultural practices. This idea is well elaborated by the writer Farida Banda who proposes three constitutional models:

- “(i) Strong cultural relativism, which allows customary law to exist unfettered by consideration of non-discrimination or equality before the law provisions.
- (ii) Weak cultural relativism, which recognises customary law and provides for equality before the law without making explicit distinctions between the formal recognition of equality provision and the continued existence of customary law.
- (iii) The universality position which, whilst recognising customary law and a right to culture, makes both subject to the test of non-discrimination.”<sup>163</sup>

Some African countries such as Kenya, Rwanda, Ghana and South Africa have gender responsive constitutions which address discrimination against women that is rooted in the negative interpretations of custom, tradition and religion. Countries such as Uganda, Rwanda and Kenya in part have unified the law of inheritance and have taken equality into account, which makes it easier for their citizens to understand.<sup>164</sup> The South African and Kenyan Constitutions create a hierarchy between the right to culture, the principles of equality, as well as non-discrimination and recognition of customary law.<sup>165</sup> The Kenyan Constitution has

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<sup>160</sup>United Nations *Fourth World Conference on Women: Action for Equality, Development and Peace*, 4–15 September 1995, Beijing, China.

<sup>161</sup>UN Special Adviser on Gender Issues and Advancement of Women, Rachel Mayanja, in the 10-year review of the Beijing Conference, New York, March 2015.

<sup>162</sup>*Ibid.*

<sup>163</sup>Banda F. *Women, Law and Human Rights: An African Perspective* Hart Publishing (2005) 57.

<sup>164</sup>TAWLA (note 72) above.

<sup>165</sup>Bond J E ‘Constitutional exclusion and gender in Commonwealth Africa’ *Fordham International Law Journal* 31(2) (2007) 286–342.



eliminated gender discrimination in relation to land and property under Article 60(1)(f) which gives everyone, including women, the right to inheritance and an unbiased right to own land. The Constitution of Ghana also provides that customary law is only applicable if it has been so pronounced by the court. However, practice has shown that the courts in Ghana apply only positive customs.<sup>166</sup>

The Constitutional Court of South Africa examined the constitutionality of the customary law rule of primogeniture as applied in cases of intestate succession in the case of *Bhe and Others v Magistrate Khayelitsha and Others*.<sup>167</sup> This court was approached by a woman representing her two daughters who had been denied the right to inherit their intestate father's estate according to the rule of primogeniture as set out in the Black Administration Act of 1927 and the Intestate Succession Act of 1987. The primogeniture rule requires that the closest surviving male relative is given preference to inherit an intestate deceased's estate over a female child. The grandfather of the daughters had ruled that the primogeniture rule be applied against the daughters. The High Court judgement held in favour of the daughters on the basis of the principles of non-discrimination and equality as enshrined in the Constitution. In this case, the Court provided the following:

“We should make it clear in this judgement that the situation whereby a male person will be preferred to a female person for the purpose of inheritance can no longer withstand constitutional scrutiny. This constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit their parents' interstate estate like any male persons.”

In reaching its decision, the Court relied in part on international human rights instruments, stating that:

“Having regard to these developments on the continent, the transformation of African communities from rural communities into urban and industrialised communities, and the role that women now play in our society, the exclusion of women from succeeding to the family head can no longer be justified. These developments must also be seen against the international instruments that protect women against discrimination, namely: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the African (Banjul) Charter on Human and People's Rights, and the International Covenant on Civil and Political Rights. In particular, CEDAW requires South Africa to ensure, amongst other things, the practical realisation of the principle of equality between men and women and to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that constitutes [sic] discrimination against women.”

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<sup>166</sup>TAWLA (note 72) above.

<sup>167</sup>High Court of South Africa, Cape Provisional Division, and Case No. 9489/02 (unreported).

The decision of the Court in the *Bhe* case has implications which reach beyond the facts of the case, in the sense that the High Court was required to weigh a long-established cultural norm against a gender issue. The gender issue prevailed, which represents a successful negotiation of culture and thus augers well for the future.<sup>168</sup> This judgement led to the current legal reform of the customary law of succession in South Africa<sup>169</sup> which was uncodified and a complex legal mosaic, but nowadays the rules are set out in the Intestate Succession Act, which provides a much simpler, logical and equitable product in this area of law as it prescribes the conditions under which a deceased's estate has to devolve according to the customary law of succession and when not.<sup>170</sup> Now the customary law of succession can only be applied if so chosen by means of freedom of testation.<sup>171</sup> Prior to the Court's decision in the *Bhe* case, the rule of male primogeniture was unsuccessfully challenged in the case of *Mthembu v Letsela*.<sup>172</sup> The latter case involved the constitutionality of customary law in terms of intestate succession regarding the rights of women to inherit. In this case a mother unsuccessfully approached the courts three times to contest the rule of male primogeniture in order to save their family home from her husband's father. The Court refused to declare the rule of male primogeniture unconstitutional, because of the male heir's concomitant maintenance duty. Presiding Judge Le Roux simply pointed out the following:

“The devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system and belonging to a particular house. ... I find it difficult to equate this form of differentiation between men and women with the concept of unfair discrimination as used in section 8 of the 1993 Constitution.”

Here, the Presiding Judge was trying to compare the form of discrimination between men and women to other methods of differentiation, such as separate toilet facilities. However, the matter did not advance up to the highest courts of South Africa.

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<sup>168</sup>Mailula L M 'Gender, culture and the law: The South African experience,' in Shivdas M & Coleman S *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context*, Commonwealth Secretariat (2010) 75.

<sup>169</sup>Rautenbach C, Du Plessis W & Venter A M 'Law of succession and inheritance' in Bekker, Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) 93–111.

<sup>170</sup>Rautenbach C 'South African common and customary law of intestate succession: A question of harmonisation, integration or abolition' *Electronic Journal of Comparative Law*, 12.1 (2008) 1–15. Available at <http://www.ejcl.org> accessed on 7 May 2016.

<sup>171</sup>Department of Justice and Constitutional Development, South Africa. 'Customary law: The way forward: *Bhe and others v the Magistrate Khayelitsha and another*' (2011) Available at [http://www.justice.gov.za/master/m\\_pamphlets/2011moh\\_succession.pdf](http://www.justice.gov.za/master/m_pamphlets/2011moh_succession.pdf) accessed on 14 June 2016.

<sup>172</sup>(1998 (2) SA 675 (T).

In another South African case, *Carmichele v Minister of Safety and Security and Another*,<sup>173</sup> the Constitutional Court held the state liable for failure to have a duty to prevent violence against women, which is a form of gender-based discrimination. The Minister of Justice and the Minister of Safety were sued for the brutal attack on a woman by a man who, at the time, was awaiting trial for having attempted to rape another woman and who had been released on the recommendation of the investigation. It was held that the Constitution of South Africa and international law obliged the state to prevent violence against women as a form of gender discrimination and to protect the dignity, freedom and security of women. Thus, the Court had the duty to develop the provisions of common law to make provision for holding the state accountable for harmful practices against women. The Constitutional Court considered the potential liability of both police and prosecutors. It held that the state was obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. In paragraph 62 of the judgment, the Constitutional Court held the following regarding the police service:

“[It is] one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.”

The Constitutional Court upheld the appeal and the matter was referred back to the High Court to have the case re-opened in a trial court on the basis that the appellant had made out a case which had to be met by the two ministers. The High Court reconsidered the matter in the light of the judgment of the Constitutional Court and found both ministers liable and ordered them to pay the victim R177 000 and to cover all her legal costs. The state appealed the matter to the Supreme Court of Appeal and lost. This case constitutes a major breakthrough in the fight to end violence against women. It awakened the government to fulfil its responsibilities and be aware that damages may be claimed against the state, in appropriate circumstances, when it fails to honour its duty to protect women against violence. Therefore, police and prosecutors have to think twice before setting dangerous criminals loose on the public.

Likewise, the High Court in Botswana joined the effort to defend women’s rights against discriminating customary laws in the *Edith Mmusi v Rhamantel* case.<sup>174</sup> In their judgement the

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<sup>173</sup>2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

<sup>174</sup>(CACGB-104-12) [2013] BWCA 1.

judges considered the nature of the relationship between section 3(a) of Botswana's Constitution, which confers upon all persons the equal protection of law, and section 15, which is an anti-discrimination provision that contains a savings clause for customary law. The court held that customary law is biased against women, with the result that women have limited inheritance rights as compared to men, and that daughters living in their parents' homes are liable to eviction by the (male) heir when the parents die. Presiding Judge Dingake argued that this was gross and unjustifiable discrimination that could not be justified on the basis of culture. Section 3 of this country's Constitution requires all the laws of Botswana to treat all people equally as may legitimately be provided by the Constitution. Therefore, to the extent that customary law denies women the right to inherit intestate solely based on their sex, it violates their constitutional right to equality under section 3, notwithstanding the savings clause under section 15. The court also held that the government of Botswana's ratification of a number of international instruments indicates that it is committed to modifying social and cultural patterns of conduct that adversely affect women through appropriate legislative, institutional and other measures. In particular, these ought to aim at attaining the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of the sexes, or on stereotyped roles for women and men. Accordingly, the court also declared that there was an urgent need for Parliament to abolish all laws that were inconsistent with section 3(a) of the Constitution.

Another celebrated case that championed women's rights was also heard in a court in Botswana. The case *Unity Dow v Attorney General of Botswana*<sup>175</sup> illustrates the role played by international women's rights instruments. The case involved the Botswana Citizenship Act of 1984, which in accordance with Tswana customary law determines the nationality of children born within Botswana by reference solely to the father's nationality, regardless of the mother's citizenship.<sup>176</sup> Unity Dow, a Botswana citizen, had married an American man and they had three children, two of whom had been born and raised in Botswana after the adoption of the Citizenship Act. However, Dow's children were denied Botswana citizenship under the 1984 Act due to their father's foreign national status. Consequently, the children were forced to travel only on their father's passport and were ineligible for the free university education

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<sup>175</sup>[1991] L.R.C. 574 (Bots.).

<sup>176</sup>Sections 4 and 5 of the Botswana Citizenship Act of 1984 read as follows: "4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana."

available to citizens. Dow challenged this law before a Botswana High Court, arguing that it discriminated against women and violated the equal protection provisions guaranteed in the Botswana Constitution. The High Court held that this prohibition on sex-based discrimination was implicit within the spirit of the Constitution and thereby declared certain provisions of the Citizenship Act unconstitutional, despite the fact that the anti-discrimination provisions within the Botswana Constitution did not explicitly prohibit discrimination based on sex. In reaching this decision, the High Court referenced international instruments, including CEDAW that should have persuaded Botswana to invalidate the Act. In its judgement, the Court stated:

“[i]t is... difficult if not impossible to accept that Botswana would deliberately discriminate against women in its [Constitution] whilst at the same time internationally support non-discrimination against females or a section of them.”

The Court of Appeal subsequently affirmed the High Court’s decision.<sup>177</sup> In so doing, it relied on the international commitments that Botswana had made in terms of respecting women’s rights, and it noted that, at the time the Botswana Constitution was drafted, Botswana was entering the “community of civilized nations” that is influenced by instruments such as the Universal Declaration of Human Rights. Notwithstanding this victory for women’s rights, the Citizenship Act of 1984 of Botswana was not officially amended until 1995, when Botswana was in the process of ratifying CEDAW.

In Zambia, the High Court case of *Sara Longwe v Intercontinental Hotel*<sup>178</sup> held that the Intercontinental Hotel’s policy of refusing entrance to women unaccompanied by a male escort was inconsistent with section 23 of the Zambian Constitution. Section 23 contains a protection against discrimination clause that includes the obligations under Articles 1, 2, and 3 of CEDAW. Sara Longwe brought suit against the Intercontinental Hotels Corporation for turning her away from one of its hotels. The hotel had a policy which prohibited the entry of any woman unaccompanied by a male. Longwe was turned away from one of the Intercontinental hotels on two different occasions: one when she was picking up her children from a party at the hotel, and again when she was attending a meeting of a group of women activists which was taking place at the hotel. Longwe argued that this policy discriminated against women and thereby violated the antidiscrimination provisions of the Zambian Constitution as well as international instruments such as CEDAW, to which Zambia was a party. While acknowledging that CEDAW would be of use to Zambian courts in cases in which domestic law was not on point,

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<sup>177</sup>*Attorney General v Unity Dow* (2001) AHRLR 99 (Bots. Ct. App. 1992).

<sup>178</sup>(1992) 4 L.R.C. 221 [HC] (Zam.)

the Court held that it needed only look to the freedom of movement and assembly provisions of the Zambian Constitution to determine that the hotel's policy was illegal and discriminatory. The High Court judge in this case also relied on the proper role of international treaties in domestic jurisprudence as he stated the following:

“Before I end, I have to say something about the effect of international treaties and conventions that the Republic of Zambia enters into and ratifies. The African Charter on Human Rights and People's Rights and the Convention on the Elimination of All Discrimination against Women etc. (ante) are two such examples. It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony of the willingness by that state to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international documents, I would take judicial notice of that [specific] Treaty or Convention in my resolution of the dispute.”

Although the Court did not apply international law in the determination of the Longwe case, the above opinion emphasized the role and importance of such international obligations, including CEDAW. The post-colonial constitutions of some African countries such as Kenya and Zimbabwe include accepted clauses that specifically exclude customary law and family or personal law matters from scrutiny under constitutional gendered equality guarantees.<sup>179</sup> Despite the existence of equality provisions within these constitutions, they concurrently contain exclusionary clauses that shield the law from constitutional equality challenging laws deemed customary or familial. In 1999 the Zimbabwe Supreme Court validated this country's exclusionary clause in the case of *Magaya v Magaya*.<sup>180</sup> The Supreme Court found that the relevant customary law, which denied women's inheritance rights, was not subject to the equality provisions in the Constitution. The case was related to the inheritance of intestate estates where the appellant, Venia Magaya, was a daughter and eldest child of the deceased by his first marriage, while the respondent was the second son of the deceased's second marriage. The Zimbabwean Supreme Court, in a unanimous decision, held that women were not allowed to inherit under customary law and that this discrimination was permitted under the exclusion clause in section 23 of the Constitution, which excludes customary law and certain aspects of personal law from the non-discrimination clause. Additionally, the court held that the non-discrimination clause did not prohibit discrimination on the ground of sex. However, the Court in the *Magaya v Magaya* case conceded that international law norms that prohibit discrimination based on sex might be applicable in interpreting the Constitution.

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<sup>179</sup>Bond (note 165) above at 289.

<sup>180</sup>(1999) 3 L.R.C. 35, 42 (Zimb).

Prior to the decision in the *Magaya v Magaya* case, Zimbabwean courts had taken progressive steps in prohibiting discrimination on the ground of sex despite the existence of that exclusive clause. In the earlier case of *Chihowa v Mangwende*,<sup>181</sup> the same Supreme Court held that a woman who had reached the age of majority could succeed her father. In reaching its decision, the Court concluded that the provisions of the Legal Age of Majority Act of 1982 superseded customary law and removed all impediments to women's inheritance. This case built upon the jurisprudence developed in the earlier decision of *Katekwe v Muchabaiwa*<sup>182</sup> which held that, because the Legal Age of Majority Act of 1982 completely emancipated women who reached the age of majority and no longer required the assistance of guardians, a father could be sued for damages for the seduction of his daughter and that he would lose the right to demand a bride price. The progressive nature of the earlier judgments in cases such as *Katekwe v Muchabaiwa* proved to be too adventurous for the Zimbabwean legal system and the Supreme Court in the *Magaya* case overruled the prior decisions on the basis that they applied an incorrect understanding of customary law. This is always one of the dangers of judge-led legal reform. From the *Katekwe* case through to the *Magaya's* case, there was no drastic refurbishment of the Supreme Court bench. The Zimbabwe Supreme Court's decision in the *Magaya v Magaya* case has often been cited as an example of the limitations of litigation in enforcing the right to non-discrimination on the ground of sex.

However, the conservative Justice Mucsheteere was able to lead the Supreme Court to effectively overturn a string of progressive Supreme Court decisions. The *Magaya* case is one of a number of cases before and during the 1990s that used constitutional exclusionary provisions to hinder the use of CEDAW and other equality instruments in challenging discriminatory practices that took place in the so-called private sphere to which family relations and property law issues were often relegated. The case is educative in demonstrating how a slight change in the composition of personnel on a Supreme Court bench can easily erode gains made through litigation. Certainly, the Zimbabwean Supreme Court in the *Magaya* case recognised the discriminatory nature of the law it was applying, but decided that it could not reform the law. This self-imposed restraint on the part of this court when dealing with inherent and far-reaching practices of discrimination constituted an unfortunate abdication of its role in

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<sup>181</sup>1987 (1) ZLR 228 (S).

<sup>182</sup>1984 (2) ZLR 112 (S).

protecting the right to freedom from discrimination under international human rights law and the Constitution of Zimbabwe.

Customary law was also held to violate provisions of the Kenyan Constitution and international law instruments in the *In re Wachokire* case,<sup>183</sup> in which the applicant petitioned the Magistrate's court for an award of one-half of the land that had belonged to her deceased father where she lived with her four children. According to Kikuyu customary law, a woman is not entitled to equal inheritance rights because of the expectation that she would get married. Therefore, the petitioners had been denied this award on the basis of Kikuyu customary law. The Chief Magistrate's court held that this customary law violated section 82(1) of the Kenyan Constitution, which prohibits discrimination on the basis of sex. It was also held to violate provisions of international instruments that provide for legal equality between men and women, specifically Article 18(3) of the African Charter and Article 15 of CEDAW. Although this was a lower court decision which was not binding to other courts in Kenya, it was an important and remarkable approach that demonstrated that courts can deal with discriminatory customary law by relying on international law and existing constitutional frameworks. This case is a demonstration that can notably be contrasted to High Court decisions in which the courts refuse to take recourse in international human rights instruments in order to uphold women's rights.

In another Kenyan inheritance case, namely the case of *Rono v Rono*,<sup>184</sup> the Kenyan Court of Appeal relied on the Kenyan Constitution, the African Charter, and CEDAW to redistribute the deceased's property according to principles of gender equality. The facts of this case were that the three sons claimed that they should inherit a larger portion of their father's estate than their sisters under Keiyo traditions. These traditions do not allow girls to inherit their fathers' estates. The presiding judge rejected the sons' claims of a greater share of property and observed:

“I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relat[ed] to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone.”

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<sup>183</sup> Succession Case No. 192 of 2000, 19 August 2002.

<sup>184</sup>(2008) 1 K.L.R. 803, 811-14, 816 (C.A.K.).



The decision in the *Rono* case was influential in 2008 in the case *Re Estate of Ntutu*<sup>185</sup> in which the High Court of Kenya at Nairobi applied the Law of Succession Act instead of Maasai customary law, which would have denied distribution of the estate to the daughters of the deceased. The High Court recognized the statutory law as the applicable law, relied on gender-equality principles in constitutional and international law, and held that even if the Maasai customary law had been applicable, the Court would have considered it “repugnant to justice and morality” and would have invalidated it on that basis. Both *Rono* and *Ntutu* were highly significant decisions for the development of women’s rights within Kenya and in other African countries. These cases also reflect the role that international law can play in litigation involving gender discrimination under customary law. Both courts carefully considered international human rights law, including CEDAW, in their decisions to strike discriminatory customary law in matters of inheritance.

The High Court of Uganda was called upon to interpret sections 4(1) & (2), 5, 21, 22, 23, 24 and 26 of the Uganda Divorce Act in light of Articles 21(1) and (2), 31(1) and 33(1) and (6), which provide against discrimination on the basis of gender. In the case of *Association of Women Lawyers & Others v Attorney General*,<sup>186</sup> The petitioners questioned provisions of the Divorce Act related to the grounds for divorce, joinder of a co-respondent by the wife only in petitions based on adultery, damages for adultery for the wronged husband only, and costs against a correspondent in such cases, alimony paid to a wife only, and a bar for the wife in adultery sharing in matrimonial property on divorce. The High Court Judge ruled as follows:

“In the instant case, the evidence available reveals that sections 4(1) & (2), 5, 21, 22, 23, 24 and 26 of the Divorce Act discriminate based on sex. This brings them into conflict with Articles 21(1) and (2), 31(1) and 33(1) and (6), all of which provide against discrimination based on sex. This is a ground for modifying or declaring them void for being inconsistent with these provisions of the Constitution. To the extent that these sections of the Divorce Act discriminate on the basis of sex, contrary to Articles 21(1) and (2), 31(1) and 33(1) and (6) of the Constitution, they are null and void. This means that the grounds for divorce stated in section 4(1) and (2) are now available to both sexes. Similarly, the damages or compensation for adultery (S.21), costs against a co-respondent (S.22), alimony (S.23 and 24) and settlement under section 26 are now applicable to both sexes.”

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<sup>185</sup> (Deceased) [2008] eKLR.

<sup>186</sup> Constitutional Petition No. 2 of 2003.

The court held that no issue was framed as to whether a contravention of an international human rights convention amounted to a contravention of the Constitution. As he did not consider or rule on the matter, the presiding judge stated the following:

“It is further important to note and appreciate that the 1995 Constitution is the most liberal document in the area of women’s rights than any other Constitution South of the Sahara. This was noted at the Judicial Colloquium on the Application of International Human Rights Law at the Domestic Level, held on 9–11 September 2003 in Arusha, Tanzania. It is fully in consonance with the international and regional instruments relating to gender issues. The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) is the women’s Bill of Rights as is the Maputo Protocol on the Rights of Women in Africa of 2003. Be that as it may, its implementation has not matched its spirit. There is urgent need for parliament to enact the operational laws and scrape all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real substantial equality based on the reality of a woman’s life; but where parliament procrastinates, the courts of law, being the bulwark of equity, would not hesitate to fill the void when called upon to do so or whenever the occasion arises.”

In *Law & Advocacy for Women in Uganda v AG*,<sup>187</sup> the Constitutional Court was called upon to decide whether the discriminating provisions of section 154 of the Uganda Penal Code Act, which makes adultery by a married woman with any man criminal, while adultery by a married man with any unmarried woman is not criminalized, were unconstitutional. The Court found that the impugned provisions of the law discriminated against women on the basis of their sex and that they were unconstitutional to that extent. The Court declared them null and void. The constitutionality of the customary practice of demand for and payment of a bride price was also questioned in a case in Uganda. In *Mifumi (U) Ltd & Others v AG*,<sup>188</sup> the petitioners argued that bride price as a condition precedent to a marriage and that a demand for and payment of a bride price as a condition precedent to the dissolution of marriage should be declared unconstitutional. They requested that the court declare these two practices unconstitutional. The court had to question and determine the following:

- “(a) Whether the demand for payment of a bride price fetters the free consent of persons intending to marry as provided in Article 31(3) of Uganda’s Constitution;
- (b) Whether bride price perpetuates conditions of inequality contrary to Article 21(1) and (2) of the Constitution of Uganda; and
- (c) Whether refund of bride price as a condition precedent to dissolution of a customary marriage fetters the free consent of persons in marriage provided for in Article 31(3) of the Constitution of Uganda.”

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<sup>187</sup>Constitutional Petition No.13/2005 and No. 05/2006.

<sup>188</sup> Constitutional Petition No. 12 of 2007.

It was the ruling of this Court that the cultural practice of bride price or the payment of a sum of money or property by the prospective son-in-law to the parents of the prospective bride as a condition precedent to lawful customary marriage is not unconstitutional *per se*. The court went further to clarify that Uganda's Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the bride price agreement. A man and a woman have the constitutional right to so choose. With regard to the refund of the bride price, the Court agreed that the customary practice of the husband demanding a refund of the bride price in the event of dissolution of the marriage demeans and undermines the dignity of a woman and is in violation of Article 33(6) of the Uganda's Constitution. The court provides that the demand of a refund violates a woman's entitlement to equal rights with a man in a marriage and that woman's contribution in a marriage cannot be equated to any sum of money or property, and any refund violates a woman's constitutional right to be an equal co-partner to the man. However, the Court ruled that is not essential to declare that practice unconstitutional as the Constitution of Uganda itself, under Article 50 and others which provide for equal rights, can adequately take care of their grievances. The Court advised the aggrieved party to institute criminal proceedings or a civil action in a court of competent jurisdiction under the relevant law. This constitutional case was presided over by five judges and one judge, Twinomujuni J, in a dissenting judgment, differentiated between bride price and dowry and found that the practice of the parents of the bride to demand payment on marriage and for the husband demanding for its refund on divorce is unconstitutional. He concluded as follows:

“Article 33(1) provides that women should be accorded full and equal dignity of the person with men. Yet, under the custom of bride price, women are not treated as human beings but as chattels. They are priced so low that they are exchanged for a cow or a few cows, a pig or a few pigs, a goat or a few goats. Their price is fixed without reference to them. Many young men cannot marry because they have no property to pay for young women. A young woman is not at liberty to choose a man of her heart because if he has no property, she has no chance of marrying him. [In such an event] marriage is not an exercise of free consent as required by Article 31(3) of the Constitution. Bride price helps to perpetuate a belief in society that a man is superior to a woman; that once he buys a woman, he can batter her, humiliate her and treat her as he likes. In my humble judgment I would hold that the custom of paying bride price in a customary marriage is repugnant to good conscience and contravenes Articles 31(3) and 33(1) of the Constitution. It is high time that the custom is abolished and that women be set free.”

Judge Twinomujuni thus found that the practice of demanding a bride price or a refund dehumanizes the woman and renders her as a chattel that can be sold in a market and that it subjects her to potential humiliation, cruelty, torture and degrading treatment. In addition, the

practice subjects a woman to slavery and servitude when it makes it impossible for her to move out of an abusive marriage. The petitioners in this case appealed to the Supreme Court of Uganda, which is presided over by seven judges, including the Chief Justice of Uganda. At the time of this study, the case was awaiting to be determined.<sup>189</sup>

In the criminal case of *Uganda v Matovu*,<sup>190</sup> the judge rejected to apply a caution to the uncorroborated evidence of a complainant in a rape case on the basis that the cautionary rule discriminated against women. The cautionary rule was to the effect that the courts should not rely on the uncorroborated evidence of a single witness in sexual offences. Because sexual offences are most commonly committed against women and in private, it was argued that this rule discriminated against women. This common law rule was applied in most former British colonies.<sup>191</sup>

The Nigerian legal system has also encountered conflicts between customary law and women's rights in respect of gender inequalities. In the landmark case of *Mojekwu v Mojekwu*,<sup>192</sup> the Nigerian Court of Appeal had to determine whether the appellant, who was the only surviving male relative of his deceased uncle, was entitled to inherit the estate of the respondent who was the deceased's widow. The appellant claimed he had the right to inherit the estate under the application of the custom of Ili-Ekpe, which prohibits women from inheriting and designates the closest male family member as the heir instead. The Court held that the Ili-Ekpe customary law was inapplicable and that the Kola tenancy custom, which does allow women to inherit, was applicable. It was the Court's opinion in obiter dictum that the Ili-Ekpe custom was repugnant and it thus applied the repugnancy doctrine, which mandates courts not to enforce any law if it is contrary to public policy or repugnant to natural justice, equity and good conscience. The court held that the custom was also contrary to the human rights protections within the Nigerian Constitution and the human rights obligations in CEDAW. The appellant appealed to the Supreme Court, where the decision of the Court of Appeal was also confirmed based on the Kola tenancy custom. Nevertheless, the Supreme Court declined to make a decision on the validity of the Ili-Ekpe custom as it claimed that it was precluded from doing so by the rules of procedure because the validity of the custom was not a legal issue before the

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<sup>189</sup>Moshenberg D 'In Uganda, women say NO! to bride price violence against women' 7 August 2015.

Available at <http://www.womeninandbeyond.org/> accessed on 17 July 2016.

<sup>190</sup>Criminal Session case No. 146 of 2001, High Court of Uganda at Kampala, 21 October 2002.

<sup>191</sup>Ibid.

<sup>192</sup>[1997] 7 N.W.L.R 283.

court. In considering the decision of the Court of Appeal in this case, the Supreme Court turned to address sex discrimination, expressed its lack of doubt in the lower court's concern for the perceived discrimination against women, and held that the concern was understandable. The Supreme Court went further by criticising the Court of Appeal for over-reaching itself, and expressed dissatisfaction with the following language of the Court of Appeal:

“...it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognise a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads.”<sup>193</sup>

The Supreme Court contradicted the principle that all laws that discriminate on a prohibited ground cannot be justified and should be struck down, as well as the whole role of the courts in safeguarding adherence to the Constitution. This view of the Supreme Court is among the examples that established the idea that a justification for discrimination has to be the norm rather than the exception. The Supreme Court went further:

“[T]he import [thing] is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities.”

Although the Supreme Court confirmed the right of the women in this case to inherit, its legal opinion on the need to give a hearing to communities that practise discriminatory customs before these are held unconstitutional had the effect of subjecting women's rights to an extra consideration that does not apply to other fundamental rights. In a jurisdiction that has constitutions which contain 'clawback' clauses, it has been easy for courts to point and decide that the Constitution mandates discrimination. The constitutions of Zimbabwe, Kenya, Gambia as well as Lesotho are just some African countries that retain the clawback clause principle.<sup>194</sup> These clawback clauses exempt customary law and personal law from inquiry into the discriminatory impact of customary law and subsequently they prevent the prohibition of discrimination provisions under a constitution from taking effect.<sup>195</sup> Equality before the law and equal protection under the law become worthless gestures in the face of such clawback clauses.

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<sup>193</sup>[2004] 4. S.C. (Pt. II). 1. (Nigeria, Supreme Court); (2004) 7 MJSC p. 165. A summary of the judgment is available at [http://www.law.utoronto.ca/documents/reprohealth/LG028-9\\_Nigeria-Mojekwu\\_cases.Pdf](http://www.law.utoronto.ca/documents/reprohealth/LG028-9_Nigeria-Mojekwu_cases.Pdf).

<sup>194</sup>Ndashe (note 1) above.

<sup>195</sup>Center for Reproductive Rights *Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts Volume II* Center for Reproductive Rights, Faculty of Law, University of Toronto (2010) 38.

All African states have bills of rights in some form or another, although not all of these bills of rights cover all the rights recognised in international and regional instruments.<sup>196</sup> Domestic courts often do not need to look to international human rights instruments to find the right that has been violated in a specific case, therefore the question of direct application is less important than how courts approach the issue of interpretation.<sup>197</sup> In interpreting constitutional and legislative provisions that protect women's rights, judges should take note of how similar provisions have been interpreted in other jurisdictions, whether by foreign courts, or by international courts or quasi-judicial bodies.<sup>198</sup> In order to achieve this, lawyers and judges must have access to relevant material.<sup>199</sup> Training and cross-border networking also play an important role. The development of women's human rights is not the sole domain of international courts and quasi-judicial bodies. Although access to courts remains a challenge in many African countries, it is important that when a litigant manages to bring a human rights case to court, it should take the opportunity to engage not only in the application of domestic law, but also in the development of women's rights.<sup>200</sup> This can only be done by engaging with how a particular right has been interpreted elsewhere.

The discussion on the implications of the above cases has clearly elucidated the fact that the problem of discrimination and violence against women is rooted in traditional practices that rank women lower and subservient to men. The crime rate, regardless of severe penalties, suggests that the law alone cannot control human beings' harmful behaviours. We need to also change other aspects of our social life. If customary law were to be developed in a manner that harmonizes local culture and international human rights standards, it can promote international human rights consensus that will ultimately advance women's rights in Africa. In order for customary law to have any meaningful effect for women in Africa, it must operate within a human rights framework because local culture cannot be used as an excuse or rationale for discriminatory practices such as the exclusion of women from inheritance rights. Customary

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<sup>196</sup>Center for Reproductive Rights (note 195) above..

<sup>197</sup>Goonsekere S 'A rights-based approach to realizing gender equality' Paper presented at the University of Colombo, Sri Lanka, in cooperation with the DAW in a workshop of gender experts from the United Nations system and from the OECD/DAC Working Party on Gender Equality in October 1998.

<sup>198</sup>Office of the United Nations High Commissioner for Human Rights (OHCHR) *International Human Rights Law and the Role of the Legal Professions: A General Introduction to Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2001) 23. Available at <http://www.ohchr.org/documents/publications/training9chapter1en.pdf> accessed on 9 July 2016.

<sup>199</sup>Killender (note 6) above at 20.

<sup>200</sup>Office of the United Nations High Commissioner for Human Rights (OHCHR) (note 93) above at 24.

law, if developed and used in line with human rights, can strengthen and complement statutory laws. This will fill the many gaps in the legal system in terms of human rights and will strengthen communities as it will have a prophylactic effect on disputes and disagreements. There is also a need for customary law to be better defined and regulated as a formal entity, and the importance of incorporating female leaders into customary justice structures in order to promote positive views of female leadership must be stressed. The role of international law, the interpretation of constitutional and statutory provisions, and the human rights applications of customary law should also be refined. Other countries such as South African and Malawi have strengthened the hands of decision makers by including provisions on the role of international law in their constitutions, particularly in terms of the interpretation of the Bill of Rights and statutory provisions. For example, the provision of section 39(1)(b) of the South African Constitution provides that courts:

...must consider international law when interpreting the Bill of Rights is the most important provision on the influence of international law on domestic law in the South African Constitution.

The provisions of the Constitution of Malawi also provide that, in interpreting the Constitution, the courts shall, where applicable, have regard for current norms of public international law.<sup>201</sup> Section 24 of the Botswana Interpretation Act also requires that the courts have regard for international treaties as an aid in the construction of the enactment of relevant laws.<sup>202</sup> With the exception of the above, many African countries do not have constitutional or statutory provisions, including international law which is relevant to the interpretation of their constitutions or statutes. However, this should not prevent courts in African common law countries, which follow dualism principles, from using international human rights law.<sup>203</sup> In this context, Justice Ocran of the Supreme Court of Ghana noted the following:

“National judiciaries with a common law background start with an uphill task [in the application of international law]: the dualist position bequeathed to us by our colonial masters still sticks to us like an albatross around our necks.”<sup>204</sup>

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<sup>201</sup>Section 11(2) of the Constitution of Malawi of 2004.

<sup>202</sup>Interpretation Act No. 20 of 1984.

<sup>203</sup>In Africa, dualism is generally associated with common law countries. These are the countries that were formerly colonized by Britain and where international law must be transformed into national law through legislation for national courts to apply it. See Okeke C ‘The use of international law in the domestic courts of Ghana and Nigeria’ *Arizona Journal of International & Comparative Law* 32(2) (2015) 371–430.

<sup>204</sup>Ocran M ‘Access to global jurisprudence and problems in the domestic application of international legal norms’. Keynote address at the 2<sup>nd</sup> West African Judicial Colloquium, 8 October 2007, Accra, Ghana.

The common law principles provide that, wherever possible, the words of a statute will be interpreted so as to be consistent with a treaty obligation.<sup>205</sup> Courts in Africa should apply this principle to statutory and constitutional interpretations in order to pave the way for striking down legislation which violates international human rights instruments by implementing properly construed bills of rights. Some observers have called for a break of this colonial heritage of strict dualism because of its peculiarity to English political and legal history.<sup>206</sup> Nevertheless, the description of the English legal system as the epitome of dualism is arguably exaggerated because customary international law forms part of the law of the land in common law countries.<sup>207</sup> Furthermore, unincorporated international treaties play an increasingly important role, though the courts may not directly apply them. This point was well articulated by L J Kerr in case *Maclaine Watson v Department of Trade*<sup>208</sup> that was heard by the English Court of Appeal. The Court held that “a court must be free to inform itself fully of the contents of a treaty whenever these are relevant to the decision of any issue which is not in itself a non-justiciable issue”. This approach allows courts to use whatever is needed from unincorporated treaties, including international case law arising under them, as long as the court does not purport to enforce the treaty obligation. It is also important for the national courts to consider not only treaty provisions, but also all relevant case law resolutions.<sup>209</sup>

In most cases, if there is not much reference to international case law resolutions or general comments, the court should include a discussion of such materials, as it would provide a better basis for the court’s decisions.<sup>210</sup> Hence, international instruments themselves often do not provide much aid to the interpretation of the provisions of a bill of rights that is couched in similar terms. Case law from other countries also needs to be considered, as international human rights law is not only developed at the international level, but also domestically through the jurisprudence on the contents of bills of rights. The establishment of specialised human rights chambers like the one established in Ghana might be one way to counter such trends.<sup>211</sup>

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Available at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/WAfricaColloq.pdf> accessed on 14 January 2016.

<sup>205</sup>Killer (note 6) above at 15.

<sup>206</sup>Mbondenyi M K & Ojienda T *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* Pretoria University Law Press (PULP) (2013) 7.

<sup>207</sup>Ibid.

<sup>208</sup>Decisions of the Court of Appeal [1989] Ch. 72; [1988] 3 W.L.R. 1033.

<sup>209</sup>Sloss D L *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* Cambridge University Press (2009) 27.

<sup>210</sup>Killer (note 6) above.

<sup>211</sup>Ibid.



Nigeria has the new Fundamental Rights Enforcement Procedure, which explicitly provides for a greater reliance on international human rights law.<sup>212</sup> The difference in approach has resulted in clashes between customary law norms on one side, and internationally protected human rights norms and national bills of rights inspired by international norms on the other. The opposition to change is based on an ideology that characterizes attempts at reforming customary law as contrary to African traditions and culture and an attempt to westernize African society.<sup>213</sup> Such opposition is often a political reaction to the colonial imposition of the common law system on African states and an effort to assert African dignity.<sup>214</sup> In such a context, efforts to reform customary law can easily be interpreted as an effort to impose Western values on African societies.

#### 4.6 Conclusion

Personal law is governed by customary rules across most African countries and many principles of customary law are discriminatory against women.<sup>215</sup> Despite the fact that the principles of equality have been entrenched in the constitutions of most countries on the continent, personal and customary law is often excluded from the ambit of these principles. This tension between customary law and constitutional principles of equality has created similar problems for lawyers and judges. Consequently, some jurisdictions have produced random and varied judgments that have led to inconsistent, directionless and unclear jurisprudence. Conflicting decisions such as those made by Tanzanian and Nigerian courts as discussed above indicate that more work needs to be done by lawyers to push the boundaries of the law.<sup>216</sup> The decision in the *Rono v Rono*<sup>217</sup> case in Kenya underscores the difference that national courts can make in upholding women's property rights regardless of contrary customary laws. In Zimbabwe, it was only after litigation that the legislature acted to amend the inheritance law and develop customary law in accordance with non-discriminatory principles in this country's Constitution.

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<sup>212</sup>Nwauche E 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?' *African Human Rights Law Journal* (2012) 503–515.

<sup>213</sup>Rwezaura B A 'Traditionalism and law reform in Africa.' Paper presented at a seminar jointly arranged by the Fundamental Rights and Personal Law Research Project, Centre for Applied Social Sciences, and the Department of Law, University of Zimbabwe on 28 January 1983.

<sup>214</sup>Ndulo (note 34) above

<sup>215</sup>*Ibid.*

<sup>216</sup>*Elizabeth Steven and Another v AG* (note 45) above; *Rubuka Nteme v Bi. Jalia Hassan & Another* (note 38) above; *Maagwi Kinito v Gibeno Warema* (note 36) above; *Mojekwu v Mojekwu* (note 192) above.

<sup>217</sup>Note 184 above.

Some other disappointing court decisions such as the one in the *Magaya's* case<sup>218</sup> resulted in lobbying which led to the positive amendment of customary intestate rules. This confirms the importance of strategic litigation as part of a strategy for social change. Judges can be extremely influential in making positive changes to the law, though this will always rely on the nature of the bench. It is therefore dangerous to rely on judges to creatively interpret the law to realise equality. While this was successful in the *Unity Dow* case,<sup>219</sup> the *Magaya* case<sup>220</sup> demonstrates the ease with which a conservative bench can overturn a progressive chain of cases.

Many African constitutions have exempted themselves from the obligation of prohibiting any discriminatory practices in customary law, thus creating a conflict between customary law statutory law and international law leaving discriminatory practices intact. The trend shows that customary law in Africa is highly flexible, because it is based on local values and varies in application depending on who interprets it and to whom it is applied. Non-codifications of customary law also lead to high degrees of its ambiguity and uncertainty. In some litigations in African domestic courts were more willing to strike discriminatory laws down as unconstitutional because they do not address women's rights. Although discrimination against women based on gender has been found to offend the equality guarantee in other cases across Africa, these cases have not sparked the expected flurry of precedent that they seemed to promise. Those cases seemed to promise that the courts would not condone laws, practices or policies that discriminate against women. However, having taken stock of the above examples of litigation, it transpires that laws that mandate discriminatory customary practices have not been repealed or struck down. Instead, there has been confusion in a number of countries on how to deal with non-discrimination and strategic litigation in terms of the right to gender equality. Refinement of the area of customary law is therefore crucial across Africa as part of the wider lobbying strategy for the recognition of women's equal human rights.

The discussion has illuminated how some jurisdictions produced random and varied judgments that have led to directionless, inconsistent and unclear jurisprudence. The courts in countries whose constitutions do not have clawback clauses show an unfortunate cleverness when refusing to interfere with discriminatory laws. It was illustrated in the examples of some countries that when it comes to laws that discriminate against women, the courts tend shy away

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<sup>218</sup>Note 180 above.

<sup>219</sup>Note 175 above.

<sup>220</sup>Note 180 above.

from considering whether a customary practice is unconstitutional because they are biased on the ground of gender. The basis for this reluctance seems to be a lack of wider consultation with the communities that practise those particular customs. Though community participation in law reform is important, especially where customary law is concerned, some courts appear to have imposed a requirement of consultation for challenges to discriminatory customary law in ways that do not exist when other rights are enforced through litigation. However, some counties in Africa have started to take concrete steps to eliminate discrimination against women in the personal sphere, even in instances where their constitutions contain a clawback clause, which is something which underscores the duty of states to eliminate discrimination against women. Courts in Botswana, Tanzania and Zambia made progressive use of international law in human rights litigation in some cases in the 1990s, but in recent years there have been fewer cases that reflect a consideration of international human rights law handed down in these countries.<sup>221</sup>

Based on the above case analyses, it is conclusive that the judicial development of customary law, according to constitutional and international principles of gender equality, has not been easy and straightforward in Africa. Additionally, this chapter revealed that political unwillingness and stereotyped mind-sets of societies are among the factors that hindered, and are still hindering, the full implementation of women's rights provisions in Tanzania's legal framework.

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<sup>221</sup>Killender (note 6) above.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

The central focus of this work was to examine various aspects of culture and traditions that impede the full implementation of CEDAW and the Maputo Protocol provisions in the Tanzanian legal framework. The main conclusion that flows from the analysis of the data that were presented in the foregoing chapters is that CEDAW and the Maputo Protocol have not been fully implemented in Tanzania due to certain traditions and cultural practices that persist in inhibiting the promotion and protection of the rights of women. However, statement is a generalization, as advances have also been made in safeguarding women's rights in Tanzania. Such advances include the following:

- The adoption of some laws, policies and campaigns aimed at improving respect for women's rights.
- The establishment of a Special Police Women's Desk in the Tanzanian police force that deals specifically with women's rights violations.
- The criminalization of some cultural aspects that are harmful to women, such as FGM, sexual violence against women, and marriage by abduction.
- Increasing the number of women in political participation.
- The enactment of separate legislation to incorporate international instruments against trafficking in persons (especially women and children) and laws that protect children.
- Establishing the Gender Budget Initiative (GBI) which involves capacity building and the development of gender mainstreaming tools.
- An increase in the number of legal professionals, which has improved women's ability to access legal services.
- An increase in the number of female judges and magistrates that serve in the judiciary.
- The interpretation of domestic legislation according to international instruments.

However, regardless of notable achievements, there are still many obstacles to the full realization of women's rights in Tanzania, as several of the rights enshrined in CEDAW and the Maputo Protocol are yet to be fully domesticated. Aspects such as a gap in law reform and discriminative cultural practices that violate women's rights are sources of serious concern. In this concluding chapter, general conclusions are drawn and specific recommendations are put forward regarding those particular areas in which the abuse of women's rights has been highlighted.

## **5.2 Harmful Traditional Practices**

One of the key hypotheses in this work was that cultural and traditional practices and beliefs are used as a basis for denying women's rights in Tanzania. Although Tanzania ratified CEDAW and the Maputo Protocol, it was demonstrated that many of their provisions continue to be violated in both law and practice. Gender discrimination and violence against women persist. It is a finding of this research that there are various cultural practices in Tanzania that perpetuate the violation of women's rights and that the issue of culture continues to feature as an impediment of women's ability to enjoy equal rights with men in Tanzania, even after the ratification of CEDAW and the Maputo Protocol. A number of traditional practices are based on men's superior position in Tanzanian culture and women suffer many human rights abuses in the name of culture. These customs include traditional faith healings and witchcraft, FGM, widows' inability to inherit, 'cleansing' practices, marriage by abduction, virginity testing, child marriages, payment of dowries (or bride price), as well as male dominance and preference for sons.

Due to these cultural practices, Tanzania has failed to honour its international obligations despite being a signatory to important and watershed international human rights treaties. Traditional faith healing and witchcraft practices cause the abuse of women's rights to life, liberty and security, as well as their right to dignity. This practice is embedded in ignorance and greed, and is a form of malpractice that is used to justify why bad things happen to certain people in the society. It leads to accusations against certain individuals who are suspected of being directly involved in acts of witchcraft which, in turn, is a phenomenon that results in atrocities and even murder, often for the acquisition of wealth and property. These accusations usually lead to the violation of rights and the abuse of the right to life, the right to property, the

right to liberty and security, as well as the right to be free from torture and social and economic marginalisation which all occur when a woman is blamed for practising witchcraft. Elderly women happen to be the most affected victims of these atrocities in the Tanzanian society. At a more sinister level, witchcraft practices are also associated with the killing of people with albinism in Tanzania. These people are under threat of extinction, as they are being attacked and killed with impunity based on the belief that a potion made from their body parts can bring good luck, wealth and success. The study established that most of the people living with albinism who are attacked are women and children who are too weak to protect themselves.

It was also observed that the culture of a male relative ‘inheriting’ a widow upon the death of her husband causes great harm to many women. Some widows are forced to undergo a sexual act with one of the husband’s relatives on the pretext that they have to be ‘cleansed’ or ‘purified’. In the event that a widow refuses to marry or to sleep with the selected man, she is banished from her home and she loses custody of her children and anything she may have inherited. Widow inheritance and cleansing practices occur as a consequence of the bride price, which is usually paid by the groom’s family to the bride’s family. In most cases, the bride-to-be is not involved at all during the negotiations. Families justify forcing widows to be inherited because all members of the husband’s family would have contributed to the payment of the bride price for the widow, which renders her a ‘bought and paid for’ family property. Once inherited, a widow loses her husband’s property, which goes to the new husband. If a widow sought a separation or divorce, the man’s family demands that the bridal price be reimbursed. Often, many widows’ families are unable or unwilling to refund the bride price, and their brothers or fathers may beat them to force them back to their in-laws. This brutal culture coerces or unduly influences women’s consent to remarry. It exposes widows to the risk of acquiring HIV/AIDS and other sexually transmitted diseases. This culture considers women as a mere family possession that can be passed on from one person to another that and she be ‘cleansed’ without her consent.

Another finding of this study is that domestic violence practices prevail in Tanzania, as 50% of the women who live in a relationship with a man or is married experiences physical or sexual violence at the hands of a partner. There is no domestic law that criminalizes such practices or that provides any sanctions to deter the perpetuation of family violence. Marital rape is not an offence in Tanzania as a wife cannot revoke her consent to have sex with her husband until she is legally separated or divorced from him. The law denies that rape is an offence if the victim

is married to the assailant and is not separated from him at the time of the incident.<sup>1</sup> Incidences of women being beaten to death by their husbands have often been reported. Culturally, women's position in society shapes the persistence of domestic violence against them. This culture that has arisen from women's low status in the family and society has created certain barriers that block them from the legal system, which in turn significantly affects women's ability and willingness to escape abusive relationships and seek legal protection or recourse. It was further established that domestic violence is justified as a form of discipline, which is instilled at an early age in girls in certain contexts. This culture deprives women of their ability to achieve their full potential as it threatens their safety, freedom and autonomy. Incidences of women being beaten by their husbands are not often reported because this practice is regarded as a private matter to be resolved informally by the family or community, rather than by the police or the court system. The police, as primary law enforcers, are also drivers of this culture as they are often blamed for not bothering to file reports of victims' complaints of domestic violence and that they are reluctant to investigate or prosecute abusers, probably because they essentially agree with men's right to 'discipline' their wives.

It was found that the traditional practice of kidnapping girls for marriage in Tanzania violates many human rights too. Girls as young as 12 years old are abducted by men while walking down the road and are taken somewhere else where they are then raped. Consequently, such a girl's family is forced to concede to the marriage as the incident of rape renders the family vulnerable as they do not have any other option because the girl's chances of contracting a desirable marriage are now null and void. Quite often the affected family is given compensation in the form of dowry to allow the girl to marry the abductor, who is often an older man. Many girls therefore do not marry suitors of their own choice, but suitors of their parents' choice or their captors. This culture also puts the health of young women in danger, as they are at high risk of contracting HIV/AIDS, sexually transmitted diseases, or other pregnancy-related complications such as infant or maternal mortality and fistula-related diseases. It also deprives girls of opportunities to pursue educational programmes and thus enhance their development. The Tanzanian Penal Code was amended to include abduction as an offense.<sup>2</sup> It now also provides for severe penalties for the sexual exploitation of girls under the age of 18, which ranges from a minimum of 5 years to a maximum of 20 years. Although the courts of law have

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<sup>1</sup> Section 5 of the Sexual Offences Special Provisions Act of 1998.

<sup>2</sup> Under Section 133 of the Tanzania Penal Code CAP 16.

also declared the abduction custom obnoxious and against Article 16(1)(b) of CEDAW,<sup>3</sup> the practice continues to persist unreported and with impunity, especially in rural areas. This culture is against both CEDAW and the Maputo Protocol, which both stipulate the requirement for both parties to express free will in marriage.<sup>4</sup>

The study found that FGM is a culture that still prevails in Tanzania. Many societies are practising it with the intention of controlling girls' sexual desires so that they will be satisfied with their husbands only. It is also believed that it paves the way for men to have easy intercourse with their wives. It is usually done to children and girls aged 8 to 25 years as a rite of passage to prepare girls for marriage. The community considers FGM important for their family's dignity, and the belief persists that it enhances a girl's social status. Those who have undergone FGM are viewed with respect and they gain higher status and recognition in the community. They are able to marry rich, respected and caring husbands. Girls are put under strong social pressure, including pressure from their peers, risk victimisation and stigma if they refuse to undergo FGM. Girls and women who refuse to undergo FGM are neither respected nor married and such as girl may be divorced if, after the marriage, her husband finds out that she did not undergo FGM. The FGM process is generally conducted under very unhealthy conditions and in such an unsafe manner that it causes some children to die due to excessive bleeding. Other complications which are the result of this practice include severe pain, haemorrhage, shock, urine retention, bacterial infection, open sores in the genital region, and injury to nearby genital tissue. Furthermore, long-term complications are recurrent bladder and urinary tract infections, infertility, cysts and childbirth complications. The FGM culture has been prohibited in Tanzania since 1998 by the amended Penal Code. However, this law does not include women over the age of 18 years and does not provide a minimum sentence for this offence. Although there have been some arrests under this law to date, the prosecution of perpetrators has been slow because of a lack of enough awareness of the law and its intention, which means that adverse effects of the procedure and its consequences are not taken seriously. To avoid detection, some societies nowadays subject baby girls of 1 month to 1 year old to FGM. It has also been reported that girls are taken across the border to Kenya for this procedure. The practice is against Article 5(b) of the Maputo Protocol, which specifically requires state parties to prohibit and eradicate all forms of FGM.

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<sup>3</sup> In the case of *Leonard Jonathan v Republic* Criminal Appeal No. 53 of 2003 (unreported), discussed in Chapter Three.

<sup>4</sup> Article 16(b) of CEDAW and Article (a) of the Maputo Protocol.



The study also revealed that child marriages and the payment of dowries are among the traditional practices that adversely affect young girls in Tanzania. Girls are married before they are physically, physiologically and psychologically ready to shoulder the responsibilities of marriage and child bearing. Statistics have shown that Tanzania has one of the highest child marriage prevalence rates in the world.<sup>5</sup> Government statistics also demonstrate that 4 in 10 Tanzanian women are married before turning 18.<sup>6</sup> Demands for the payment of a dowry by greedy parents force their children to marry men who are sometimes old enough to be their grandfathers. Many arranged marriages involving very young girls condemn these brides to a life of near slavery. Most girls end up experiencing domestic violence and abuse from their husbands or/and their in-laws such as assault and rape by their husbands, and they are left to care for their children without any financial support when they are abandoned. Many of these girls become women who end up living in a lonely and isolated marriage, confined to the house by domestic and child rearing duties because their husbands and in-laws restrict their movements. It affects them socially and biologically and makes them more vulnerable to sexually transmitted infections (STIs) and child bearing complications. The child marriage culture is a symptom of and exacerbates gender inequality as it undermines girls' opportunities to access resources that may lead to fruitful and happy lives. Child marriage is a barrier to young girls' right to education, causes numerous women to end up living in poverty and dispossession, and contributes to the cycle of poverty in the country.

Moreover, this culture is contrary to Article 2 of both CEDAW and the Maputo Protocol, which require state parties to embody the principle of the equality of men and women and to condemn discrimination against women in all its forms. The tradition of child marriage is also contrary to Article 10(f) of CEDAW and Article 12(2) (c) of the Maputo Protocol, which require state parties to take appropriate measures to eliminate discrimination in the field of education through the reduction of female students and the organisation of programmes for girls and women who have left school prematurely. The child marriage practice is also in contravention of Articles 2(b) and 14 of the Maputo Protocol and Article 12 and 13 of CEDAW, which condemn harmful practices that endanger the health and general well-being of women. The

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<sup>5</sup> UNFP 'Marring too young: Ending child marriage in Tanzania' (2012). Available at <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf> accessed on 28 September 2015.

<sup>6</sup> Human Rights Watch 'Tanzania: Child marriage harms girls' 29 October 2014. Available at <https://www.hrw.org/news/2014/10/29/tanzania-child-marriage-harms-girls> accessed on 17 October 2016; Legal and Human Rights Centre *Tanzania Human Rights Report 2014* LHRC (2015) 380.

custom also violates Article 16 of CEDAW and Article 1(c)(I) of the UN Supplementary Convention on the Abolition of Slavery and the Slave Trade and Institution and Practices Similar to Slavery of 1956. These instruments prohibit any institution or practices whereby a woman, without the right to refuse, is promised in marriage on payment of money or goods to her parents or another person.

Another culture which was found to violate women's rights in Tanzania is virginity testing. It is done in various forms in different societies. This practice may be singled out as a key cause of early pregnancy as it is perceived to be a highly sexualised social event which takes place at a very young age. The process of vaginitis testing examines the presence of an intact hymen. However, it is humiliating for girls as it is invasive of their most intimate privacy. Failing a virginity test also leads to stigmatisation and mockery by the community as it is done openly and the results are made public. Lack of virginity also affects girls' chances of getting married hence their parents forfeit the bride price. Girls who are found not to be virgins are also ostracized, labelled prostitutes, and some are beaten by their parents. The fear of shaming one's family and failing the test has caused young girls to do things that put their health at risk, as they may resort to inserting different kinds of object into their private parts, such as toothpaste or freshly cut meat, to make their vagina appear tight and to mimic virginity.<sup>7</sup> Some may resort to anal sex instead to make sure that they keep their virginity for their wedding day and hence they become more vulnerable to sexually transmitted infections, including HIV. This culture is gender biased, as it does not treat boy and girl children equally. No boys are tested for early sexual activity. It is also unhealthy and it increases violence against women and girls who fail these unreliable tests. The vaginitis test practice violates several girls' rights, including the right to privacy, dignity and bodily integrity.<sup>8</sup> It also exposes girls to sexual abuses as the practice of inserting a finger in the vagina of a woman or girl is recognised as digital penetration and it amounts to sexual abuse.<sup>9</sup> This culture, which is applicable to women only, infringes on their right to equality that is guaranteed by the Tanzanian Constitution and several international human laws.<sup>10</sup> Currently, there is no other law that addresses virginity testing in Tanzania.

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<sup>7</sup> Sakamoto K 'Social development, culture, and participation: Toward theorizing endogenous development in Tanzania' PhD thesis submitted to the Graduate School of Asia-Pacific Studies, Waseda University (2002) 47.

<sup>8</sup> Those rights are guaranteed by Articles 12(2) and 13 of the Constitution, Article 3 of the Maputo Protocol, and Article 3 of CEDAW.

<sup>9</sup> Bangser M *Falling through the Cracks - Girls in Tanzania: Insights from Mtwara* Juárez and Associates 12139 National Boulevard, Los Angeles (2010) 170.

<sup>10</sup>Ibid.

Other countries where a similar practice prevailed, such as South Africa, have managed to amend their laws to prohibit it.<sup>11</sup>

This study also examined the male preference culture and found that societies generally view females as inferior and subordinate to males in Tanzania. This culture begins early, even from before the birth of a child. Normally the birth of a son is welcomed with celebration as an asset, whereas that of a girl is seen as a liability and an impending economic drain. Preference for sons has prompted polygamy in Tanzania as men keep on marrying more wives so that they can have a male child or more male children. It has also resulted in high number of children in families as women keep on bearing more children than initially planned hoping to have a son or more sons. The effect of multiple pregnancies on women's physiological well-being increases their morbidity and mortality risk.<sup>12</sup> Not having a son is viewed as a source of vulnerability for parents, while having only daughters attracts social stigma. Some women have been bearing the consequences of giving birth to an unwanted girl child, which includes abandonment, divorce, violence or even death. The culture manifests itself in deprivation, neglect and discriminatory treatment of daughters to the detriment of their mental and physical health. In most traditional societies, women are not allowed to inherit property; male members retain and control the rights to use the property. This leaves many girls who cannot find suitable husbands destitute and/or vulnerable to abuse.

A female child is disadvantaged from birth in terms of the quality and quantity of parental care and the extent of investment in her development.<sup>13</sup> Many 'unwanted' girls are denied all basic rights such as good health, education, recreation, economic opportunity and the right to choose a partner. The culture denies women the right to make autonomous decisions regarding their own sexuality, marriage or child bearing and impacts their children's religion, nationality, and citizenship as well. The culture portrays women as passive and domestically oriented and men as dominant and breadwinners. Childhood experiences of discrimination against women result in a strong sense masculine superiority and the controlling behaviour of adult men. Culturally

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<sup>11</sup>Section 12(4) of the Children's Act of 2005 prohibits virginity testing of children under the age of 16. Section 12(5) allows virginity testing provided that: the child has given consent to the testing, that it is done in the prescribed manner, and that it occurs after proper counseling of the child and in the manner prescribed.

Section 12(6) of the same Act prohibits disclosure of virginity testing without the consent of the affected child.  
<sup>12</sup>Ibid.

<sup>13</sup>UNICEF 'Son preference perpetuates discrimination and violations of women's rights: It must and can end' UNICEF Press Releases, Geneva, 14 June 2011. Available at [https://www.unicef.org/media/media\\_58924.html](https://www.unicef.org/media/media_58924.html) accessed on October 2016.

accepted male superiority reinforces girls' low sense of self-worth, their low self-esteem, depression, and eventual low productivity in adulthood. Men continue to be the primary decision-makers both in public and domestic life and are seen as the income earners. This culture violates several provisions of the Tanzanian Constitution, CEDAW and the Maputo Protocol which are clear on the rights to equality for all human beings.

The last traditional culture that was illuminated by this study is the 'ghost marriage' culture, also known as 'nyumba-ntobhu'. According to this practice an older lady takes a young girl to her home as a 'ghost' in-law. This girl is expected to have her children and to assist with the household chores. The nature of their relationship is not lesbian, as there is no sexual attraction or any sexual involvement between the female husbands and her wife (or wives). The older woman becomes a female husband by paying a bride price and observing all other rituals required of a suitor by the bride's family. This practice usually forces the married girl to bear the children of any man chosen by her female husband and the married girl is forbidden to get married to any particular man. This culture violates girls' right to life, health, dignity, education and physical integrity. Girls who are married as partners in ghost marriages lose their dignity and integrity by being forced to sleep with different men without any love and affection for the purpose of bearing children for their female husbands. The practice violates many provisions of CEDAW and the Maputo Protocol. It denies girls the rights to make decisions regarding sexual issues and it subjects them to the risk of contracting sexual diseases. Young girls are sold like commodities to bear children for someone else, they are involved in prostitution, and they serve as slaves to take care their female husbands. The Law of Marriage Act of Tanzania is clear on the meaning of marriage to the exclusion of same sex marriages; however, nothing has been done so far to condemn ghost marriages.

An assessment of the findings of the study revealed that it is not culture per se that lies at the root of women's oppression, but the practices and norms that deny women's education, gender equity, resources, and political and social power. The authority of social conservative cultural leaders is covered by multicultural policies, so they end up sacrificing the rights of women in favour of the preservation of culture. Tragically, these harmful practices are perpetuated as they are regarded as normal and appropriate behaviours. Moreover, regardless of the fact that modern society recognizes these practices as having specific gender-related forms of abuse, they are not recognized as human rights abuses by society. The tensions between these cultural practices and gender equality violations are often masked in litigation by stereotypes of culture

and hierarchy that favour traditional norms. In this context, decision makers and society are concerned that the promotion of gender equality would interfere with local culture, and therefore it is felt that gender equality should not be promoted for ethical reasons. Ongoing efforts to reform discriminating laws have therefore been undermined by the articulation that the position of culture is time-honoured and therefore static, sacred, monolithic and outside of history.

This study observed that most women's rights infringements occur in the private circle of family life and are justified by appeals to society to adhere to cultural norms. Consequently, women experience less personal independence, have fewer resources at their disposal, and have limited influence over the decision-making processes that shape their communities and their own lives. They are left in the unpleasant situation where they have to choose between their rights or their culture; yet as mothers they are tasked with the main responsibility to transmit cultural practices and group identity to succeeding generations. Hence, their rights are subordinated to upholding their role as the carriers of group identity.

It was also learned that most women are still unaware of their rights as enshrined in international and national human rights instruments. This ignorance causes them to suffer severely and to fail to advocate for change in domestic legislation. The few women who are aware of their rights have been overwhelmed by the social attitudes and cultural practices in which communities are embedded; as a result, they have been reluctant to enforce their rights. Even some human rights activists, until recently, have been unwilling to recognize many culturally sanctioned abuses and instances of neglect of women as serious violations of human rights.<sup>14</sup> Regardless of provisions in the Constitution of the United Republic of Tanzania of 1977 that guarantee the right to equality for all human beings, there are harmful cultural practices and traditional beliefs that override this right.<sup>15</sup> Many practices that subject women to abuse continue to manifest themselves despite the existence of domestic legislation such as the Penal Code of Tanzania, Cap 16 R.E. 2002, which prohibits them. Reports have shown that Tanzania is among the African countries that have been criticized for not respecting women's rights as guaranteed by international instruments because of its failure to reform some of its

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<sup>14</sup> Human Rights Watch *World Report 2013: Event of 2012* Human Rights Watch (2013) 77.

<sup>15</sup>The Constitution of the United Republic of Tanzania of 1977 (as amended fourteen times until 2005) is also referred to as the Constitution (of 1977). Article 12(1) and (2) of this Constitution stipulates that all human beings are born free and equal and every person is entitled to recognition and respect for his /her dignity.

domestic laws that still promote traditions and cultural practices that are prejudicial to women and that compromise their right to gender equality.

Based on the above observations and findings, the following recommendations are offered:

*5.2.1 Traditional and cultural practices should adhere to the values of equality and women's rights*

It is important to be culturally sensitive, but this does not mean that respect for culture warrants uncritical and insensitive adherence when cultural, traditional or religious practices are invoked. Culture or tradition as a rationale for discrimination against a venerable group should not to be accepted; rather both society and the government should look for opportunities to counteract prejudice and its consequences. Sensitivity to and respect for culture would be better demonstrated by adherence to the values of equality and women's rights as espoused by the international community in relation to issues of women's position in society. Traditional values are therefore required to take a backseat when they do not adhere to human rights norms. The assumption that cultural values are static and inalienable ignores the reality that their conflict with human rights requires urgent change. This assumption has thus disregarded the many worthwhile and forward-looking efforts by international and national societies that question harmful cultural values to work effectively towards equality.

Although it is imperative that we draw attention to the fact that most Western understandings of African traditional law are influenced by their negative attitudes towards all things African, it is important to realize that African theory and practice have been influenced and have become part of the global movement for the globalization of human rights. By enthusiastically joining international human rights instruments and adopting African instruments such as the Maputo Protocol, African states are embracing the international human rights movement and its universality. However, decisions about what aspects of culture and tradition to protect are not for outsiders to make. Assuming a role in protecting indigenous cultures from changes in gender relations is an outside imposition, and therefore more respectful approach will be to consult with women and equality advocates to learn how they are defining issues and what they see as potential ways forward.

### 5.2.2 *Strengthening laws and policies*

Traditions and culture should not be obstacles to the realization of women's rights, but rather a means of paving the way for women to obtain their rights. In this context, the right to take part in cultural activities and practices and in traditional life includes the right not to participate in particular traditions and customs that infringe on human dignity and rights. Tanzania needs to strengthen its laws and policies that protect women from a culture of violence against them.

The government has enacted new laws and regulations with regard to the development of a modern economy and modern technology, and it has developed frameworks and practices that are appropriate in a modern democracy. Yet, it seems that in the area of women's rights change is slow and marginal. Changes in the legal system that would address some of the harmful traditional practices that have been discussed have merely comprised amendments to criminal law, but these amendments have demonstrated societal condemnation as they do not provide for support and assistance to victims or mandate preventative measures to be taken in instances of the violation of women's human rights. Furthermore, the legal response to the many forms of harmful practices that affect women's lives is mostly centred on the criminalization of such harmful traditions.

Given the unique social dynamics of these harmful traditions, the enactment of a comprehensive stand-alone legislation to address them is recommended. Tanzania needs to adopt laws that go beyond criminalization to incorporate prevention as well as support of and assistance to victims. This recommendation emphasizes the importance of adopting a comprehensive and human rights-based legislative approach to all forms of violence against women. This legal framework should not only encompass criminalization and the effective prosecution and punishment of perpetrators, but it should also address the prevention of violence; the empowerment, support and protection of survivors; and the creation of mechanisms to ensure effective implementation of human rights and women's rights legislation.

It is vital to enact a comprehensive legislation on harmful practices as stand-alone legislation, or within comprehensive legislation, which addresses several forms of violence against women.

This should be enacted to ensure that all recognised harmful practices are getting clear enforcement of law. The recommendation is that the law needs to acknowledge that all forms of violence against women, including harmful traditional practices, are forms of discrimination because any harmful practice against women is a form of violence and a manifestation of gender-based discrimination. Moreover, any harmful traditional practice is an expression of the outdated unequal power relations between men and women and hence a violation of women's human rights. Legislation should clearly state that no custom, tradition or religious consideration may be invoked to justify harmful practices against women.

The most promising example in this regard is the Italian Law No. 7/2006 on the prevention and the prohibition of the FGM practice. This Italian legislation criminalizes FGM and mandates a range of preventative activities, including information campaigns for immigrants from countries where female genital mutilation is still practised, specific training programmes for teachers in primary and junior high schools, as well as the creation of anti-violence centres as a part of development cooperation programmes. The Bangladesh Prevention of Oppression against Women and Children Act of 2000, which addresses 'dowry death' as a harmful traditional practice, is an example of how a harmful practice may be addressed in the context of legislation on multiple forms of violence.

Additionally, it is important that the recommended legislation provides for punishment and remedies in instances where harmful practices and crimes are planned and committed across borders. To counter these phenomena, the principle of extraterritoriality in respect of traditional harmful practices must be applied. Adopting this principle will allow for the extradition of the perpetrators of harmful practices for trial and it will eliminate diplomatic protocols that may hinder a victim's access to assistance in cases where she has dual citizenship. The principle of extraterritoriality is found in many European laws pertaining to FGM and forced marriage. A practical example is Spain which, under its Constitutional Act 3/2005, provides that FGM that is committed abroad is a crime.<sup>16</sup>

The Forced Marriage Civil Protection Act of 2007 of the United Kingdom also provides for the issuance of protection orders in cases of forced marriage. The order was first applied in 2008 in the case of a Bangladeshi national who was living in the United Kingdom and was at

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<sup>16</sup>Constitutional amendments by Organic Act No. 3/2005 of 8 July (Official Gazette No. 163 of 9 July 2005).



risk of a forced marriage upon her return to Bangladesh. The Bangladesh High Court, in response to a protection order of the United Kingdom, ruled that her parents should return the woman's passport and credit cards and she eventually returned to the United Kingdom.<sup>17</sup> The essential principle of extradition powers was also demonstrated in the case of an Iraqi citizen who had been accused of committing a so-called 'honour' murder in the United Kingdom. This perpetrator was extradited to face trial.<sup>18</sup>

### 5.2.3 *The involvement of community leaders*

The focus on available international human rights laws to eradicate harmful cultures may at face value appear as a western pressure for change. Such a focus is sometimes criticized as being heavy handed and insensitive and is often perceived as culturally imperialistic in most African countries. It is argued that efforts to change harmful traditions are most effective when they originate from within the culture that practises them. Struggles to alter or eradicate harmful cultures thus require the cooperation and understanding of local community leaders, policy makers, and the people who have experienced or witnessed the hardships caused by harmful practices within societies. These people will be of assistance in promoting upright conduct and respect for human dignity. Religious and traditional leaders have a great influence on customs and practices and are therefore vital in efforts to change societies' attitudes in Africa. They usually have a say in how people live their lives and how they are governed. Therefore, empowering and enabling local leaders in advocating for the abolishment of harmful practises is likely to be an effective way of affecting change. It is a strong argument that, if traditional leaders support the abolition of harmful practices, then people in their communities are likely to do the same. These leaders will be useful in dispelling the myths that are attributed to the continuation of harmful practices, particularly those that affect women and girls. Continuing to use their services will, in the end, change many harmful traditional practices for a better dispensation in African societies.

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<sup>17</sup>Bowcott O & Percival J 'Bangladeshi "forced marriage" GP due back in Britain tomorrow' *The Guardian* 15 December 2008. Available at: <http://www.guardian.co.uk/uk/2008/dec/15/gp-bangladesh-forced-marriage> accessed on 10 October 2016.

<sup>18</sup>Daily Mail reporter 'Extradited Iraqi appears in court accused of strangling woman in "honour" killing' *Daily Mail* 30 June 2009. Available at: <http://www.dailymail.co.uk/news/article-1196609/Extradited-Iraqi-accused-strangling-woman-honour-killing.html> accessed on 10 October 2016.

#### 5.2.4 *The use of traditional versus contemporary methods*

Positive traditional methods and practices must be used to eradicate the harmful ones for a better understanding of rural social realities. For example, traditional dances and rituals such as ‘ngoma’ can be used to discourage harmful traditional cultural practices and eliminate discrimination against women. We can encourage dialogues about human rights in different traditional systems that comprise different cultures and religions to challenge negative aspects of our culture in our communities. Indigenous languages should also be used to address harmful traditional and cultural practices and gender discrimination, as Tanzanian societies have many languages in which to convey strong and positive messages. We can capitalize on that advantage and use native languages as an asset instead of a liability to clearly communicate the need to eliminate harmful cultural practices. Harmful traditions can effectively be addressed through a grassroots approach, which would take cognisance of all aspects of a particular culture by trying to work within that system of beliefs to eradicate the harmful ones. UNFPA refers this as the ‘culture lens’ approach.<sup>19</sup> This approach is an analytical programming tool that helps policy makers and development practitioners to understand and utilize positive cultural values in order to reduce resistance to change.

Useful cultural practices that traditionally protected women and girls should be considered in designing programmes to address gender inequality and to eradicate harmful cultures. Girls can be given a chance to undergo initiation (if they wish to) which does not involve any harmful practices but which advocates for their rights instead. The upholding of human rights must be done in such a way that communities do not feel that the integrity of their culture is being compromised. In this way parents and society as a whole will be able to feel that they are not losing their heritage but that women’s rights would be preserved. It is important for communities to feel that their traditions and cultures are not being disregarded. The community should also be included in the process. When educating the society about harmful traditional practices, the focus should be on the negative consequences rather than on human rights or legal aspects. In this way people will be more likely to accept what they are being taught.

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<sup>19</sup>Scorgie F ‘Virginity testing and the politics of sexual responsibility: Implications for AIDS intervention’ *African Studies* 61(1) (2002) 55.

### 5.2.5 *Empowerment of victims and the education of girls at a young age*

To prevent girls from becoming victims, they need to be educated and empowered at a young age because children are brought up to believe that harmful traditional practices are part of the natural order of things. If they are left growing up with this belief, it is likely that it will be difficult to resist these practices because of the subordinate status they hold in society. Their 'emancipation' can thus be achieved by including human rights education in the primary school curriculum which should cover deep topics of women's rights. Eliminating obstacles to the education of girls and women is essential. This should be achieved by adopting measures to retain girls in school and implementing awareness-raising programmes to overcome stereotypes and traditional attitudes. Parents should be motivated to ensure a comprehensive education of their daughters in line with that of their sons.

The government should take effective measures to ensure that women have access to and have control of economic resources, including land, credit, and employment as a measure of promoting self-esteem which is a prerequisite for the higher status of women in the family and the community. This will help to change the social position of women and children in society, make them aware that they need to shake off oppression, and will challenge them to overcome harmful traditional cultures. This is because harmful traditions persist in an environment where women and girls have unequal access to education, wealth, health and employment and are unaware of their basic human rights. It is this state of ignorance which perpetuates their subordination. Often, even when some women have acquired a degree of economic and political awareness, they feel powerless to bring about the necessary changes to eliminate those practices that intensify violations of their rights. Empowering girls with knowledge and skills is therefore vital to any process of change and to the elimination of harmful traditional practices.

Once girls have been empowered, they will grow up to be strong women and will in turn protect the future generation from harmful traditions. Empowered girls will also be able to make decisions about their bodies without fear. The effort to change the norms of gender equality should be employed during childhood. Male responsibilities in family life must be included in the education of children from the earliest age. Programmes that promote dialogue between men and women to challenge intimate partner violence as an acceptable expression of masculinity should be initiated. Moreover, school curricula and textbooks should be surveyed

and reviewed with a view to eliminating prejudices against women and adding knowledge in terms of larger societal issues, including relevant laws for the protection of the rights of women and girls.

#### *5.2.6 Both men and women must be involved*

The systematic encouragement of and support for collective action among women themselves is needed. The traditional exclusion of women from the development, articulation, implementation, and enforcement of human rights has rendered gender issues invisible and has therefore shielded gender-based abuses from much needed examination. The adaptation of the multiplicity of women's voices and concerns into the rights discourse is essential to effect this reformulation of rights. Women's voices must be heard. The attainment of gender equality must involve changes in both men's and women's knowledge, perceptions, attitudes and behaviour and efforts to end harmful traditional practices that impact women must involve and address men. This need was illuminated by the fact most of the harmful traditional practices that were highlighted in this study are conducted for the benefit of men. Men need to be engaged because of the role they play in societies as community leaders, providers and heads of families. Therefore, they are in a primary position to enable the eradication of harmful practices.

Even at grassroots level, men need to be involved in programmes that are aimed at empowering women. If men engage with women to participate in peer-to-peer learning, it will help reduce various forms of traditional masculine superiority and resultant behaviours that discriminate against and sabotage women. Furthermore, it is crucial to improve communication between men and women on issues of sexuality and reproductive health as well as an understanding of their joint responsibilities, so that both can become equal partners in public and private life. Changes must be effected regarding the responsibilities of a father to a girl child and extensive motivational campaigns should be launched to educate parents to value the worth of a girl child. Specific public educational campaigns that focus on redefining men and women's roles in the family should be considered as well, as the family is the basic institution from where gender biases emanate. Government needs to actively attempt to change the misconceptions regarding the responsibilities of the mother in determining the sex of the child and emphasis should be placed on the fact that mother is not responsible for selecting a child's sex. The government must also value the full diversity of women's conditions and recognize that some women face

particular barriers to their empowerment which were erected by the patriarchal order and are rooted in a variety of economic, social, political, and ideological foundations.

### **5.3 The Domestication of International Human Rights Instruments for the Protection of Women**

The second assumption that prompted the researcher to undertake this study was that most of the provisions of international human rights treaties that focus primarily on women have not been adequately incorporated into national legislation; hence the rights of women in Tanzania are violated because of the failure to domesticate relevant international treaties. The findings show that, although Tanzania has not enacted any specific law to incorporate CEDAW and the Maputo Protocol, some of their contents are reflected in Tanzania's domestic legislation. For example, the principles of gender equality and non-discrimination are provided in the Constitution. However, the Constitution itself contains derogative clauses that water down the application of other legislations, which are against it.<sup>20</sup> These derogative clauses, which limit the proper application of women's rights as guaranteed in the Constitution, pave the way for the infringement of those rights by other applicable legislation. In addition, customary law is part of the Tanzanian legal system and receives constitutional recognition and protection. However, the Constitution itself is silent about what is to happen in the event of conflict between personal laws and constitutional provisions that are supposed to guarantee equality. Difficulties often arise in determining what course to take when laws within a state are in conflict with customary law. It becomes particularly problematic when personal laws violate the principles of equality.

Most of Tanzania's domestic legislation which is currently in operation was enacted during colonialism before the principle of human rights was articulated and enshrined by the UDHR. However, the findings showed that most of the rights declared under the UDHR have been incorporated into different pieces of domestic legislation; but it appears that these provisions are not duly enforced.<sup>21</sup> Furthermore, it was noted that Tanzania has some operating legislations that are biased against women, something which is against her own constitution and international commitments. Some laws constitute gender discrimination and violate the

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<sup>20</sup>Article 30(2) of the Constitution.

<sup>21</sup>These include the Anti-Trafficking in Persons Act of 2008 and the Law of the Child Act of 2009.

protection of the right to equality before the law and lack enforcement of the right to equal protection against discrimination. Most of these discriminating laws are contained in personal laws, such as the Law of Marriage Act, which provides for a different minimum age of getting marriage for boys and girls. Girls may be married at 15 years and boys at 18 years. The law also allows a 14-year-old girl to get married by leave of the court in special circumstances that make the marriage desirable. This law is against the provisions of CEDAW and the Maputo Protocol, which specify 18 years as the minimum age of marriage for both men and women. The Law of Marriage Act is also in contravention of other Tanzanian legislation such as the Law of the Child Act, which defines a child as a person who is under 18 years old. Legally allowing a girl child to get married at such a young age denies girls their right to development, health and education, which should be fundamental and inalienable rights for all children and vital for human development as well as democratic functioning. In more than 18 African countries, the minimum age is either biased or below 18, while other countries (like Zimbabwe) guarantee 18 years as the legal age for marriage.

Furthermore, the study found that the existing Employment and Labour Relations Act interferes with a women's freedom to plan her family, as this act limits female employees to four periods of paid maternity leave only. Also, they are bound to deliver no more than four children in order to keep their income. It was also observed that this law is instrumental in affecting women's health as some do not take maternity leave but continue to work to earn an income. Not taking care of themselves during the last phase of a pregnancy may have adverse health effects. The Law violates provisions of CEDAW and the Maputo Protocol that require a woman to have the right to decide freely and responsibly on the number and spacing of her children. In addition to that, the law allows an impracticable maximum of two hours only per day for a nursing mother to breastfeed her child during working hours, while it is silent on the mechanism of establishing nursing units in the working place.

The study further observed that section 164 of the Law of Evidence Act is discriminatory as it allows the character of a raped woman to be examined before a court of law. This provision implies that men are allowed to rape women of 'bad character', such as prostitutes. However, the denial of legal protection for women of 'bad character', or any character, is equivalent to discrimination. This provision is contrary to the Constitution as well as international instruments that protect all women from all forms of harmful practices.

Another piece of legislation which was found to discriminate directly against women is the Citizenship Act. Section 11(2) of this Act provides that a foreign woman who is married to a Tanzanian citizen is entitled to be naturalised, yet it remains silent in terms of foreign men who are married to Tanzanian women. Sections 22 and 23 of this law denies Tanzanian women the right to challenge the discriminatory nature of section 11(2) by ousting the jurisdiction of the court to review any decision made by the minister responsible for citizenship. Additionally, the law requires the minister who alone has the power to grant that right not give any reasons for denying anyone citizenship. This discriminative law concretises the African discriminating culture which undervalues women and affirms that a woman, once married, loses her independent identity and is therefore not permitted to pass her nationality to her husband and children, unlike her male counterpart.

Furthermore, Tanzania's customary and Islamic inheritance laws limit women's inheritance based on their gender. These laws deny women the right to own property upon divorce or the death of their husbands. Under Islamic law, daughters inherit the smallest share with attached restrictions while widows only inherit half as much as men do. The law provides that a widower with children be entitled to a quarter of his spouse's estate, while a widow with children is only entitled to one-eighth. Likewise, a widower without children is entitled to one-half of his spouse's estate, while a childless widow is only entitled to one-quarter. The discrimination is worse in polygamous marriages, as the wives are required to equally divide the small share allocated to them, which means if there are four wives, each wife will get one-thirty-second of the estate. The law thus perpetuates and stereotypes the inferior position of women and places them at the mercy of their brothers and sons. The situation is complicated when a widow has to rely on someone other than her children, such as her brother-in-law or father-in-law, for support.

Likewise, customary laws that have been codified and included among the laws of the country under Customary Law (Declaration) Order No. 436/63 discriminate against widows and daughters with respect to inheritance. The Declaration forbids women and girls to inherit clan land. Besides, the law requires widows and daughters to inherit less, if at all, in immovable property. This law delegates the responsibility of taking care of the widow to the deceased's heir who is the deceased's son and, if the deceased's sons are young, the law provides that a guardian must be appointed to look after the deceased's children, widow and their property. Customary law thus sets out an inheritance hierarchical scheme based on gender in which

daughters are granted the smallest share of inheritance. It divides heirs into three degrees: the first degree is for the first son, the second degree is for other sons, and the third degree is for daughters.

The law also attaches limitations to the smallest property inherited by daughters in that a woman cannot fully inherit clan land. A woman may use the land for cultivation, but unlike sons, they are forbidden to sell it even if there is no other child in the deceased's family. This law denies women the right to own property as guaranteed in the Constitution and several provisions of CEDAW and the Maputo Protocol. Article 20 of the Maputo Protocol specifically provides that widows should have an adequate share in the inheritance of the property of their husbands and that they have the right to continue to live in the matrimonial house. By not adhering to these provisions, the inheritance laws deprive women of shelter, expose them to physical harm such as sexual violence and abuse, and carry negative social and economic significance for them and their dependants. They violate a range of rights, including the right to property, dignity, equality and non-discrimination, and may lead to the violation of their right to health, including their sexual and reproductive health. Despite the fact that some other laws and policies in Tanzania are consistent with CEDAW and the Maputo Protocol on the protection of women's rights, these inconsistent laws have a big impact on the denial of women's rights. In fact, a tiny offensive or thoughtless word in the legislation may result in a big, negative impact on society.

Discriminative laws continue to deprive women of their rights, and the time for action has never been more urgent than now. Despite 70 years of international efforts to ensure that the international community adheres to proper recognition of the special needs and vulnerability of women as human beings, change has been slow and marginal in Tanzania. The government has, until now, shown little political commitment regarding the need to acknowledge and safeguard women's rights and interests at all levels. As such, it is widely felt that the Tanzanian government has failed to fully comply with international obligations imposed upon it. Though Tanzania has enacted many new laws and regulations with regard to the development of a modern economy, modern technology and development practices that suit a modern democracy, it has been very slow to accept changes in the area of women's rights. As a result, Tanzanian individuals are barred from fully accessing the same rights as those that are enjoyed by other human beings across the world, despite the fact that their country, by virtue of its own commitment to various treaties, is obliged to obey them.



The study revealed that most of the officials who are responsible for legislative amendments in the government are men whose minds seem to be clouded by male dominant thinking. For this reason they are tardy in pushing for amendments. In almost all areas in the state, men are the decision makers. They are the heads of families and their numbers are large in all-important areas such as government, parliament and the judiciary. Men are the ones who enjoy the benefits of the cultural and traditional subversion and exploitation of women, and for this reason they have been dragging their feet in advocating for the incorporation and enforcement of human rights treaties that should protect this vulnerable group in society.

It was also learned that the wide discretion that is given to the executive, who has to choose whether and when to incorporate treaties, contributes to the slow pace of the domestication of international human rights instruments that address women's needs and vulnerability. The cumbersome procedures for the amendment of domestic laws in Tanzania, which only require the concerned ministry to initiate a Bill for amendments in parliament, seem to discourage members of parliament (MPs) from so doing in *suamoto*. Again, this tardiness contributes to the slow pace of law reform. Moreover, the procedures do not allow MPs to initiate amendments of the law in the parliament. Therefore, an MP cannot initiate a move to amend any law unless the concerned ministry has tendered a Bill for its amendment. This contributes to the delay in incorporating international human rights treaties.

With reference to the findings discussed above, the following recommendations are urged:

### *5.3.1 Reformation of discriminating laws*

Tanzania should review all legislation that has a discriminatory impact on women. Discrimination against women should be abolished by both public and private actors in all areas. Society and the views and values of its citizens change over time. A concerted process of changing and updating domestic laws is therefore required so that they reflect the current values and needs of women.

Domestic laws such as the Penal Code, the Law of Marriage Act, the Labour Law Act, the Indian Succession Act, Local Customary Law and the Citizenship Act need to be reformed or repealed to comply with CEDAW and the Maputo Protocol. By reforming these Acts, the

government will clearly express its political will to protect and elevate women to the status they are entitled to as citizens of equal stature to men in the Tanzanian society. All states, including Tanzania, should be responsible for modifying the social and cultural attitudes of both men and women with a view to eradicating harmful practices that perpetuate the idea of the inferiority or superiority of either sex or of the stereotyped roles of gender.

Whenever a state enters into an agreement with the intent of being governed by international law, it puts itself under obligation to comply with such an agreement. For this reason, it is mandatory for Tanzania to repeal discriminative legislations to comply with CEDAW and the Maputo Protocol and the provisions of its own Constitution that support the principles of gender equality and non-discrimination. There is no need to hesitate to amend the laws that are against the Constitution simply because some communities in the country have a stake in them. An equitable society cannot be attained if the fundamental human rights of half of its citizens, which are women, continue to be violated by the provisions of law and to be denied their rights.

### *5.3.2 Constitutional review*

The Constitution of the United Republic of Tanzania needs to be reviewed. Specifically, it needs to incorporate provisions that will clearly address the continuing tension between protected rights and preserved cultural norms and it needs to indicate which is to have priority in the event of a conflict. It should ensure that, where multiple legal systems exist, they are consistent with human rights and gender equality standards, and that they do not disadvantage women as victims of violence. This is because an interpretation of the role of international law relates to an interpretation of constitutional provisions, statutory interpretation, and the development and adaptation of common and customary law.

To address this requirement in modern societies, some African states have already adopted constitutional provisions that explicitly state that, where customary or other legal systems exist, they must function in accordance with human rights standards regardless of customary law. For example, the Constitution of Uganda under Article 33(6) provides the following:

“Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution.”

Likewise, section 39(2) of the Constitution of South Africa states:

“When interpreting any legislation, and when developing the law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

In light of these proactive examples Tanzania must harmonise civil, religious and customary law to conform to CEDAW and the Maputo Protocol requirements and it must ensure that, where conflicts arise between statutory legal provisions and customary law, statutory provisions prevail. Tanzania should also include a clear provision in its Constitution that recognises women’s rights to strengthen the enforcement of their equal position in society at all levels. As was mentioned in Chapter two, other African countries such as Uganda, Malawi, South Africa and Namibia have successfully incorporated women’s rights in their constitutions. For this reason, they are termed as the most women friendly constitutions in Africa. They clearly stipulate that, in the event of a conflict, non-discrimination or equality provisions rank above the custom or culture under consideration.<sup>22</sup> They go further by providing that there can be no derogation from equality articles even in the event of a declaration of a state of emergency.<sup>23</sup>

### *5.3.3 Review of procedures for adoption and domestication of international instruments*

A clear provision for treaty making and incorporation procedures in the Constitution of the United Republic of Tanzania is recommended. The Constitution needs to provide for treaty-making powers and it must clearly set out how a treaty can be accepted and domesticated in municipal law, because currently it only provides for the procedures of ratifying international treaties. A country signifies its intention to behave in the manner agreed in a particular treaty by accepting it by ratification. This is a serious undertaking on the part of an individual country, and for this reason it is a matter of good sense that the manner in which a particular country enters into a binding relationship with other countries is provided clearly in the ground norm

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<sup>22</sup>Article 10 of the Constitution of the Republic of Namibia of 1990; Articles 20(1) and 24(1) of the Constitution of Malawi of 1994; Articles 9(1) and 9(3) of the South African Constitution of 1996; and Article 36(6) of the Uganda Constitution of 1995.

<sup>23</sup>Article 66 of the Namibian Constitution of 1990; Article 24(2) of the Malawian Constitution of 1994; and Articles 30, 31(2) and 37(5)(c) of the South African Constitution of 1996.

of that particular country. Such control would at least assure effectiveness in the incorporation of a treaty into the domestic laws of the country.

Furthermore, the power to initiate the incorporation of ratified instruments into domestic instruments is granted to the executive by Presidential Circular No. 6 of 1993 (hereinafter Circular No. 6) and Presidential Circular No. 1 of 1995. This power should be shared with the National Assembly. The President should remain within his power for the negotiation and adoption of international instruments, but the decision as to whether or not the country should agree to be bound by any treaty should be made by parliament. This will give room to the legislators to push for the domestication of international treaties that acknowledge all citizens' individual rights, such as CEDAW and the Maputo Protocol.

#### *5.3.4 Domestication of CEDAW and the Maputo Protocol*

Tanzania must domesticate CEDAW and the Maputo Protocol as it has already ratified these treaties which should now be rendered enforceable internally. By signing these treaties means that Tanzania considered their provisions before accepting to be bound by them. For this reason, there is no need to hesitate in giving them force of law in the country, which will be the best way of guaranteeing the protection and the elevation of the position of women. The government needs to stop avoiding collisions with customs and religions in society. The incorporation of international treaties into domestic legislation is of paramount importance, because if the judiciary is left in a position where they can only take ratified instruments into consideration, the rights of many will continue to be denied. This goal can be achieved by sensitising MPs and government officials to the fact that the international human rights norms contained in these treaties are guidelines for legislative and policy action, and that ratification is the beginning, not the end, of local responsibilities. Special training in the procedures and enforcement of international treaties therefore needs to be provided to MPs.

### 5.3.5 *Codification of customary law*

Customary law needs to be developed in a manner that harmonizes local culture and international human rights standards. These laws should reflect and promote the international human rights consensus that will ultimately advance women's rights in Africa. In order for customary law to have any meaningful effect on women in Africa, it must operate within a human rights framework because local culture cannot be used as an excuse or rationale for discriminatory practices such as the exclusion of women from inheritance rights. Customary law, if developed and used in line with human rights provisions, can strengthen and complement statutory law, thus filling gaps in the legal system by strengthening communities and having a prophylactic effect on disputes and disagreements. There is also a need for customary law to be a more defined, regulated, and formalised as an entity, which will stress the importance of incorporating female leaders into customary justice structures in order to promote positive views of female leadership.

## **5.4 Judicial Enforcement of Women's Rights**

The final presumption (or hypothesis) of this study was that some of the provisions which protect women's rights that are enshrined in domestic legislation and international laws are not effectively enforced due to derogatory clauses of other pieces of domestic legislation or the ignorance and stereotyped mind-sets among law enforcers in particular and society in general. In any effort to advance human rights, the courts play a crucial role; hence this research examined the role of the courts in the implementation of women's rights as well as the reaction of courts to Tanzania's customary law norms that discriminate against women.

The findings showed that, in Tanzania and other African countries, courts have progressively begun to understand that women's rights are human rights and that discrimination on a prohibited ground cannot be justified. However, women's rights have been looked at with varying degrees of success and some issues such as tradition and culture continue to be a most unpredictable terrain when subject to litigation despite the existence of internal, regional and national human rights law that prohibits this view. The courts have been taking forward and backward steps with respect to the application of women's rights as guaranteed in international instruments, and their interpretation of existing customary laws and practices in Tanzania in line with human rights provisions has been erratic, to say the least.

In general, international human rights instruments that Tanzania ratified, but have not yet incorporated into domestic legislation (such as CEDAW and the Maputo Protocol) are applied only as a guide to constitutional interpretation in Tanzania. Clearly, the courts use international treaties as an interpretative tool to establish whether they are consistent with the Constitution for purposes of being guarded and persuaded by such authorities. The study illuminated that some judges took cognisance of international norms when deciding cases in which domestic law was uncertain or incomplete. It must be noted that it is the proper nature of the judicial process and function to have regard for ratified international and regional Conventions, whether or not they have been incorporated into domestic law, for the purpose of removing ambiguity or uncertainty from national, constitutional, legislative or common law. It was found that Tanzanian courts had gone beyond this requirement in some cases by applying case law from international courts and other international 'soft law' in interpreting constitutional provisions.<sup>24</sup>

The study revealed that, in some cases, the courts showed good spirit in dealing with discriminative customary laws. For example, the court applied its duty well in the cases of *Ndewawiosia Ndeamtzo v. Emmanuel Malasia (1989)*, *Bernardo Ephrahim v Holaria Pastory and Another (1989)*, *Scholastica Benedict v Martine Benedict (1993)*, and *Rubuka Nteme v Bi. Jalia Hassan & Another (1993)*, as was discussed in Chapter four. In these cases the courts determined that the validity statutes that had been alleged were unconstitutional, because no law that contravenes the Constitution can be suffered to survive. It was also ruled that the authority to determine whether the legislature had acted within the powers conferred upon it by the Constitution was vested in the court.

The Constitution of Tanzania prohibits any form of discrimination as it recognizes the equality of all human beings and guarantees equality and protection of all before the law without any discrimination, yet conversely some judges did not find it unjust to make decisions based on discriminating legislation, regardless of current social and economic democratic developments. In these circumstances, they presented divergent views in their interpretation of the rules. Their literal application of legislation sometimes resulted in women being left destitute. In this

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<sup>24</sup>This was the case in *Peter Ng'omango v Gerson MK Mwangwa and the Attorney-General (1993)*; *Reverend Christopher Mtikila and Others v the Republic (1990)*; and *the Republic v Mbushuu alias Dominic Mnyaroje and Another (1994)*.

context, it must be argued that failure to incorporate international human rights into the country's legislative framework has given wide powers of discretion to the judiciary to decide on matters relating to women as they think fit.

The assenting attitude of the courts in terms of the protection of women's human rights was reduced after the government introduced new procedures for the enforcement of basic rights and duties as guaranteed in the Constitution. For example, the procedures that are required by the Basic Rights and Duties Enforcement Act of 1994 have turned out to be too burdensome for the victims of human rights to enforce their rights. A particular barrier is the requirement that, before a petition for basic rights may be admitted for hearing, a single High Court judge needs to determine if such an application is fit for hearing. The law also requires that admissible applications are to be determined by three High Court judges. This is a provision that has turned out to be too cumbersome and costly for numerous individuals, because most regions in Tanzania do not have a High Court and in those regions where a High Court exists, only one or two High Court judges are available. Consequently, individuals are obliged to travel to distant regions in order to file their cases and to wait for the availability of a quorum of three High Court judges for hearing, which means that justice is delayed for these citizens.

Furthermore, the Basic Rights and Duties Enforcement Act also introduced a derogative clause which took away the High Court's power to declare any law that is inconsistent with the Constitution invalid or unconstitutional. Instead, section 13 of this law, which was derived from Article 30 of the Constitution, requires the courts to simply allow parliament or the concerned governmental legislative authority to correct a defective law or action within a specified context. The case of *Baraza La Wanawake Tanzania (Bawata) v the Registrar of Societies, Minister for Home Affairs and the Attorney General Miscellaneous Civil Cause No. 27 of 2007, High Court of Tanzania at Dar Es Salaam (unreported)* is an example of a delayed case that was decided under the procedure available under the law. This constitutional case was brought under several Articles of the Constitution and sections 4 and 5 of the Basic Rights and Duties Enforcement Act of 1994. The case was filed in 1997 and judgment was given only in 2009, more than ten years later.

The study revealed that the application of customary law is the most problematic area in Tanzania as far as the equality of all its citizens is concerned. Some courts in Tanzania produced random and varied judgments which have led to misdirection, inconsistency and

unclear jurisprudence in this area. Customary law adversely affects women in the areas relating to ownership of property, inheritance, and custody of children. Some judges and magistrates held male dominant mind-sets as they were insensitive to gender issues in their rulings, because sometimes they made decisions based on customary rules without even considering the principles of human rights as enshrined in international instruments and the Constitution. This was seen in the cases of *Maagwi Kinito v Gibeno Warema (1984)*; *Rubuka Nteme v Bi. Jalia Hassan & Another (1986)*; *Scholastica Benedict v Martine Benedict (1993)*; and *Elizabeth Steven and Another v AG High Court of Tanzania at Dar es Salaam: Miscellaneous Civil Cause No. 82 of 2005 (unreported)*. In these cases the judges decided to base their rulings on customary law; particularly on the law that denies women the right to inherit. They maintained that customs evolve and change with time and that it is a process that does not end or can be ended; hence the courts should not interfere with these laws.

Discriminating elements of customary law was quashed by the High Court in numerous cases, but they still exist in the legislation of the land where the judiciary is left with the discretionary power to decide to use customary law and forget the principle of precedent. The High Court in these cases only nullified a particular provision of customary law and failed to provide a proper remedy for future interpretations. Instead, the High Court argued that district councils should lobby the responsible minister to change the law instead, and left the solution in the hands of the political process. However, it is strongly argued that sole political process cannot be considered as a satisfactory means of redress, as to hold so is to subject the application and enforcement of those rights in the democratic process.

The cases that were analyzed in this study showed that female judges are at the forefront in making sure that women's rights are upheld according to national and international principles of human rights.<sup>25</sup> They have been keen to make sure that women are not oppressed but that they enjoy their rights as guaranteed by the Constitution and other international instruments that Tanzania ratified.<sup>26</sup> Female judges have been reaching conclusions in line with international human rights norms. They granted disposition of matrimonial property without

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<sup>25</sup>*Chiku Lidah v Adam Omary; Jason Tinkazaile Katalihwa v Halima Balthazar Ngaiza; and Ndossi v Ndossi.*

<sup>26</sup>This was seen in the cases of *Chiku Lidah v Adam Omary (1999)*; *Laurence Mtefu v Germana Mtefu (2000)*; *Naftal Joseph Kalalu v Angela Mashirima (2001)*; *Mwajuma Mohamed Njopeka v Juma Said Mkorogoro (2011)*; *Gulya Mohamed v Ahmed Makamo (2001)*; *Ndossi v Ndossi (2002)*; *Leila Jalaludin Haji Jamal v Sharif Jalaludin Haji (2003)*; and *Jamal and Tinkazaile Katalihwa v Halima Balthazar Ngaiza (2006)* as were discussed in Chapter four.



any discrimination, and female children and widows were granted the right to inherit land and administer wills despite being excluded by customary laws. They have also interpreted domestic legislation in conformity to the jurisprudence of CEDAW and the Maputo Protocol by granting women equal rights before the law. The findings also showed that female judges have been in the frontline to provide adequate remedies for offences of female abuse in criminal cases. Women judges have therefore been playing a major role in ensuring that the rights of their fellow women are granted according to human rights provisions.

It was also found that cases that involved sextortion and that were linked to economic violence and the issue of sexual harassments of women within the working place were adjudicated with compassion and international legal expertise by female judges.<sup>27</sup> The demand for or the imposition of sexual favours on subordinate female staff or those who need a person in authority to exercise that authority in their favour either for services, employment, or promotion is a common complaint in the workplace and in the community at large in Tanzania. Women have faced sexual harassment as service users and employees as money and sexual favours are demanded of them as preconditions for obtaining bail, a favourable judgment, or employment benefits. Tanzania's police database shows that the highest number of sexual victims is among females and males below the age of 15 years, and that this figure has increased in the last few years.<sup>28</sup> Female judges also positively decided against harmful traditional practices and domestic violence,<sup>29</sup> and the perpetrators were convicted and given firm punishment.

In some cases, women who were dissatisfied with the decision of the courts in Tanzania utilized international law procedures and sent their cases to the UN CEDAW Committee where they were successfully granted remedy.<sup>30</sup> A High Court in Tanzania that was presided over by a female judge recently nullified and declared unconstitutional sections 13 and 17 of the

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<sup>27</sup> As discussed in previous chapters, in the cases of *Mussa Zanzibar v the Republic* Criminal Appeal No 287 of 2012, Court of Appeal of Tanzania (unreported); *John Martin Marwa v the Republic*<sup>27</sup> Court of Appeal of Tanzania at Tabora, Criminal Appeal No. 22 of 2008. *Seif Mohamed El-Abadan v the Republic* Criminal Appeal No. 320 of 2009, Court of Appeal of Tanzania at Tanga, (unreported). *Onesphory Materu v the Republic* Criminal Appeal in Tanga, Criminal Appeal No. 334 of 2009.

<sup>28</sup> TAWJA 'Stopping the abuse of power for purposes of sexual exploitation: naming, shaming and ending sextortion' and the Millenium Development Goal 3 Program Tanzania: 2009 - 2011 Country Report (2012) 57.

<sup>29</sup> *Leonard Jonadhan v R* High Court of Tanzania, at Dar es Salaam. Criminal Appeal No. 53 of 2001 (unreported), *Republic v Elvan S/O Cyprian Luvindu* High Court of Tanzania Dar es Salaam District Registry (2015).

<sup>30</sup> Committee on the Elimination of Discrimination against Women, Communication No. 48/2013, Views adopted by the Committee at its sixtieth session on 16 February–6 March 2015. In the case of E S and S C discussed in chapter four.

Tanzania Law of Marriage Act which allow girls to marry at age 15 with parental permission and at age 14 with the permission of a court. This ruling was given in the case of *Rebeca Gyumi v Attorney General*.<sup>31</sup> The Attorney General was given one year from the date of the decision to arrange for amendments of that law, by putting 18 years as the minimum age for a girl to be contracted into marriage. Surprisingly, the government filed a notice of intent to appeal against this decision of the High Court on 20 July 2016.<sup>32</sup> This means that the Tanzanian government openly declared its intention not to commit itself to adopting the minimum age of marriage for girls as established by CEDAW and the Maputo Protocol, regardless of the fact that it had ratified these instruments.

Female judges in Tanzania, through their association called the Tanzania Women Judges' Association, have been conducting human rights seminars for judges and magistrates every year to discuss national and international precedents and legislation that safeguard human rights, with specific focus on the protection of women and children. They are of the view that it is not easy for men who are steeped in stereotyped thinking and who are enjoying the benefits of oppressing women to give recognition to women's rights and thus to abdicate their position of superiority. This study found that women are currently regularly included in judicial appointments in many African countries, most notably not only as chief justices of supreme courts in common law countries like Ghana, Nigeria, Sierra Leone, Gambia, Malawi, Lesotho and Zambia, but also as presidents of constitutional courts in civil law countries such as Benin, Burundi, Gabon, Niger and Senegal.

Concurrently, women have been appointed in record numbers as magistrates, judges and justices of courts of records across the continent. This trend seems to acknowledge the fact that it is of benefit to involve women in the quest for gender equality and for a more engaged understanding and compassionate handling of cases in the courts when women's issues are under consideration or at stake. Their appointments promote gender equality and female rights in general. Evidence has shown that a court presided over by a female judge produces judgements and rulings that give regard to real world implications and their impact on the lives of female members of society. For example, the Constitution of South Africa, under section

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<sup>31</sup> High Court of Tanzania at Dar es Salaam Main Registry. Miscellaneous Civil Case No. 5 of 2016.

<sup>32</sup>Mhagama H 'Tanzania: Network asks government to rethink decision on early child marriages' *allAfrica Report* 5 August 2016. Available at <http://allafrica.com/stories/201608050234.html> accessed on 7 August 2016.

174(2), specifically declares the need for the judiciary to reflect a broad gender composition when judicial officers are appointed. It is argued that women judges approach issues of law and case management from a different perspective and with a different way of thinking than their male counterparts, and that this would go a long way in correcting and eradicating the prejudices that exist in traditions and customs.

However, the study also revealed that challenges exist in accepting female judges in African societies. These challenges even derive from male members of the legal profession. Prevailing gender stereotypes and norms often still play a significant role in preventing women's full and equal participation in the judiciary. Gendered assumptions based on the culture of women's inferior role in society have affected the way in which female judicial members are treated by their male colleagues and authority figures in Africa. Women's appointment and promotion within the judiciary are often discussed in terms of the assumption that women are children's primary caregivers and that they will stop working or reduce work levels when they become mothers. There is also a widely assumed perception among the public that judges are, or should be, men. This presumption is proved by the fact that people who appeared in court presided over by a female judge sometimes asked where the judge was. In addition, some female judicial members have had the experience that men and women refused to appear before them or sought to have their cases transferred to a male judge. In addition, some of the court officers in Africa still use the male form of address for female judges as they address them as "My Lord" or "Your Lordship" instead of "My Lady" or "Her Ladyship."<sup>33</sup>

Despite the above mentioned major challenges in the enforcement of women's rights, other factors that limit the enforcement of CEDAW and the Maputo Protocol were also pinpointed in this study. These include insufficient publication of case outcomes and thus a lack of awareness of cases for precedence. This problem not only affects legal practitioners, but also officials of the court, thus hindering the entire administration of justice. Judicial decisions were last published Tanzania's Law Report Book series in 2006, although moves are alleged to be under way to compile and make available the reported cases of the years that followed. This state of affairs has caused some judges not to follow available precedents, probably because they came across them. It may be for this reason that they used their own initiative and insight

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<sup>33</sup> Fourth International Commission of Jurists (ICJ) Geneva Forum of Judges and Lawyers 5 & 6 December 2013 Women and the Judiciary.

for decisions which were sometimes inconsistent. Other challenges to the enforcement of CEDAW and the Maputo Protocol in Tanzania appear to be limited access to relevant international and national human rights documents as well as poorly drafted pleadings that do not sufficiently highlight relevant issues. Moreover, citizens' inability to obtain access to justice due to, inter alia, the high cost of litigation and cumbersome procedural rules is also among the factors that hinder proper enforcement of CEDAW and the Maputo Protocol in Tanzania.

The power vested in national judges to apply international instruments is important, but the behaviour of legal practitioners and judges' attitudes cannot be disconnected with regard to the enforcement of women's rights as enshrined in international instruments. Both male and female judges hail from the same background and go through the same initial legal training; thus they share similar legal and procedural knowledge. It is obvious that if attorneys wish to use provisions of women's rights that are enshrining in international treaties in litigation, they must first be aware of existing treaties, case law, etc. This pertains to the extent to which international human rights law forms part of legal training. Nowadays human rights law is a common part of the curriculum of law faculties in Tanzania, but international law as such is often offered as an optional course. Therefore, the lack of courts' reliance on international human rights law in relevant cases may be a result of a lack of relevant training, and it may be ignored by attorneys who, through experience, know that judges will not accept international law arguments that are unfamiliar to them.

However, efforts have been done in Tanzania to make sure that law enforcers are getting the necessary up-to-date knowledge in the field of human rights. Initiatives have been implemented with a view to influencing judges to become friendlier to international human rights law, such as through the training provided by an organised women judges' association. The East African Magistrates' and Judges' Association has the objective to promote and protect human rights, among others. The Southern African Chief Justices' Forum, which Tanzania is a member to, holds annual conferences. Discussions at these conferences include, among other things, women's human rights issues. Tanzania has also established the Law School of Tanzania in 2007, which contributes a lot in giving lawyers practical legal training and human rights is among the courses offered by this institution. There are more than 15 universities in Tanzania that offer a degree in law, but the standard of education varies across these universities, so the one-year program at the Law School of Tanzania is intended to supplement the law degree.

Completion of the Law School of Tanzania is compulsory in order to practice law as a public or private attorney and as a judicial member. Other countries such as Uganda have gone far in establishing judicial studies institutes which provide human rights training under the auspices of the judiciary. Such an institute was established in Uganda in 2004.

It was also revealed that domestic courts in other African countries are currently at the forefront of applying women rights as guaranteed in international instruments, instead of basing their ruling on discriminating traditional laws. The study examined a number of cases from African domestic jurisdiction that involved women's rights and traditional practises. It was established that the difference in the impact of application of harmful customary laws depends on the way countries' Bills of Rights were constructed in the Constitution of a particular country. Hence, some of the constitutions in African countries protect women against the negative impact of cultural practices. Countries like Kenya, Rwanda, Ghana and South Africa have gender responsive constitutions that address discrimination against women which is rooted in negative interpretations of custom, tradition and religion. Uganda, Rwanda and Kenya in part consider equality under unified laws of inheritance which makes them easier for their citizens to understand. The South African and Kenyan Constitutions present a hierarchy between the right to culture, the principles of equality, non-discrimination, and the recognition of customary law. The Kenyan Constitution eliminated gender discrimination in relation to land and property under Article 60(1)(f) which gives everyone, including women, the right to inheritance and an unbiased right to land. The Constitution of Ghana also provides for the application of customary law only when pronounced by the court and practice has shown that court in Ghana apply only positive customs.

Domestic courts do not often need to refer to international human rights instruments to cover a right that has been violated in a specific case, therefore the question of direct application is less important than how courts approach the issue of interpretation. It was found that, in most cases, African domestic courts do not refer to international case law, resolutions or general comments. This difference in approach has resulted in clashes between customary law norms on the one hand, and internationally protected human rights norms and national bills of rights inspired by international norms on the other. The opposition to change is based on an ideology that characterizes attempts at reforming customary law as contrary to African traditions and culture and an attempt to westernize African society. Such opposition is often a political reaction to the colonial imposition of the common law on African states and an effort to assert

African dignity. In such a context, efforts to reform customary law can easily be interpreted as an effort to impose western values on African societies.

The tension between customary law and constitutional principles of equality has created problems for lawyers and judges alike. Many African constitutions have exempted themselves from the obligation of prohibiting any discriminatory practices in customary law, thus creating a conflict between customary statutory law and international law that leaves discriminatory practices intact. The trend shows that customary law in Africa is highly flexible, because it is based on local values which vary in application depending on who interprets them and to whom they are applied. Non-codifications of customary law also lead to high degrees of ambiguity and uncertainty. In some litigations, African domestic courts seemed more willing to strike down discriminatory laws that do not affect women's rights than those that do. Though gender discrimination has been found to offend the equality guarantee in other cases across Africa, these cases have not sparked the expected flurry of precedent that they seemed to promise. Those cases seemed to promise that the courts would not condone laws, practices or policies that discriminate against women.

Based on the findings pertaining to the judicial enforcement of women's rights in Tanzania, the following recommends are offered:

#### *5.4.1 Interpretation of domestic law should be in line with international law*

Courts act as guardians and trustees of a constitution in which human rights are enshrined and guaranteed. Therefore, the courts need to recognize ratification instruments signed by a country in order to fulfil the international obligations of the state. They need to play an active role in enforcing human rights by interpreting domestic law in line with international human rights standards. In this way they will technically help to incorporate international treaties by formulating binding case law. A constitutional or legislative mandate for courts to consider international human rights law in implementing domestic legislation consistent with their international obligations is therefore needed in Tanzania. South Africa, Malawi and Seychelles have managed to include provisions in their constitutions on the role of international law with

regard to the interpretation of their respective bills of rights and statutory interpretation.<sup>34</sup> Some few common law countries in Africa have included constitutional provisions that automatically incorporate international law into domestic law. These include Article 144 of the Namibian Constitution which provides as follows:

“Unless otherwise provided by this Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

#### 5.4.2 *Reference of international law cases, resolutions and general comments*

In most cases, the judiciary in Tanzania does not refer to international case law, resolutions or general comments.<sup>35</sup> They should include a discussion of such materials, as it would provide a better basis for courts’ decisions. However, international instruments themselves often do not provide much aid to the interpretation of the provisions of a bill of rights couched in similar terms. In interpreting constitutional and legislative provisions that protect women’s rights, judges should also take note of how similar provisions have been interpreted in other jurisdictions, whether by foreign courts, international courts, or quasi-judicial bodies.

Case law from other countries also needs to be considered, as international human rights law is not only developed at the international level, but also domestically through the jurisprudence of the contents of countries’ respective bills of rights. In order to achieve this, lawyers and judges must have access to relevant material. Training and cross-border networking also play an important role. The establishment of specialized human rights chambers like the one established in Ghana might be one way to counter such trends.<sup>36</sup> Nigeria has newly introduced the Fundamental Rights Enforcement Procedure which explicitly provides for a greater reliance on international human rights law.<sup>37</sup> Although access to courts remains a challenge in many African countries, it is imperative that when a female litigant manages to bring a human rights case to court, it should take the opportunity to engage not only in the application of domestic

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<sup>34</sup> Section 39 of the Constitution of the Republic of South Africa; Article 48 of the Constitution of Seychelles; and section 11(2) (c) of the Malawi Constitution.

<sup>35</sup> Killender M (ed) *International Law and Domestic Human Rights Litigation in Africa* Pretoria University Press (2010) 13.

<sup>36</sup> *Ibid* .

<sup>37</sup> Nwauche E ‘The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?’ *African Human Rights Law Journal* (2012) 503–515.

law, but also in the development of women's rights. This can only be done by engaging with how a right has been interpreted elsewhere.

#### 5.4.3 *Professional ethics of judicial members*

Some judicial members need to abide by their professional oath of safeguarding the Constitution of the United Republic of Tanzania. They need to play their role in interpreting the law so that they can give just decisions. Before taking office, they usually take an oath to protect the Constitution of United Republic of Tanzania and to do justice to it without fear or favour. Therefore, it is important for each of them to abide by his or her Oath. Articles 107A (2) (a) and 107B of the Constitution of the United Republic of Tanzania are very clear on the role of the courts in this country.<sup>38</sup> These Articles provide in very clear terms how the courts should dispense their duty to administer justice and what should guide them.

The courts should always address issues by being guided by the Constitution and other relevant laws that are concerned with the issues(s) before the court. Apart from that, Article 9(f) of the Constitution also obliges the state authorities and all its agencies to direct their policies and programmes to ensure, among other things, "that human dignity is preserved and upheld in accordance with the UDHR". The UDHR is a source of subsequent international conventions that deal with human rights, so if the court disregards these international conventions it is disregarding the Constitution of the United Republic of Tanzania. The father of this nation, the late Mwalimu J K Nyerere, once issued the following warning in one of his speeches:

"Although every individual was joined to his fellow by human respect, there was in most parts of Tanzanian, an acceptance of one human inequality. Although we try to hide the facts and despite the exaggeration, which our critics have frequently indulged in, it is true that the women in traditional society were regarded as having a place in the community which was not only different, but was also to some extent inferior. If we want our country to make full and quick progress now, it is essential that our women live in terms of full equality with their fellow citizens who are men"<sup>39</sup> (tense sic).

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<sup>38</sup>Article 107A (2) states: "In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles; that is to say - (a) impartiality to all without due regard to one's social or economic status"; and Article 107B provides that: "In exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land."

<sup>39</sup>Nyerere J K *Socialism and Rural Development in Freedom and Socialism: A selection from his Writing and Speeches 1965–1967* Oxford University Press (1998) 339.



Therefore, the incorporation of international human rights treaties is very important to completely tie the hands of those who seem not to understand the importance of rights as guaranteed in the Constitution. It is a strange dichotomy that, although the courts sometimes use the international conventions that were ratified by Tanzania, they are not bound to use them. Therefore, if the government were to incorporate international conventions, the hands of those who oppose such provisions will be tied and they will not be able to get rid of them other than interpreting them accordingly.<sup>40</sup> Otherwise, the courts of law will continue to use their discretion to apply or not apply international human rights instruments. The main role of international human rights law, in the form of case law and other interpretations by supervisory bodies, should be to aide national courts to interpret constitutionally recognised rights.<sup>41</sup>

#### 5.4.4 *Judicial gender sensitivity*

Courts are critical institutions in addressing all forms gender-based discrimination and traditional harmful practices. Judges and magistrates play a crucial role in the legal system's response to women' rights. They are generally the final authority in civil and criminal matters involving the abuse of women. They are responsible for delivering equal justice to all individuals regardless of their gender, race or financial status. They make decisions that affect the lives of the victim, the perpetrator, women, children, and potentially other family members. If women's rights commitments have to be implemented at national level, judges and magistrates have to play a leading role. The judicial system can help to protect victims and their families and ensure that perpetrators are held accountable, which in turn will prevent or at least reduce further gender-based violence and discrimination.

While recognizing the important role legislation can play in law reform, this study argues that the fight for gender equality needs to move to the courts and mass movements. To ensure that the courts interpret the law in such a way that gender equality is advanced requires that social movements put pressure on the courts and society in order to act in the interest of gender equality. The courts need to be encouraged to interpret customary law in accordance with human rights norms by showing that the traditional social and economic relations on which the customary norms that discriminate against women are founded and on which traditionalists

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<sup>40</sup>Killender (note 35) above at 60.

<sup>41</sup>Kijokisimba H & Chris P *Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries* LHRC (2005) 382.

rely to oppose reform, have in reality been radically transformed. This will demonstrate that communities no longer practise the values used by traditionalists to support customary legal norms that discriminate against women in their existing form.

#### 5.4.5 *Engagement of strategic litigation*

Strategic litigation must be attempted to ensure that decisions prohibiting discrimination on the ground of gender are well thought out and resistant to criticism. Lawyers must attempt to persuade courts to make decisions that establish or build on principles already set by a previous judgment in order to develop stronger jurisprudence. There is a need to continue appealing decisions that ignore the enjoyment of rights by women because it is not enough when it is merely ruled that it is discriminatory.

More effort is required on the part of the courts to set out clear jurisprudence that demonstrates why such distinctions constitute unlawful discrimination and how they break up the principle of equality. Only then will it be possible to enshrine proper content and purpose into this principle in Tanzania. More importantly, the principle of equality is entrenched in the Constitution even though personal and customary law is often excluded from the ambit of this principle. It is this tension between customary law and the constitutional principle of equality that has created problems for lawyers and judges alike, but from a strategic litigation perspective, this is an important opportunity for litigation and lobbying.

#### 5.4.6 *Sensitization of all law enforcers*

Tanzania must ensure the effective prosecution of cases related to women's rights and the punishment of offenders. To achieve this, all law enforcement officers, including attorneys, prosecutors, the police and medical practitioners must be involved in campaigning against gender discrimination and harmful cultural practices. If courts are to effect substantive justice, then lawyers and adjudicators must ensure that the social context, values and perspectives that underpin people's legal claims are properly heard and understood. Seen in this light, the primary responsibility of a judge or a lawyer is not simply that of adjudicator or advocate, but a facilitator of access to justice.

The police force also plays a critical role in the quality and timeliness of protection available to victims of harmful cultural practices and gender-based violence. Societies turn to the police to intervene in violence and call on them for protection. They believe and trust that they carry the authority to legally remove an assailant, using force to do so if necessary, and that they will initiate the investigation that a prosecutor relies on when bringing a case to court that involves a women's rights violation. Police who perceive women's rights violations, such as domestic violence and gender discrimination, as a private family matter and are therefore less sympathetic to the victims, need to be better educated, otherwise they will dispense with the whole process of justice.

Prosecutors also play an important role in the enforcement of women's rights in criminal cases, as the burden of proof ordinarily rests on their shoulders. The court is bound to ground a conviction on watertight prosecutory evidence or to acquit the suspect if the prosecution's case is weak. The prosecution should properly study the case and competently present it according to the required standards of proof in order to facilitate fair justice. It is important to have in-service training on a continuous basis for all law enforcers to keep pace with changing technologies and social values. Disseminating knowledge of the law and imparting skills to law enforcement officers for the better performance of their duties are very important for the efficient delivery of services.

Health care providers must also improve their examinations for the admissibility of evidence, which will strengthen cases of harmful traditional practices and domestic violence. Therefore, correctly completing, duly signing and stamping 'Police Form 3 (PF3) of the victim in criminal cases are vital. When a woman presents her injuries as a result of intimate sexual violence or harmful practices such as FGM, medical doctors are required to record forensic evidence using a police incident report (Form PF3). They may also be required to testify in court based on the evidence that was recorded on PF3. The form is available only from police stations in Tanzania, so victims must report to the police before seeking health care if they want to press charges. Due to apathy or corruption, getting a medical doctor to complete a PF3 form may be difficult for a helpless victim.

Medical records are often difficult to obtain, are inaccurate or incomplete, and the handwritten notes are often illegible. Many medical records contain shortcomings that prevent their admissibility as evidence in legal proceedings. Health care providers are often confused about

whether, and how, to record information that will be useful in legal proceedings. They should improve record keeping in a number of ways, including by documenting information rather than making conclusive or summary statements, noting the patient's demeanour, photographing the injuries, clearly indicating the patient's reliability, recording the time of day the patient was examined, refraining from using legal terms, and writing legibly for authenticity and evidentiary value. Some medical doctors have also been reluctant to testify in court, probably because they are concerned about the confidentiality of medical records. A well-documented medical record can strengthen women's rights cases when they are brought to court, because it constitutes third-party factual evidence that corroborates and/or establishes that the victim was indeed violently attacked or sexually abused.

#### *5.4.7 Other legal system barriers that should be addressed*

Other barriers in the legal system that impede female victims' ability to access justice must also be considered and addressed. These include attending to the hours of operation and/or location of the court, legal technicalities of court procedures, delay in court procedures, and monetary sanctions imposed against perpetrators. Court and user fees also hinder access to justice. These difficulties in access affect everyone, but they place a particular strain on those women who have no formal employment, have limited access to financing, have extensive health care needs because of pregnancy and childbirth, and suffer under extremely large domestic workloads. Access to courts must be improved so that women can bring claims based on infringement of their basic rights to justice, and this will in turn provide opportunities for the courts to reform the law.

### **5.5 Extra-Judicial Facilities for the Implementation of Women's Rights in Tanzania**

The study also examined the extra-judicial efforts made in Tanzania for the enforcement of women's rights. Many extra-judicial institutions in Tanzania have been in the frontline for the promotion and protection of women's rights. Civil societies, NGOs and a few governmental institutions are directly involved in the promotion and protection of women's rights at domestic level. The Tanzania Ministry of Health for Community Development, Gender, Seniors and Children (Formerly the Ministry of Community Development: Women's Affairs and Children) established the National Development Vision 2025 that provides, among other things, that

Tanzania should ensure the attainment of gender equality and the empowerment of women in all socioeconomic, political and cultural spheres by the year 2025. Plans have been prepared to realize the Vision 2025 goals which include, among others, the Poverty Reduction Strategy (PRS) that identifies gender as crosscutting in all sectors. The ministry has also reviewed the Women Development Policy of 1992 with a view to bringing about gender equality, which led to the formulation of the Women and Gender Development Policy which was adopted in 2000. This Policy was operationalized through the National Strategy for Gender Development (NSGD) of 2005. The Policy has increased awareness of issues related to women's empowerment and the need for gender equality. The policy was translated from Kiswahili into English to facilitate easy understanding by development partners and non-Swahili speakers.

In addition to the above initiatives, the ministry also translated some international human rights instruments, including CEDAW, into the Swahili language. It also laid down gender mainstreaming approaches towards building a foundation to promote gender equality in the country through NSGD. The ministry also hosted the Gender Mainstreaming Working Group - Macro Policy (GMWG – MP) that was co-chaired by UN Women as a leading development programme. The GMWG – MP delivers a multi-stakeholder space for dialogue, priority setting, analysis, and strategic interventions on policy processes and programs to enhance gender equality and women's empowerment in the context of developmental effectiveness and dialogue. The Tanzania government also developed a National Plan of Action for the Prevention and Eradication of Violence against Women and Children (2011-2015) along with a communications strategy. This National Plan of Action provides strategies and activities to be implemented by various stakeholders that has been widely disseminated and implemented. Moreover, the government established a National Committee on Violence against Women, Children and People with Albinism.

However, the study found that the ministry has been facing many challenges in terms of the implementation of these gender-sensitive programs and plans. These problems include funding, especially with the matching of policy priorities and budget allocations in the annual budget process and incorporating emerging policy changes. The government, through this ministry, underwent an institutional capacity assessment review called the Forward Looking Strategies Study (FLS) in 2010. This evaluation raised the concern that the ministry's institutional capacity, including inadequate human, financial and technical resources, need to be enhanced along with a stronger engagement in policy work. Lack of funding is reflected in the varying

priorities in different sectors accorded to gender issues in their plans and budgets, as the major funders for gender interventions remain development partners. For most institutions, it has proved difficult to quantify and track investments to address gender interventions.

However, as of recently this problem has been addressed through the public financial management reform. A rapid gender budget analysis was carried out on the 2014 national budget and this analysis highlighted key recommendations for the way forward. Furthermore, the ministry does not have a comprehensive monitoring and evaluation (M&E) system across all levels of implementation, and neither does it have a corresponding reporting system. Subsequently, it lacks a regular and coherent system of M & E for enabling up-dates and reviews to be conducted on a regular basis or routine data to be compiled continuously and periodically. Likewise, the ministry has failed to lobby for the amendment of discriminating laws in the country.

It has been established that the Tanzania Police Force launched a 3-year Action Plan as a measure of its long-term commitment to respond to gender-based violence issues with proper planning and allocated resources. The Action Plan is designed to guide the efforts of the Tanzania Police Force to enhance the effectiveness and efficiency of its response to gender-based violence cases and child abuse. The Police Force has also established a Tanzania Police Female Network (TPFNET) which is an association that sensitizes women to the laws that support their rights. In addition to this initiative, the police force also established Gender and Children's Desks at 417 police stations in 2012 to receive complaints and to investigate and prosecute cases of the violation of women's and children's rights.

Nonetheless, the quality of the services delivered by the Gender and Children's Desk units and the skills and knowledge of the police officers staffing these Desks were found to vary hugely and did not generally meet the standards set out in the guidelines for its establishment and the laws in response to gender-based violence and child abuse of 2012. So far, there is only one established shelter for victims of gender violence in Tanzania. This situation complicates the enforcement of the law in terms of gender-based violence. After running to the police station and reporting their cases, most victims end up having nowhere to shelter and consequently they are forced to reconcile with the perpetrator to survive. The curriculum of police training institutions was also reviewed to include women's rights issues, which is something that has enabled more police graduates to carry out gender sensitive law enforcement.

It has been established that the Commission for Human Rights and Good Governance (CHRGG) and the Law Reform Commission of Tanzania (LRT) are among the government institutions that promote equality in Tanzania. The CHRGG receives and investigates allegations and complaints of human rights violations and contraventions of the principles of administrative justice. It also conducts public hearings on these matters, proposes compensation where appropriate, initiates proceedings on its own, and handles individual complaints concerning the violation of human rights generally, with vested rights to investigate, conduct hearings, and settle disputes. The CHRGG promotes and advises by educating the public about human rights and good governance issues, carries out research on human rights and good governance, and monitors compliance with human rights standards and principles of good governance. It also advises the government and other public organs and private sector institutions on specific issues relating to human rights and administrative justice and offers mediation and conciliation through alternative conflict resolution.

However, the CHRGG is barred from investigating the President, who can direct the Commission to discontinue an investigation, although the law requires the President to provide reasons for doing so if he considers that there is a real and substantial risk that the investigation would prejudice matters of national defense or security. Furthermore, the CHRGG has not yet developed its capacity to serve the whole country as it operates through other government related organs, such as the Good Governance Coordination Unit in the President's office, the Prevention of Corruption Bureau, the police, and civil society organizations. So far, there have been too few cases since its establishment to conclude whether the government does act on the findings of the agency. Generally, the CHRGG does not respond to citizens' complaints within a reasonable time, but the response period seems to depend on the importance of the case and the status of the complaint or the complainant.

Additionally, the Law Reform of Tanzania (LRT) agency reviews any law or branch of law and recommends ways and measures through which that law or branch of the law can be improved or made simpler and updated in line with human rights and the current circumstances of Tanzania. It also revises and simplifies complex laws for public consumption. It has also researched, reviewed and prepared a number of reports related to the protection of women's human rights, such as a report on criminal law as a vehicle for the protection of the right to personal integrity, dignity and liberty of women; a report on laws relating to the Sexual

Offenses Special Provisions Act of 2009; a report on laws relating to succession and inheritances of 1995, and a report on the Law of Marriage Act of 1995.

The findings show that the government has been reluctant to work on the recommendations of this Commission. For instance, as far back as twenty years ago the Commission suggested amendments to the Law of Marriage Act and laws relating to succession and inheritance that undermine and discriminate against women, but thus far the government has not considered any of those recommendations. Tanzanian female members of parliament also established a parliamentarians' caucus, the Tanzania Women's Parliamentary Group (TWPG), which is made up of political parties' women's wings and which unites women irrespective of their political affiliation in order to address gender issues and women's rights in a more focused way in parliament. An objective of the TWPG is to facilitate efforts to render women effective legislators and to demonstrate leadership on national policy issues and law making. The body also aims to increase awareness on gender equality, women's rights issues, and gender responsive budgets.

On the other hand, there are non-state actors in Tanzania who are involved in the promotion and protection of women's rights. These include actors in civil society, the media, trade unions and political parties. They complement the work of the government by promoting human rights through various activities. For example, civil society structures conduct and broadcast public awareness programmes to the government and the public on human rights issues; they monitor and publicize human rights violations; and they conduct strategic litigation and provide legal aid in various cases. The media is a vehicle for the promotion of freedom of opinion and expression through various programmes. It is also a means of imparting knowledge and disseminating information to the public.

Civil societies also have been providing a critical foundation for holding the government accountable in order to ensure good governance. There are currently more than 6 173 NGOs registered under the Ministry of Health, Community Development, Gender, Seniors and Children. There are a number of prominent civil society organizations working on women's rights issues in Tanzania. These include the Tanzania Gender Networking Programme (TGNP), the Legal and Human Rights Centre (LHRC), the Tanzania Women Lawyers' Association (TAWLA), the Msichana Initiative, the Women's Legal Aid Centre (WLAC), the Tanzania



Legal Aid Organisation for Women and Children, and the Tanzania Media Women's Association (TAMWA).

Most of these organizations provide civic education, human rights training, and research work. These organizations have also been working collectively in the lobbying and advocacy fields and their collective efforts have had a notable influence on government policy in a number of key areas. The TAWLA-led Gender Land Task Force, for example, successfully introduced several amendments to the Land Act,<sup>42</sup> which now ensures that the final legislation is far more gender progressive on the questions of land inheritance and other issues than might have been expected. In addition, a TAMWA-led coalition helped to amend the Sexual Offences Act<sup>43</sup> so that it now provides greater protection and legal recourse to victims of rape and sexual violence. In order to consolidate these achievements, TGNP has been instrumental in the formation of a coalition of women's rights and civil society organisations called Feminists' Activities (FEMACT), which initiates joint initiatives on issues of common concern. The establishment of CHRGG was a result of intensive negotiations of non-governmental civil societies that had engaged in lobbying the government in terms of proposals for its establishment.<sup>44</sup> Their intervention ensured that the CHRGG's powers to investigate abuses were enhanced. The success of the aforementioned coalition has been derived mainly from their willingness to engage in constructive dialogue with the government rather than simply criticizing its stance on contentious issues.

Likewise, civil organisations in Tanzania have been involved in training government personnel such as police officers, prison officials and magistrates on human rights issues. This practice has opened up a space for civil society and government to engage collaboratively within the justice system. They provide legal aid services as well because there is no statutory legal aid service in Tanzania except in cases of murder and treason.

Most women in Tanzania cannot afford to hire the services of advocates or legal advisers, which is something that has resulted in unfairness and injustices in the administration of the law to the poorest members of the community and other vulnerable groups such as children. A number of NGOs have been providing free court representation for women and others most in

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<sup>42</sup>Land Act and Village Land Act No. 4 of 1999 and the Village Land Act No. 5 of 1999.

<sup>43</sup>Sexual Offences Special Provisions Act of 1998 (SOSPA).

<sup>44</sup>Ibid.

need to address this problem. They also initiate public interest cases in which a successful outcome might result in changes to the law for the benefit of women and other vulnerable groups. Even though most of the organisations involved in the legal aid sector are based in large cities such as Dar es Salaam, Arusha and Mwanza, a few have established legal aid clinics in the rural regions.

Civil societies that are involved in the provision of legal services have been striving individually to mobilize resources from different donors and agencies for the support of their activities. In some cases this has led to unnecessary duplication of efforts and funds. These organizations have succeeded in the promotion of women's human rights in the country, but the protection of the same has been a difficult task as, when they institute cases before a court of law that may involve a breach of international human rights, the court usually dismisses the case due to a lack of the domestication of the law.

The hands of the courts are tied with regards to either invoking or interpreting provisions of international human rights instruments without express and clear recognition of the covenant and a law transforming such instruments into domestic laws in Tanzania. Although some of the provisions of the covenants are embodied in the Constitution, the enforcement mechanism is not satisfactory because even the law that allows the enforcement of the basic rights and duties under the Constitution does not seek to guarantee maximum enjoyment of the fundamental rights and freedoms of everyone. Although the government and civil society structures have tried to play a role in women's rights education, public awareness campaigns and community mobilisation in attempting to address, minimise and eradicate gender-related cultural practices that perpetuate the violation of women's rights have been largely ineffective as their magnitude is still big in Tanzania, especially in rural areas.

Based on the above summary of findings pertaining to extra-judicial efforts to curb the violation of women's rights, the following recommendations are offered:

#### *5.5.1 Advocating for the domestication of CEDAW and the Maputo Protocol*

The Ministry of Health, Community Development, Gender, Seniors and Children should strengthen its commitment to advocate for the domestication of CEDAW and the Maputo Protocol. Civil society organizations, being an inseparable part of the movement towards the

promotion and protection of women's rights, need to continue introducing various roles to advocate for the incorporation of those international human rights treaties into domestic law. They need to keep on making the public aware that there are certain instruments that provide for the protection of their rights, but the government has not yet incorporated them into the domestic legal system. They need to inform the public about the losses they incur due to the non-incorporation of CEDAW and the Maputo Protocol. They can go further and state clearly that some of the human rights violations are the result of their irresponsible government for not incorporating the treaties and they should appeal for public support for the incorporation of these treaties. By doing that, a more responsive and accountable government will be created that will be likely to take heed of women's needs, and they will be abiding by the Preamble to the UDHR that provides as follows:

“Now therefore [the] General Assembly proclaims this UDHR as a common standard of achievement for all nations, to the end that every individual and every organ of the society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for this right and freedom...”

Civil society organizations should also involve themselves in research studies that focus on CEDAW and the Maputo Protocol and they should propose ways in which these instruments can be applied to the Tanzanian context. They can even share their proposals with lawmakers and actually get involved in the law-making system of the country.

#### *5.5.2 Legal aid and compensation for the victims*

The legal aid system needs to be well established to assist victims of harmful traditional practices. International organizations and donors should support and encourage the establishment of pools of lawyers and pro bono services through small legal aid funds to ensure effective legal representation of victims, especially in rural areas. It is also important that specific budgetary resources be devoted to the compensation of and reparation for victims.

Donors can also support the development of capacities for data collection and the management of the monitoring of and reporting on the progress of implementation. The establishment of shelters for women victims of violence is also paramount. Many victims hesitate to report their cases as they are not sure of their life thereafter. Having a good legal mechanism without

concomitant care for the victims will not be helpful. A good example is Ghana, where they have established camps to accommodate women victims of witchcraft allegations who are banished from their communities.<sup>45</sup>

### 5.5.3 *Raising awareness at grassroots level*

The majority of citizens in Tanzania, especially from rural areas where traditional harmful practices are prevailing most, are unaware of their human rights. Outreach programs that assist in raising people's awareness of human rights and the procedures for claiming for them are urgently needed in these regions. Education programmes must be conducted to sensitize communities about women's rights and to raise awareness about these harmful cultural practices and their effects. Stakeholders need to go to the villages to reach the targeted people. Advocacy, which focuses on respect for traditions, must be used to unite communities and to reinforce harmless practices that benefit all members. At the same time, those practices that damage the integrity and diminish the humanity of girls and women must be confronted as a matter of urgency.

The creation of public awareness is one of the most effective ways of bringing about change. It will help rural societies to know that their behaviour is inconsistent with acceptable standards and that some have major side-effects that they must be willing to change. This is because most people indulge in harmful practices because they were brought up to believe that it is a way of life. Sometimes children believe that these practices are part of their culture and identity even when the law has failed them. Some even opt to perform harmful, life-changing procedures on themselves. This is evidenced by what happened in Kenya, where girls of the Meru District resorted to cutting themselves as a consequence of the ban of female circumcision.<sup>46</sup> They did not necessarily have the intention to harm themselves, as they were just doing what they thought was right under the circumstances.

### 5.5.4 *Media sensitization*

The power of the media must be used to sensitize the awareness of women's rights in the country and to eradicate harmful cultural practices. The media has been identified as having

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<sup>45</sup>ActionAid International 'Condemned without trial: Women and witchcraft in Ghana' ActionAid International (2012). Available at [https://www.actionaid.org.uk/sites/default/files/doc\\_lib/ghana\\_report\\_single\\_pages.pdf](https://www.actionaid.org.uk/sites/default/files/doc_lib/ghana_report_single_pages.pdf) accessed on 27 November 2016.

<sup>46</sup>Action on Gender Equality 'Women's empowerment and ending violence against women in Africa' Issue Paper 1, Sixth African Development Forum, 19–21 November 2008, Addis Ababa, Ethiopia.

the unique capacity to convey messages and to influence massive groups within communities.<sup>47</sup> It has great potential to impact people's attitudes and is one of the quickest ways to impart information. It is an efficient and effective tool in public education via newspapers, radio, television, the internet and other multimedia information and communication systems that have the capacity to provide coverage all over the country and worldwide. The media should commonly sensitize people by reporting cases of harmful cultural practices and related matters. Addressing this point with regards to the practice of FGM, Abdoul Aziz Kebe, an expert in Islamic population and development issues, argues as follows:

“The problem is we talk about it [FGM] in our workshops and conferences, but we do not integrate it into our sermons and media programmes, largely because it is easier to simply lay down a moral law than engage in scientific explanations for barring FGM.”<sup>48</sup>

#### 5.5.5 *Interdisciplinary approach*

The implementation of CEDAW and the Maputo Protocol is not the sole responsibility of a ministry or government agency that is dealing with human rights alone as women's rights is a crosscutting issue which requires the efforts of all stakeholders. In this regard, state and non-state actors should collaborate to ensure effective implementation of CEDAW and the Protocol in all their dimensions. Scholars, organizations, national and international representatives, and activists in various fields must work together to utilize an interdisciplinary approach to the rights construct in order to implement existing rights in a fashion that includes and protects women. Such an approach will develop, expand, and transform the content and meaning of human rights in a manner that will reflect women's realities and include women's diverse perspectives. They need also to carry out monitoring of the implementation of CEDAW and the Maputo Protocol periodically and without complacency. In this regard, governments will have to demonstrate tremendous political will in order to counter socio-economic constraints and harmful cultural practices.

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<sup>47</sup>UN ‘Violence against women: Harmful traditional and cultural practices in the Asian and Pacific regions.’ Based on the report of the Expert Group Meeting on Regional Strategies for Implementing the Recommendations from the Secretary General's in-depth study on all forms of violence against women, with particular emphasis on harmful traditional and cultural practices and the role of national women's machineries, April 2007, UN Conference Centre. Available at [www.unescap.org/ESID/GAD/Publication.pdf](http://www.unescap.org/ESID/GAD/Publication.pdf) accessed on 20 July 2016.

<sup>48</sup> Maimela M. *Combating Traditional Practices Harmful to Girls: A Consideration of Legal and Community-Based Approaches* (mini-dissertation submitted in partial fulfilment of the requirements for the degree Magister Legum in the Faculty of Law, University of Pretoria (2009) 32.

### 5.5.6 *Individual accountability in terms of the protection of women's rights*

Changes in national legislation will not in themselves ensure the attainment of women's rights, unless extensive educational and advocacy campaigns at various levels throughout the country are launched to support the legal processes that are carried out. Every citizen in our society needs to take responsibility for protecting women's rights. This responsibility is derived from the Constitution of the United Republic of Tanzania as stated by the late Justice Lugakingira:

“The Constitution of the United Republic of Tanzania provides for various duties. That means everyone has a certain duty to society and is bound to discharge that duty towards the community as indicated in Articles 25 to 28 of the Constitution.”<sup>49</sup>

Social power relations among the various actors, their internal values and wider social norms are illuminated as critical factors within the realities of the whole process of justice. Ultimately, legal claims are shaped and determined by social power relations.

## 5.6 **Conclusion**

While it is compulsory to implement and enforce any laws that perpetuate traditional harmful practices, sometimes these harmful traditions seem impossible to change. Still, it is the duty of the state, regardless of the political, economic and cultural systems that prevail in the country, to protect all human rights and fundamental freedoms. Using the law to address harmful traditional practices is necessary, and an effective legal framework should be implemented as a main tool to change harmful legal and social settings. The benefits of using the law to address traditional harmful practices will include sending out a message to society as a whole that these customs are violations of women's rights and that they will not be tolerated. It will also build a sense of understanding that women are as important individuals as their male counterparts.

However, mere illegalisation or criminalization of harmful practises usually results in resentment and resistance. The rising rates of the abuse of women's rights despite the existence of CEDAW and the Maputo Protocol suggest that the law alone cannot control human beings' harmful behaviour. The implementation of CEDAW and the Maputo Protocol will only become

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<sup>49</sup>The Late Justice Lugakingira in the case *Rev. Christopher Mtikila v AG* (1995) TLR 31.

effective when their provisions are integrated into aspects of comprehensive eradication strategies. Harmful and discriminatory aspects of social life need to be changed. It is therefore crucial to supplement the law with more practical methods, including engagement with traditional and religious leaders, peer education, engagement with state actors, and the development of symbolic alternatives in order for women in Tanzania to reap the promises of CEDAW and the Maputo Protocol.

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