



Tanzania Women Judges Association (TAWJA)

# Gender Bench Book On Women's Rights

Supported by:



## **EDITORIAL TEAM**

Hon. Salum Massati

Hon. Dr. Marry Levira

Hon. Rehema Kerefu Sameji

Hon. Joacquine De-Mello

Hon. Robert Makaramba

Hon. Dr. Fauz Twaib

Hon. Dr. Zubeda Z. T. Masabo

Hon. Anipha Mwingira

Hon. Kifungu Mrisho

## **Research Assistant:**

Hon. Anipha Mwingira

Hon. Kifungu Mrisho

## **Project Officer:**

Asha Komba

## **Technical Support (UN Women):**

Beatrice Duncan

Racheal Boma

Janette Amer

Julia Broussard

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# PREFACE

With the support of UN Women Tanzania, Tanzania Women Judges Association (TAWJA) has been implementing a project titled “*Strengthening the court system in management of Violence Against Women (VAW) cases*” which included the development of this Judicial Gender Bench Book on Women’s Rights for Tanzania Mainland. Under this project, TAWJA intends to strengthen, equip and impart new knowledge and skills to members of the association and other members of the judiciary on relevant laws and their application and interpretation, and how to approach decision-making in cases where issues of gender arise in line with relevant global and regional gender equality norms and standards.

It has been a pleasure for TAWJA to be in the forefront of this initiative which will undoubtedly raise the profile of the association locally, regionally and internationally on gender sensitivity within the Judicial functions. The Bench Book, with its focus on the rights of women, addresses the adverse impact of discriminatory practices on the ability of women to gain access to justice. It is obvious that women’s development and empowerment in every aspect of their lives rely upon systems of law and justice that work for the women and vulnerable groups in society. Lessons were drawn from the Commonwealth initiatives in the East Africa Region which positioned the rights of women in four countries, i.e., Kenya, Rwanda, Tanzania and Uganda<sup>1</sup>. TAWJA is proud to have developed the Bench Book, driven by our own members’ initiative with technical and financial support from UN Women, which has been designed for our local usage. The Bench Book is user-friendly in all senses as it serves the purpose of being a handbook and a working tool for daily reference by judicial officers with a gender-sensitive eye.

The Bench Book is another effort by TAWJA in accelerating its creative actions in fulfilling its role of imparting and disseminating changes in Human Rights, gender knowledge and skills to Judicial Officers as part of our continuing contribution to capacity building within the judicial system. Producing this Bench Book on women’s rights includes a strong element of the management of VAW/C cases in Tanzania and has been a participatory and a learning experience, drawing upon the professional reflections and written submissions from human rights, gender experts and legal practitioners at various levels of the justice system in Tanzania including the Court of Appeal, the High Court and the Law School of Tanzania. The experience of retired and sitting Judges also made a valued contribution to the undertaking.

Grounded in the equality and dignity of the person, TAWJA is the principle that Gender Equality in the Justice System is an important choice if the system is truly committed to its vision of justice for all and ending the cycle of poverty. In this Bench Book, areas of law specific to gender-based violence against women and children are highlighted with references to decided cases that carry a gender perspective.

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<sup>1</sup> Commonwealth Secretariat, *Judicial Bench Book on Violence Against Women in Commonwealth East Africa* (E-book), January 2017.

In addition to addressing gaps in judicial outcomes and procedures, the Bench Book also reacts to gaps identified in adhering to International and Regional Women Rights Standards.

Every Judicial Officer is encouraged to pay attention to the social context, the embedded bias systems due to gender stereotypes, discrimination and unequal division of labour and access to productive resources; how social and economic power is used to dominate and control and not to empower the powerless; the manifestations of gender based violence and how gender inequalities become the basis for gender based violence and its impact on society, development and the judicial system. Specific areas of law addressed in the Bench Book include reference information that is easy to use and could facilitate the work of judicial officers in addition to laws and legal knowledge available through legislation. The Bench Book supports the State in responding to recommendations made at the international and regional levels on appropriate ways of improving the administration of justice and promoting gender equality. Universal Periodic Review (UPR) submissions highlighted concerns focused on Children's Rights and the Rights of vulnerable groups, in particular Sexual Abuse as well as Rights of Widows, among others. List of issues and questions raised in the combined seventh and eighth Periodic Reports of the United Republic of Tanzania to the Committee on the Elimination of Discrimination Against Women discussed in 2015/2016 ranged from definition of Discrimination Against Women in accordance with Article 1 of the CEDAW Convention (para. 4); several sector-specific laws that do not ensure substantive equality of women with men, e.g. inheritance laws, the Marriage Act; the provision of free legal aid, barriers to women's access to justice; limited access to information about their rights, lack of support in pursuing those rights and high legal costs.

Issues addressed in the CEDAW committee recommendations were among others on the public's attitudes and mindsets regarding social and cultural patterns that lead to gender stereotyping of the roles of women and men in the family, the community and the society. This leads to prevalence of harmful practices such as early and forced marriage, female genital mutilation, "widow cleansing", the killing of older women; high prevalence of violence against women; the lack of specific legal provisions on domestic violence, including marital rape, stigma surrounding child survivors of gender-based violence and girls and women who are victims of human trafficking and sexual exploitation. It is fitting that UN Women has wholeheartedly supported the Tanzania Judiciary and TAWJA to address gender gaps in Access to Justice identified at the national, regional and international levels through a Bench Book on women's rights. It is hoped that Judicial Officers will find this Bench Book a sustainable and useful working reference tool in ensuring judicial outcomes and judgements which provide women, girls and other vulnerable groups equal access to justice and portray a justice system that is gender-aware, sensitive and transformative.

# FROM CHIEF JUSTICE CHAMBERS/DESK

It is common knowledge that access to justice and service delivery for marginalized groups such as women is severely constrained due to socio-economic, political, legal and, governance factors. I strongly believe this Gender Bench Book will enhance, not only the gender responsiveness of the judicial system, but also raise further the profile of women's rights as human rights. This Bench Book gives practical effect to the Constitution of the Tanzania Women Judges Association, which seeks to promote the rights and advancement of women, through impartial administration of justice and, to develop, uphold, protect and to promote the advancement of gender equality in all aspects of the administration of justice.

I appreciate the efforts that, have gone into making this Bench Book possible. I applaud women Judges and magistrates, who, despite their daily judicial workloads, still found time to put together this work.

As the prevailing institutional barriers; complex legal procedures; and deeply entrenched patriarchal bias shows, the road ahead is still long and treacherous. Yet, this work gives me great comfort and immense hope that with a very determined professional group like the Tanzania Women Judges Association, the building blocks that sustain gender inequalities and gender-based violence will surely be forced down sooner than later. I remain optimistic that the resourcefulness of this Bench Book will continue to broaden and sharpen the comprehension of women's rights and gender equality at the heart of the national development agenda.

It is my hope that TAWJA will continue to find even more ways beyond this Bench Book of mainstreaming gender justice in the legal and socio-economic fabric of Tanzania.

I commend TAWJA, its leadership and all the Judges and Magistrates who wholeheartedly volunteered their time towards the preparation of this Bench Book which has raised the profile of TAWJA to a higher level. The Judiciary of Tanzania values the immense support, which TAWJA gets from UN Women, the global champion for gender equality and women's empowerment. UN Women's steadfast support is highly appreciated.

Without any doubt, the critical thrust behind success and vibrancy of the Tanzania Women Judges Association is its ordinary members, who I salute for keeping the candle of gender justice burning.



**Hon. Prof. Ibrahim Hamis Juma**  
**CHIEF JUSTICE**

# FOREWORD

Thirty-six years ago, Tanzania ratified the Convention on the Elimination of All Forms of Discrimination (CEDAW). The CEDAW and other treaties, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), clearly articulate how discrimination is demonstrated in all areas of life, and how the law can benefit women and men equally, declaring that States must act to eliminate violations of women's rights whether by private persons, groups or organizations. The treaties map out a broad range of actions that States must take to respect, protect and fulfill those rights, and furthermore, the CEDAW Committee's General Recommendation No. 33 on Women's Access to Justice, adopted in July 2015, stresses the importance of women's access to justice in diverse legal systems and in all areas of law for all women. The General Recommendation further situates the obligations of States Parties to ensure women have access to justice.

Violence against women girls is a stark reality in the lives of many women and girls in Tanzania. According to government data, 41,000 cases of violence against women were reported in 2017 alone. The Tanzania Demographic and Health Survey 2015-2016 shows that forty percent of women aged 15-49 have experienced physical violence, and 17% have experienced sexual violence. Thanks to the government's unwavering commitment to combatting the issue, including those made in the National Plan of Action on Violence Against Women and Children 2017-2022, significant progress has been made as evidenced by an increase in awareness on women's rights and consequently, an increase in reporting of cases of violence against women. However, there is still work to be done in order to achieve substantive gender equality and provide women who are victims of violence with the access to justice they are entitled to.

The judiciary has a powerful role to play in the response to violence against women and girls and in women's rights generally. It has a unique role in ensuring that associated legislations are enforced, holds perpetrators accountable, keeps women and girls safe and that through the justice sector, both national and international standards and norms are upheld. Access to justice women is a critical component of delivery of justice at the national level in-line with the Strategic Plan for the Judiciary 2020-2025.

With the support of the Government of Sweden, UN Women is implementing a programme on women's access to justice. The programme has partnered with TAWJA on several initiatives, including the production of this Gender Bench Book on Women's Rights. The Bench Book seeks to provide an accessible, user-friendly reference guide for judicial officers to protect the rights of women and girls, to strengthen the gender-responsiveness of judgements on cases, and to ensure that women and girls are treated with the dignity and respect they deserve. UN Women is proud to have supported the development of this Gender Bench Book, which I believe should be an essential tool for the achievement of gender justice. UN Women provided technical support through UN Women pool of expertise and provided international good practices from Uganda and Bangladesh.

It is my hope that this publication will be of great benefit to judicial actors in Tanzania, and that it will make a valuable contribution to efforts to achieve a safer nation, where the rights of women and girls are fully realized.



**Hodan Addou**  
**UN Women Representative**

# ACKNOWLEDGMENT

The Tanzania Women Judges Association (TAWJA) is grateful to those who presented the idea of preparing a Judicial Bench Book on Women’s Rights to UN Women, who in turn responded generously by providing the technical and financial support which facilitated the accomplishment of this publication. Specifically, we acknowledge the UN Women technical inputs from Beatrice Duncan, Racheal Boma, Julia Broussard and Janette Amer. In addition, we are grateful to the editing committee and our project staff, for their roles in coordinating, and preparing the document for printing and publishing.

We are particularly indebted to Retired Justice Eusebia Munuo, a former President of the International Association of Women Judges (IAWJ), who patiently went through the document and made significant improvements thereto.

Special thanks go to the coordinating team and to individual contributors who assiduously participated in drafting the various chapters. We recognize and appreciate the support of the TAWJA Executive Committee under the leadership of the then Chairpersons Honourable Judges Eusebia Munuo, Engera Kileo, Iman Aboud and currently Joaquine De Mello, for their tireless vision, guidance and efforts in ensuring that expectations are met as planned in producing a Bench Book that is readily comprehensible and will make a contribution towards reaching the vision of equal justice to all. This could not be achieved if not for the readiness, willingness and volunteerism of the team despite their demanding chores and routine Court and other functions. In this regard, we recognize and acknowledge Hon. De-Mello the Chairperson, Hon. Rehema Kerefu Sameji, Hon., Hon. Anipha Mwingira, Hon. Kifungu Mrisho, and Epiphania Mfundo for their commitment.



.....  
**Judge Joaquine de Mello**  
**Chairperson**



.....  
**Judge Zainabu Mango**  
**Secretary**

**TANZANIA WOMEN JUDGES ASSOCIATION**

# ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights (Banjul Charter)
ADR	Alternative Dispute Resolution
AU	African Union
BPFA	Beijing Declaration and Platform for Action
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CHRAGG	Commission for Human Rights and Good Governance
CMA	Commission for Mediation and Arbitration
CPA	Criminal Procedure Act
CRC	Convention on the Rights of the Child
CSO	Civil Society Organizations
DDR	Disarmament, Demobilization and Reintegration
EAC	East African Community
ELRA	Employment and Labour Relations Act
FGM	Female Genital Mutilation
GBB	Gender Bench Book on Women's Rights
GBV	Gender-Based Violence
HCT	High Court of Tanzania
HRC	Human Rights Committee
HIV/AIDS	Human Immune Virus/Acquired Immune Deficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPD	International Conference on Population and Development
ICT	Information and Communications Technology
IGP	Inspector General of Police
ILO	International Labour Organization
IWJA	International Women Judges Association
MCA	Magistrates Court Act
MDG	Millennium Development Goal
NPAVAWC	National Plan of Action to end Violence Against Women and Children
OHCHR	Office of the High Commissioner for Human Rights
PC	Penal Code

PCCA	Prevention and Combating of Corruption Act
PCCB	Prevention and Combating of Corruption Bureau
PCMs	Primary Court Magistrates
PF3	Police Form 3
PLHIV	Person Living with HIV
PMCT	Prevention of Mother-to-Child Transmission of HIV
R.E.	Revised Edition
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SOSPA	Sexual Offences Special Provisions Act
SRHRs	Sexual and Reproductive Health Rights
SSR	Security Sector Reform
TAWJA	Tanzania Women Judges Association
TCA	Tanzania Court of Appeal
TGP	Tanzania Gender Policy
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN-DEVAW	United Nations Declaration on the Elimination of Violence Against Women
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UN-DEVAW	United Nations Declaration on Violence Against Women
UNDP	United Nations Development Programme
UNESCO	United Nations Education, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolutions
UPR	Universal Periodic Review
URT	United Republic of Tanzania
VAC	Violence Against Children
VAW	Violence Against Women
VAW/C	Violence Against Women and Children
WHO	World Health Organization
WRs	Women's Rights

# GLOSSARY OF TERMS

Access to justice	UNDP <sup>1</sup> defines access to justice as more than improving an individual’s access to courts or guaranteeing legal representation in terms of ensuring that legal and judicial outcomes are just and equitable. But broadly speaking, it engages the wider social context of our court system, and the systemic barriers faced by different members of the community. UNDP therefore defines access to justice as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, in conformity with human rights standards. It is an important driver of change and means of implementation of the Sustainable Development Goals (SDGs).
Access to justice by women	Women’s access to justice is critical because when justice institutions are gender responsive, they support women to assert and claim their social, economic, cultural, political and civil rights because they tend to be the poorest segments of their societies and consequently, lack voice and agency.
Affirmative action	A policy, program or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life.
Best interest of the child	The Law of the Child Act No. 21 of 2009 in section 4 (2) states that, the best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies.
Charter	The term ‘Charter’ is used for particularly formal and solemn instruments, such as the treaty founding an international organization like the United Nations (‘The Charter of the United Nations’).
Convention	A ‘Convention’ is a formal agreement between States. The generic term ‘Convention’ is thus synonymous with the generic term ‘treaty’.
Discrimination	Any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of an individual’s human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
Domestication	States achieve the incorporation into their domestic laws (domestication) of multilateral or bilateral treaties (international obligations) of which they are parties, so that the rights and duties contained in such treaties may become applicable and enforceable domestically in the States concerned.
Equality	The state of being equal in terms of enjoyment of rights, treatment, quantity or value, access to opportunities and outcomes, including resources. Gender Equality is equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys.

Equity	The quality of being fair and impartial or the absence of avoidable or remediable differences among groups of people, whether those groups are defined socially, economically, demographically, or geographically.
Gender	Gender is a social construct that refers to differences between women and men and the attributes associated with being female or male. The Bench Book focuses also on gender-based violence which refers Gender-Based Violence (GBV) as violence that is directed at an individual based on his or her biological sex. It includes physical, sexual, verbal, emotional, and psychological abuse, threats, coercion, and economic or educational deprivation, whether occurring in public or private life. Gender-based violence is an issue faced by people all over the world. Women and girls are disproportionately affected by gender-based violence <sup>2</sup> . That is why the Judicial Bench Book focuses on the role of the judiciary in ending violence against women and ensuring the law does not discriminate against either sex.
Gender Equity	Just and fair distribution of benefits, rewards and opportunities between women, men, girls and boys.
Gender mainstreaming	The process of identifying gender gaps and making the concerns and experiences of women, men, girls and boys integral to the design, implementation, monitoring and evaluation of policies and programs in all spheres so that they benefit equally.
Gender stereotypes	Beliefs held about characteristics, traits, responsibilities, and activity domains that are deemed appropriate for women, men, girls and boys based on their Conventional roles both in private and public spheres.
Human trafficking	The recruitment, transportation, harbouring or receipt of persons, by means of threat, abuse of power, position of vulnerability, force or other forms of coercion, abduction, fraud or deception to achieve the consent of a person having control over another person for the purpose of, amongst other things, sexual and financial exploitation.
Juvenile Justice	Of particular relevance to the implementation of this provision are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), known as the Beijing Rules. Noteworthy are also the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (1990).
Ratification	'Ratification' is an act by which a State signifies an agreement to be legally bound by the terms of a particular treaty. To ratify a Treaty, the State first signs it and then fulfills its own national legislative requirements.
Secondary victim	The victim affected by violence, without being the main target originally.

Sex	In our everyday language, we often use these terms interchangeably, but they do have different meanings but sex refers only to “the biological characteristics that define humans as female or male.” For this reason, the book mentions Sex-based discrimination referring to differential, unequal and unfavourable treatment based on the sex of the person (for example, if an enterprise hires only women for certain lower posts and men for higher posts).
Sextortion	A type of corruption and exploitation that involves non-physical forms of coercion to extort sexual favours from the victim. Sextortion refers to the broad category of sexual exploitation in which abuse of power is the means of coercion, as well as to the category of sexual exploitation in which threats are used to control.
Sexual harassment	Any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another whether such sexual advance or request arises out of unequal power relations.
State party	A ‘State party’ to a Treaty is a country that has ratified or acceded to a particular Treaty/Convention and is therefore legally bound by the provisions in the instrument.
Sustainable Development Goals.	World Leaders under the auspices of the UN endorsed a plan called the Sustainable Development Goals (SDGs), a set of 17 goals that target a future just up 2030 that would be rid of poverty and hunger, and safe from the worst effects of violence and climate change.
Treaty	A ‘treaty’ is a formally concluded and ratified agreement between States. The term is used generically to refer to instruments binding at international law, concluded between international entities (States or organizations). Under the Vienna Convention on the Law of Treaties, a Treaty must be (1) a binding instrument, which means that the contracting parties intended to create legal rights and duties; (2) concluded by states or international organizations with Treaty-making power; (3) governed by international law and (4) in writing.
Victim/Survivor	The current practice is the use of the word “survivor” when referring to the recipient of violence, regardless of the reaction of the recipient, since the word victim suggests weakness, compassion and surrendering while the word “survivor” suggests resilience and strength.

*NOTE: - Definitions were sourced from: [unfpa.org/sites/default/files/pub-pdf/5-Glossary-of-GBV-Terms-and-Vocabulary](https://unfpa.org/sites/default/files/pub-pdf/5-Glossary-of-GBV-Terms-and-Vocabulary), <https://www.unicef.org/crc/files/Definitions>, Wikipedia and Oxford Dictionary.*

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# EXECUTIVE SUMMARY

**B**ench Books are now common in many countries. The main purpose of Judicial Bench Book is to avail judicial officers with ready references and provide guidance on a range of areas such as procedure or evidence while hearing cases, be they civil or criminal. They could be on general subjects or on more technical areas, but they have never been used as substitutes for substantive law<sup>2</sup>.

In a modest attempt to generate interest and bolster capacity of judicial officers and other stakeholders in their duties, the Tanzania Women Judges Association (TAWJA) has come up with this Judicial Bench Book on Women's Rights. While the broader aim in any system of administration of justice is to promote and render equal justice to all, this Judicial Bench Book focuses on the particular area of the rights of women in Tanzania Mainland.

The purpose of this Bench Book therefore is to provide ready references for judicial and other law enforcement officers, materials that they might need to consult in the course of disposing cases relating to violence to women and children. It is expected that this book will provide additional knowledge on the areas covered.

To enable easy access to each relevant materials as and when required, this book is divided into six chapters. The first chapter focuses on international human rights law. It is noted that any discussion on human rights in Tanzania is necessarily interwoven with international law, because by their very nature, human rights are universal. In fact, the Constitution of the United Republic of Tanzania enjoins the state to ensure that the human rights detailed in the Constitution are administered in accordance with the principles of The Universal Declaration of Human Rights. So the chapter covers not only the sources of international law, but also the application of international law by domestic courts and a preview of several relevant international Conventions and Charters that have been ratified, and some domesticated in Tanzania.

The second chapter examines, briefly, the prevalence of gender violence in Tanzania and the efforts made by the authorities in combating it by applying both international and domestic law. It also brings to the reader's attention how the judiciary has been proactively responding. In the third chapter, the dominant discussion is on access to justice, especially by vulnerable groups such as women and children. The various challenges and efforts made by the authorities are revisited.

The fourth chapter covers family, gender and social relations. It is an overview of the laws on the foundation of the family and related issues, such as marriage, divorce, custody and maintenance of children and spouses. Chapter five takes the reader through some aspects of labour law that directly affect children and women. The chapter pays particular attention to discrimination against women and inequalities at workplaces, the right to maternity leave,

<sup>2</sup> (WIKIPEDIA 19<sup>th</sup> October 2019).

and payment of emoluments. It also examines the position of the law on child labour as well as good practices from other jurisdictions and international standards of labour and several directions issued by the ILO.

The last chapter gives a bird's eye view of some legal aspects of women and children's rights to property. Particular attention is paid to the land laws, the Law of Marriage Act, mortgage and succession, and how they impact on the property rights of these vulnerable groups. It is hoped that the consumers for which the book is intended will find it useful.

# GENERAL INTRODUCTION AND BACKGROUND INFORMATION

The United Republic of Tanzania's endorsement of the 2030 Agenda for Sustainable Development marks a paradigm shift in development through 17 Sustainable Development Goals (SDGs) which are expected to transform the lives of all Tanzanians. The values behind the SDGs recognize violence in any form as one of the destructive challenges that affect the development, growth and wellbeing of human beings. Unaccountable legal and judicial systems that deprive people of their human rights and fundamental freedoms constitute forms of violence and injustice<sup>3</sup>:

SDG 16 has targets that specifically take account of the role of the judiciary in: – *“Significantly reducing all forms of violence and related death rates everywhere; ending abuse, exploitation, trafficking and all forms of violence against and torture of children and promoting the rule of law at the national and international levels and ensure equal access to justice for all”*.

On the other hand, SDG 5 requires urgent action to eliminate the many root causes of discrimination that still curtail women's rights in private and public spheres. It underlines the importance of gender equality in strengthening the rule of law. Integrating gender in laws and policies and court procedures is instrumental in bringing about equitable, accountable and fair legal and strong justice institutions that caters to the needs of a wider population<sup>4</sup>.

The commitment to gender equality and the empowerment of women and girls (SDG 5) and commitment to promoting peaceful and inclusive societies and the provision of access to justice for all (SDG 16) present enormous opportunities to make a difference in the lives of women and children through the momentum afforded by these pledges. SDG 16 in particular, is unprecedented as issues of peace, justice and inclusion had been ignored in previous global development agendas.

General Recommendation No. 33 on Women's Access to Justice of the Committee on the Elimination of Discrimination Against Women (CEDAW GR 33) was one of the first formulations of the manner in which SDG 5 and SDG 16 intersect:

“The right to access to justice for women is essential to the realization of all the rights protected under the Convention on the Elimination of All Forms of Discrimination against Women. It is a fundamental element of the rule of law and good governance, together with the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and corruption, and the equal participation of women in the judiciary and other law implementation mechanisms. The right to access to justice is multidimensional. It encompasses justifiability, availability, accessibility, quality, provision of remedies for victims and the accountability of justice systems.”

<sup>3</sup> <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals>.

<sup>4</sup> <https://www.undp.org/content/undp/en/home/blog/2019/promoting-gender-equality-in-the-judiciary.html>.

Discriminatory justice systems deny women and their families' protection, accountability and reparation, leading to impunity for perpetrators and a cyclical pattern of further violations. Justice is a right in itself as well as an enabler of all other rights. Yet many women and girls, particularly those who face multiple and intersecting forms of discrimination are excluded from justice. The effective implementation of the 2030 Agenda for Sustainable Development is not conceivable without access to justice. If the commitment of leaving no one behind is to be attained, justice services must reach the excluded. When women's rights are protected through effective justice systems, pathways are created for inclusion, poverty reduction and sustainable peace.

## **Purpose and Operational Considerations in Drafting the Bench Book**

This Bench Book is an essential working tool that adds support to the application of relevant international laws, regional obligations and national laws in working towards achieving justice for all with a focus on gender justice. Its purpose is to make available an essential resource for judicial officers considering legal issues relevant to women's rights, VAW/C. It is expected that this Bench Book will assist judicial officers in acquiring additional knowledge while making decisions and writing rulings and judgments which will reflect gender equality norms and standards. Reference to relevant international and regional Conventions is reiterated based on the established judicial function that courts have a duty to protect women from violence and to interpret and apply the law within the context of those applicable international obligations to which Tanzania is bound, thereby developing and strengthening a jurisprudence of equality in all cases.

Tanzania ratified the Convention on the Elimination of All Forms of Discrimination (CEDAW) in 1985 and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (the Maputo Protocol) in 2007. The Bench Book complements government efforts under the National Plan of Action to End Violence Against Women and Children in Tanzania - 2017/18 – 2021/22 by augmenting the capacity of judicial officers so as to encourage best practices in gender equality and improve reliability of judicial experiences for victims in cases involving gender-based violence/violence against children and meet legal expectations. This Bench Book does not seek to epitomize the views of judicial officers as to the manner in which they should respond to gender-based violence related cases and balance the interests of all participants. Rather, it provides background information and knowledge, social economic realities, basic principles, practical guidelines and best practices - linked to international human rights law and case law for courtroom management that judicial officers may refer to when processing the scope of issues and appropriate course of action in individual cases. Apart from skills and knowledge development targeting judicial officers, the Bench Book is also expected to serve as a resource in evolving a gender jurisprudence which would provide substance to the legal scheme of protective discrimination in favour of women and girls. It is structured to be reader-friendly and accessed as additional reference material on procedures and gender-responsive guidelines for enhanced access to justice to the marginalized. The Bench Book is a publicly available resource that is also intended to benefit other legal professionals, academics, social and legal researchers, civil society working in the areas of gender justice and legal and para-legal service providers who are dealing with victims and perpetrators of gender based violence, violence against women and violence against children.

The development of this Bench Book is also intended to support its TAWJA's general position on the need to understand the power of gender as a social process and how it relates to the judiciary and identifies a range of court procedures that result in building gender responsive justice institutions. The Bench Book thus provides a practical guide and a working tool on how to apply the general principles and conduct hearings while applying human rights and gender equality perspectives. The content of the Bench Book relates to the law, practices and procedures needed by Judicial Officers to perform their duties on a day-to-day basis.

In drafting the Bench Book, the involvement of stakeholders and consultations were key in assessing the need for it. An analysis of targeted audience was done, and key thematic areas were identified. Needs assessment included desk review, situation report, stakeholders and gaps analysis. Based on the assessment, the outline and structure of the Bench Book were designed and shared with the editorial team for consensus building and approval. Comments were incorporated on the structure from the editorial team and a draft Bench Book was developed and reviewed.

The Bench Book also benefitted from expert group validation meetings, which brought together members of the judiciary, government officials, civil society organizations and UN Women in Tanzania. Comments from stakeholders were incorporated before the draft was finalized. However, in compliance with TAWJA internal policy, authorship of its publication is not attributed to individuals or other organisations.

## **How to use the Judicial Gender Bench Book on Women's Rights**

This Bench Book may be referred to as "the GBB". The uniqueness of this Judicial Gender Bench Book is that it provides particular emphasis and reference materials for judicial officers and other users. However, the Bench Book is not a substitute for substantive law, but a guide for quick reference that includes international human rights Conventions, relevant statutes, case law, rules and regulations, bye-laws and Chief Justice' Circulars and Directives. It should be used in close reference to other judicial Bench Books, training manuals and other guidelines published by the Judiciary of Tanzania or adopted from international and regional sources. Judicial officers are also encouraged to appreciate the socio-economic and cultural environment in which laws are enforced.

The Book is resourceful on legal procedures and gender-responsive guidelines when deciding cases. It is designed to be read as a whole book or in sections related to the various topics and sub-topics covered. The thematic areas or chapters are condensed with adequate information under subtopics to cover most legal aspects required.

The style of presentation of the Bench Book includes introduction of the theme by reflecting on situation analysis in the country, international, regional and national standards involved and case law. Lists of cases and statutes referred to are available at the beginning of the book for easy access. Reference materials referred to are at the end of each chapter.

## **User Feedback**

Information contained in this Judicial Gender Bench Book on Women's Rights is considered updated and correct. However, since the law is not stagnant and circumstances may change including legal reforms after its publication, there could be a change in the accuracy and reliability of the information contained. Revisions will be made from time to time to ensure accuracy, reliability and clarification of the information displayed in this Bench Book. It is essential that readers and users take the initiative to provide feedback which is to be sent to the following:

Tanzania Women Judges Association,  
24 Kivukoni Road, P O Box 9004, Dar es Salaam,  
Phone: +255 22 2123897.  
E-mail: [info@judiciary.go.tz](mailto:info@judiciary.go.tz)

# CHAPTER ONE

## HUMAN RIGHTS AND INTERNATIONAL LAW

### 1.0. Introduction

Women and children’s human rights, which are the subject matter of this Bench Book, are human rights in themselves. It is impossible to discuss human rights without reference to international law. Article 9 of the Constitution of the URT commits as its overall objective the building of a nation of equal and free individuals enjoying freedom, fraternity and concord. The same Article enjoins the state to preserve and uphold human rights in accordance with the spirit of the Universal Declaration of Human Rights, also referred to as the fundamental law of human rights.

Therefore, it is important to examine the relevance of international law in the context of women and children’s rights in Tanzania. Given the above-identified significance of international law, this chapter therefore covers two important areas: Sources of international law in which various international and regional statutes ratified by Tanzania will be examined and the application of international law by domestic courts.

### 1.1. Sources of International Law

According to section 38(1) of the Rome Statute of the International Court of Justice (ICJ), the sources of international law are: treaties, international customs, general principles of law recognized by civilized nations, judicial decisions of national courts and scholarly writings.

#### 1.1.1. Treaties and Conventions

These are written agreements that states willingly sign and ratify and so are obliged to follow. They are sometimes called statutes or Protocols. Treaties and Conventions may either be international or regional. Below is a list of both international and regional instruments which are relevant to the subject of the rights of women.

### 1.2. International Treaties and Conventions

#### (a) **The 1966 International Covenant on Civil and Political Rights**<sup>5</sup>

This Convention obliges State parties “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.” Its accession was on 11 Jun 1976.

<sup>5</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

**(b) The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW - 1979)**

CEDAW is a major step forward in establishing key rights for women. It obliges States “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.” It defines violence against women as a constituent of discrimination<sup>6</sup> Tanzania, signed and ratified the Convention on 17 July 1980 and 20 August 1985, respectively.

**(c) The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

This Convention prohibits torture, inhuman and degrading treatments. Tanzania is not a state party to this Convention. However, the Constitution of the URT prohibits torture.

**(d) The 1989 Convention on the Right of the Child (CRC) <sup>7</sup>**

The CRC provides the legal framework for the protection, rights and welfare of children. It establishes principles such as non-discrimination and best interest of the child. Tanzania is a party to this instrument since 10 June 1991, 11 November 2004, and 24 April 2003 by accession. Tanzania has since enacted the Law of the Child Act which basically incorporates all the principles of the Convention.

**i) Regional and Sub-Regional Human Rights Instruments**

**(a) The 1981 African Charter on Human and People's Rights**

This Charter, also known as the Banjul Charter<sup>8</sup> is intended to promote and protect human rights and basic rights in the African Continent. It prohibits discrimination, torture and cruel and inhuman treatment and promotes equality before the law. Tanzania signed, ratified, and deposited the instruments of ratification without reservation on 31st May 1982, 18th of February 1984 and 9th March 1984, respectively.

The Protocol on the African Charter on Human and People's Rights on the Rights of Women in Africa is a product of this Charter. It aims at ensuring the protection of women's rights, dignity and protection from all forms of violence, particularly sexual and verbal violence. Tanzania signed the Protocol, ratified it and deposited the instruments of ratification respectively on the 5th November 2003, 3rd March 2007 and 7th May 2007.

<sup>6</sup> *Ibid.*, article 1, See also UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992.

<sup>7</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, See *inter alia* article 2(3).

<sup>8</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

**(b) The 1990 African Charter on the Welfare of the Child**

This Charter was adopted in 1990 and came into force in 1999.<sup>9</sup> The Charter sets out rights and defines principles for the status of children, their responsibilities and calls for their protection from harmful cultural and traditional practices. It also prohibits child labour and child marriage. Tanzania signed, ratified, and deposited the instruments of ratification on 23<sup>rd</sup> October 1998, 16<sup>th</sup> March 2003 and 9<sup>th</sup> May 2003, respectively.

**(c) The 2008 SADC Protocol on Gender and Development**

This Protocol was adopted by the heads of states to give effect to the provisions of the SADC Treaty, which among other things, prohibits discrimination on the basis of sex, or gender. The object of this Protocol is to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality.

**1.2.1. Customary International Law**

This is made up of rules and directives from a general practice accepted as law. It comprises of written or unwritten rules that form part of the general concept of justice. Customary law, unlike Treaties and Conventions, are binding upon all states regardless of whether they have ratified a Treaty. It exists independently from treaty law. Customary law is confirmed through the behaviour of States manifested through official statements and actions. Often, the International Court of Justice (ICJ) considers the General Assembly resolutions as indicative of customary international law.

**(a) United Nations Standards and Norms in Crime Prevention and Criminal Justice**

Comprehensive international standards have been developed to support gender mainstreaming within the operations of criminal justice systems, including, but not limited to, taking measures to meet the gender-specific needs of women as suspects, accused and prisoners. These standards may be found in both binding and non-binding international instruments, as well as in guidance materials and tools that aim to support the implementation of such instruments. Instruments that relate to the broader dimensions of criminal justice administration include the United Nations ECOSOC Resolution 2002/13. Guidelines for the Prevention of Crime presents different approaches to preventing crime and recommends that crime prevention strategies pay due regard to the different needs of men and women. The United Nations General Assembly Resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems establishes the responsibility of the State to put in place a national legal aid system that is accessible, effective, sustainable and credible, and recognizes the right to legal aid of persons in contact with the law at all stages of the criminal justice process.

<sup>9</sup> <https://au.int › treaties › african-Charter-rights-and-welfare-child>.

The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)<sup>10</sup> provide a framework for applying non-custodial measures in the criminal justice system. While there is no specific mention of measures for women, this gap was later closed in the Bangkok Rules (the United Nations General Assembly Resolution 70/175), the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) provide the most comprehensive guidelines on the treatment of prisoners and was initially adopted in 1955 and updated by the General Assembly in 2015.

United Nations ECOSOC Resolution 2002/12, namely, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, identify a range of flexible, adaptable and complementary measures for criminal justice systems that take legal, social and cultural circumstances into account.

The African Commission on Human and Peoples' Rights' Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), developed with the support of CSOs and UNDP, define a rights-based approach to pretrial detention, arrest and post-trial detention, and encourage practices that can be integrated into programming from a regional perspective. In addition, the following instruments specifically relate to the needs and rights of women:

Article 2(g) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) places an obligation on States to "repeal all national penal provisions, which constitute discrimination against women."

United Nations General Assembly Resolution 65/228 (Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice) provides guidance on crime prevention in the context of violence against women and on criminal justice responses to such violence. United Nations General Assembly Resolution 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) applies to women prisoners under sentence; suspected women offenders awaiting trial while in detention; female offenders subject to non-custodial measures and corrective measures; and women who are in "protective custody."

**(b) General Recommendations of Human Rights Treaty Bodies**

Human Rights Treaty Bodies such as the CEDAW Committee have issued specific thematic policy recommendations over the years on issues affecting women to which it believes the States Parties should devote more attention. Several general recommendations of the CEDAW Committee and other treaty bodies are central to justice programming because they assist in identifying the underlying causes of gender discrimination in justice delivery, as well as actions that are needed to address them. In 2015, the CEDAW Committee issued General Recommendation No. 33 on Women's Access to Justice (CEDAW GR 33) to guide States Parties and other stakeholders on the most effective ways to protect women against violations of their rights across diverse legal systems.

<sup>10</sup> United Nations General Assembly Resolution 45/110.

There are many areas of law that influence and shape women's access to justice. Guided by CEDAW GR 33, these fall under four broad categories which may sometimes overlap.

**(c) Civil Law and Family Law**

This area of law extends to rights, procedures and remedies in the fields of personal/legal capacity, contracts, private employment, personal injury, consumer protection, inheritance and property rights. Article 15 of CEDAW guarantees women equality before the law, identical legal capacity to that of men and the same opportunities to exercise that capacity in civil matters. SDG Target 5.1 encourages States to undertake reforms in the sphere of civil law that would give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws. According to CEDAW GR 33, States are required to:

- (i) Eliminate all gender-based barriers to access in civil law procedures, such as requiring that women obtain permission from judicial or administrative authorities, spouses and other family members prior to initiating legal action, or requiring that they furnish documents relating to identity or title to property.
- (ii) Deem null and void all contracts and other private instruments that restrict the legal capacity of women, as set out in the provisions of Article 15(3) of CEDAW.
- (i) Adopt and enforce positive measures to ensure women are free to enter into contracts and other private law agreements.

Technically, family law (otherwise known as “personal law”), is a part of civil law. It is, however, treated as a separate legal domain under CEDAW GR 33 because of its specific impact on women. This area of the law addresses matters related to marriage, divorce, parental rights and obligations and property rights in the context of marriage or inheritance. Whether or not contracted under statute or religious or traditional arrangements, polygamy has been described by CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations (CEDAW GR 21) as a contravention of a woman's right to equality with men, in view of the serious emotional and financial consequences for a woman and her dependents. Additionally, CEDAW General Recommendation No. 27 on Older Women and Protection of their Human Rights (CEDAW GR 27) provides that: “Older wives are often neglected in polygamous marriages once they are no longer considered to be reproductively or economically active.” In CEDAW General Recommendation No. 29 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) (CEDAW GR 29), the Committee was careful to note that polygamy must be abolished through a two-pronged approach: firstly, by protecting the rights of women in existing polygamous marriages and secondly, by discouraging future polygamous marriages. The Committee's view is consistent with the African Union's position in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) that “monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected.” Although registration of traditional and

religious marriages is being encouraged by State law and regional instruments, such as the Maputo Protocol, CEDAW GR 29 cautions against using registration as the sole means of proving their existence, since they may also be “substantiated by production of a marriage contract, witness accounts of the rituals or other means, as appropriate in the circumstances.”

**(d) Criminal Law**

Criminal law encompasses frameworks which define what constitutes a crime and the corresponding remedies and punishments. All legal systems recognize two important dimensions of criminal law in the context of women's access to justice: when women are (1) victims or survivors of crime, and (2) persons in conflict with the law. Gender-sensitive reforms in criminal law could include:

- (i) Creating gender-sensitive resources and procedures for dealing with crimes that are often committed against women, such as providing and training female police officers and medical examiners to support female survivors of sexual assault.
- (ii) Reviewing the legal status of behaviours that are not criminalized or punished as harshly if they are committed by men, such as pre-marital sex, adultery or prostitution.
- (iii) Revising laws that seek to regulate women's behaviour, but which are not crimes by any international legal standard, such as running away from home without permission, or failure to respect modesty and dress codes.

Understanding the framing of violence against women and how this has evolved over time enhances the contextualization of women's access to justice programming in this field. The CEDAW Committee's recent recommendation, General Recommendation No. 35 (CEDAW GR 35) on Gender-Based Violence against Women, Updating General Recommendation No. 19, frames violence against women within the overall context of discrimination against women as defined by CEDAW.

CEDAW GR 35 also emphasizes that specific acts of gender-based violence can amount to torture or cruel, inhuman or degrading treatment within the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, such as cases of rape, domestic violence or harmful practices. These acts include: “violation of women's sexual and reproductive health and rights, such as forced sterilization, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services.”

**(e) Administrative, Social and Labour Law**

Issues of special importance to women in this area include health services, social security entitlements, labour relations (such as equal remuneration, including for civil servants, and equal opportunities to be hired and promoted), housing and land zoning, compensation funds, governance of internet resources and immigration and asylum, including detention in such cases. Measures to promote gender-responsiveness in this area of the law include:

- (i) Carrying out independent reviews in accordance with international standards and ensuring that they are available for all decisions by administrative bodies.
- (ii) Requiring decisions rejecting an application to be reasoned and ensuring that the claimant can appeal to a competent body against the decision. The implementation of any prior administrative decisions should additionally be suspended pending further judicial review.
- (iii) Using administrative detention only exceptionally, as a last resort, and for a limited time when necessary and reasonable in the individual case. Administrative detention must be proportionate to a legitimate purpose and in accordance with national law and international standards.
- (iv) Ensuring that all appropriate measures, including effective legal aid and procedures, to challenge the legality of their detention are available, as well as regular reviews of such detention in the presence of the detainee.

This area of the law significantly impacts upon marginalized and excluded women, because they often cannot access institutions for protection. Examples include domestic workers, migrants and women who work in the informal economy without protection from economic and sexual exploitation.

### **1.3. Acts of International Governmental Organizations and Other Instruments of Relevance to Human Rights**

International Governmental Organizations (IGOs) exist at different levels. For instance, the UN exists at the global level, while regionally there is the African Union (AU), and sub-regionally there are organisations like the East African Community (EAC) and the SADC<sup>11</sup>. The Acts of these IGOs comprise of resolutions, declarations, policies, action frames, etc. These supplement the other sources of international law enumerated in Article 38 of the Statute of International Court of Justice. Consideration of the Acts of international organizations as a source of international law follows the growth of these institutions with membership across states<sup>12</sup>.

In this part, focus is placed on the resolutions of these organizations. They may be the evidence of customary law because they reflect the views of the States voting for them. They have exactly the same value as they would have if they had been passed at a conference outside the framework of the United Nations, and, if many states vote against it, its value as evidence of customary law is correspondingly reduced. Sometimes, international organizations are authorized to take decisions (often by majority vote) which are binding on member states; thus a source of law. The only clear example in the United Nations Charter is in Chapter VII, which empowers the Security Council to give orders to states as part of its action to deal with threats to peace, breaches of peace and acts of aggression.

<sup>11</sup> See, Shaw, *supra*, M. pp 426.

<sup>12</sup> Malanczk, *supra*, at pg 53; Shaw, *ibid.*.

With regard to resolutions of international organizations being source of law, the International Court of Justice in its advisory opinion on the legality of the threat or use of nuclear weapons<sup>13</sup> made reference to series of General Assembly resolutions since 1961 that affirm the illegality of such weapons, noting that:

“.....resolutions, even if they are not binding, may sometimes have normative value.

They can in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinion juris required for the establishment of a new rule...”<sup>14</sup>

In the same vein, the resolutions and declaration of the IGOs are sources of international law. The extent to which they bind States depends on case-by-case analysis of the resolution in question.<sup>15</sup> Their promulgation and acceptance are in a case proof of the development of customary international law. Nevertheless, there is controversy on the status of certain declarations and resolutions of international organizations.<sup>16</sup> This is connected with the phenomenon of ‘soft law’.<sup>17</sup> Soft laws refers to guidelines of conduct (such as those formulated by the United Nations concerning the operations of transnational companies, which are neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics. Soft law is considered a special characteristic of international economic law and of international environmental law.<sup>18</sup> Such provisions can be found, for example, in treaties not yet in force or in resolutions of international conferences or organizations, which lack legally binding quality. In this vein, the following instruments are considered relevant in as far as women’s rights are concerned.

## 1.4. Other Documents of Relevance

### (i) The 1995 Beijing Declaration and Platform for Action

This declaration was adopted at the Fourth World Conference on Women in September 1995. Tanzania is committed to this Declaration.<sup>19</sup> Cognizant of the need to set clear targets in each area, the government of Tanzania decided to concentrate on four initial critical areas of concern. The government was convinced that these would lay a solid foundation for the implementation of the rest of the areas as well as the SDGs. In this regard, the main areas were identified as: enhancement of women’s legal capacity; economic empowerment and poverty alleviation; political empowerment and decision-making; women’s access to education, training and employment.

<sup>13</sup> Legality of Nuclear Weapons Case at 826, para 70.

<sup>14</sup> *Ibid.*

<sup>15</sup> Shaw, *op cit.*

<sup>16</sup> See, generally, Shaw, *supra*, pg 445; Asamoah, O.Y. (1966) *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague; Johnson, D. (1966) ‘The Effect of Resolutions of the General Assembly of the United Nations’, 32 *BYIL*, pp. 97; See also A. Cassese, *International Law in a Divided World*, London, pp. 192–5.

<sup>17</sup> Shaw, *ibid.*

<sup>18</sup> Pierre-Marie D. “Soft Law and the International Law of the Environment” 12 *Mich.J.Int’l L.* 420, (1991) Available at: <https://repository.law.umich.edu/mjil/vol12/iss2/4> (accessed on 14/04/2019).

<sup>19</sup> The Ministry of Community Development Gender and Children, (2014) *Tanzania-Country Report on the Review and Progress Made and Challenges Encountered in Implementation of the Beijing Declaration and Platform for Action and Outcomes of the Twenty Third Special Session of the General Assembly*, Beijing +20, Dar es Salaam.

Relevant to women's rights, this declaration is accepted as a milestone achievement in the human history for advancing the human rights of women globally. In the end, subject to the declaration, it accepts that sexual and gender-based violence, including physical and psychological abuse, trafficking in women and girls, and other forms of abuse and sexual exploitation, place girls and women at high risk of physical and mental trauma, disease and unwanted pregnancy. Such situations often deter women from using health and other services.<sup>20</sup> It further accepts as violence against women, 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 private life. In the end, the Declaration also attests to the principle that other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery, and forced pregnancy.<sup>21</sup> States are thus obliged to take action with the view to do away with the acts constituting VAW/C.<sup>22</sup>

**(ii) The 1993 UN General Assembly, Declaration on the Elimination of Violence against Women**

This declaration was proclaimed by the UN General Assembly considering the need for a universal application of the principles of equality, security, liberty, integrity, and dignity of human beings.<sup>23</sup> It notes that violence against women is an obstacle to the achievement of equality, development, and peace. It also accepts that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms.<sup>24</sup>

In very specific terms it recognizes that some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence.<sup>25</sup> The declaration accepts that violence against women means 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. It underscores the women's right to equal enjoyment of all human rights and fundamental freedoms in political, economic, social, and cultural fields.<sup>26</sup>

This Declaration calls upon States to condemn violence against women and add that they should not invoke any custom, tradition, or religious consideration to avoid their obligations with respect to its elimination.<sup>27</sup> States should pursue by all appropriate means without delay a policy of eliminating violence against women and, to this end, should:

<sup>20</sup> See, para 99 annex on Program of Action.

<sup>21</sup> *Ibid.*, paras 113 and 114.

<sup>22</sup> See, para 130.

<sup>23</sup> UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104.

<sup>24</sup> See, preamble provisions.

<sup>25</sup> *Ibid.*, article 1.

<sup>26</sup> *Ibid.*, article 3.

<sup>27</sup> See, article 4.

ratify or consider to ratify CEDAW or withdraw any reservation at all if any; refrain from acts of VAW; conduct due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons; legislate contra laws on GBV and associated violence; take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women.

**(iii) The 1995 AU Declaration on Gender Equality in Africa**

This declaration was adopted by the head of states of AU as a commitment to the principle of gender equality as enshrined in Article 4 (I) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human and women's rights. Accordingly, African member states accepted to campaign against VAW/C and abuse of women and as recruit soldiers, sex slaves with the view to bring end to inhuman treatment of children. Against the GBV, this it proves the acceptance of the States to take lead from the front sustained public campaigns against gender-based violence for the protection of women at the national level. It also demonstrates the galvanized national legislative processes to promulgate and enforce specific laws relating to violence against women in all its forms.<sup>28</sup> The AU Strategy for Gender and Women's Empowerment 2018-2028 sets forth a plan to realize the AU commitments on gender equality.

**(iv) United Nations Security Council Resolutions**

The first resolution to be highlighted is **the Security Council Resolution on Women, Peace and Security United Nations of 31 October, 2000**<sup>29</sup> which pursuant to the Charter of the United Nations, this resolution binds the States.<sup>30</sup> Its adoption recalls the state commitments in the Beijing Declaration, the Platform for Action and associated documents.<sup>31</sup> The resolution reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.<sup>32</sup> Resolution 1325 urges all actors to increase the participation of women and incorporate gender perspectives in all peace and security efforts, from domestic to international.<sup>33</sup> It also calls on all parties to conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict.<sup>34</sup> The resolution provides a number of important operational mandates, with implications for Member States and entities of the United Nations system. It needs to be noted that resolutions of the UNSC, unlike other resolutions, have a binding force on all member states to the United Nations.

<sup>28</sup> *Ibid.*, paras 6 and 7.

<sup>29</sup> The Security Council Resolution (S/RES/1325) on Women and Peace and Security of 31 October 2000.

<sup>30</sup> See, 1945 Charter of the United Nations, article 25; similar view is also reflected in *Namibia case*, ICJ Reports, 1971, pp. 16 and *Lockerbie case*, ICJ Reports, 1992, pp. 3.

<sup>31</sup> *Ibid.*

<sup>32</sup> See the preamble provision.

<sup>33</sup> *ibid.*, Article 1.

<sup>34</sup> *Ibid.*, Articles 9, 10, 11, 12, and article 13.

Another resolution in this regard is **the UNSC Resolution 1820 (2008)** on the special measures taken to protect women and girls from sexual violence in armed conflict (e.g. enforcing appropriate military disciplinary measures and upholding command responsibility, training troops on the prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces for past actions of rape and other forms of sexual violence, and evacuation of women and children under threat of sexual violence to safety). It calls on states to end impunity for sexual violence and ensure that all victims have equal protection under the law. It requests the development and implementation of appropriate training programs for all UN peacekeeping and humanitarian personnel to help better prevent, recognize and respond to sexual violence and other forms of violence against civilians and it further requests the Secretary General to strengthen efforts to implement the policy of zero tolerance of sexual exploitation and abuse in UN peacekeeping operations and urges countries contributing peacekeeping troops to take preventative action on sexual exploitation and abuse, including pre-deployment and in-theatre awareness training.

This Resolution urges countries contributing peacekeeping troops to increase personnel responsiveness to protect civilians, including women and children, and prevent sexual violence against women and girls including by deploying a higher percentage of women peacekeepers or police. It requests that UN-assisted SSR and DDR initiatives consult with women and women-led organizations to develop effective mechanisms for protecting women from violence. Urges women's participation in discussions related to conflict prevention and resolution, the maintenance of peace and security, and post conflict peace building, and encourages parties to facilitate women's equal and full participation at decision-making levels. It reminds on development of peacekeeping guidelines and strategies to protect civilians, including women and girls, from all forms of sexual violence. It encourages the development of effective mechanisms for providing protection from sexual violence to women and girls in and around UN managed camps for refugee and internally displaced persons, and in all disarmament, demobilization, and reintegration processes, and security sector reform efforts assisted by the UN.<sup>35</sup> While **Resolution 1889 of 2009** relevantly, demands that "all parties to armed conflict immediately take appropriate measures to protect civilians, including women and children, from all forms of sexual violence, including, vetting candidates for national armies and security forces to ensure the exclusion of those associated with... sexual violence."

Moreover, the Resolution urges States to undertake comprehensive legal and judicial reforms to ensure that survivors of sexual violence have access to justice, are treated with dignity throughout the justice process, are protected and receive redress for their suffering; all parties to conflict to ensure that all reports of sexual violence committed by civilians or by military personnel are thoroughly investigated and alleged perpetrators brought to justice, and that civilian superiors and military commanders use their authority and powers to prevent sexual violence and address impunity. It encourages States to increase capacities of law enforcement personnel with regard to sexual violence in armed conflict; urges including sexual violence issues from the outset of

<sup>35</sup> See Articles 3-13.

peace processes, including in sector reform and during the vetting of armed and security forces; deployment of greater numbers of female military and police personnel to United Nations peacekeeping operations, and to provide all military and police personnel with adequate training to carry out their responsibilities; provision of technical support to troop and police contributing countries, in order to include guidance for military and police personnel on addressing sexual violence in pre-deployment and induction training.<sup>36</sup>

Another Resolution is the **UNSC 1889 on Women, Peace and Security** (2009) which that highlights state responsibility to put an end to impunity and to prosecute those responsible for all forms of violence committed against women and girls in armed conflicts, including rape and other sexual violence.<sup>37</sup> To design concrete strategies to support women and girl's security needs, including through gender-responsive law enforcement. Consideration of the needs of women and girls associated with armed forces, armed groups, and their children in the planning for disarmament, demobilization, and reintegration, ensuring their access to such programmes.<sup>38</sup> Followed by the **UNSC Resolution 1960 (2010)**. This Resolution makes parties to armed conflict to make and implement specific and time-bound commitments to combat sexual violence, including, issuance of clear orders through chains of command prohibiting sexual violence and the prohibition of sexual violence in Codes of Conduct, military field manuals; and parties to make and implement specific commitments on timely investigation of alleged abuses in order to hold perpetrators accountable.<sup>39</sup> It encourages Member States to deploy greater numbers of female police personnel to United Nations peacekeeping operations, and to provide all police and military personnel with adequate training on sexual and gender-based violence.<sup>40</sup>

The Resolution continues to request the provision and deployment of guidance on addressing sexual violence for pre-deployment and inductive training of military and police personnel, and in developing situation-specific procedures to address sexual violence at the field level and to ensure provision of technical support to troops and police contributing countries. Therefore guidance is included for military and police personnel on addressing sexual violence in pre-deployment and induction training.<sup>41</sup>

**(v) The 2018 EAC Policy on Gender**

This resolution was adopted by the EAC States with a need to prioritize gender and equality concerns. Its adoption takes in cognizance of the fact that partner states have obligations incumbent from other international arrangements. It is therefore in place as preparation towards the formation of a treaty on Gender in the context of the EAC. This policy acknowledges the variation of the partner states laws in dealing with women's rights.<sup>42</sup> Deriving its mandates from the Treaty establishing the EAC<sup>43</sup> which places the member states into a covenant for nondiscrimination, principles of social justice,

<sup>36</sup> See, article, 3, 6, 7, 9, 19 and 20.

<sup>37</sup> See, Article 3.

<sup>38</sup> See, respectively Articles. 10, and 13.

<sup>39</sup> See, Article 5.

<sup>40</sup> *Ibid.*, Article 15.

<sup>41</sup> See, *Ibid.* 16.

<sup>42</sup> See, The East African Community, Policy on Gender, pg 24

<sup>43</sup> Article 5(3)(e), 6(d), 121 and 122 of the Treaty for the Establishment of the East African Community.

equal opportunities, gender equality, as well as recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights, the East African Community Policy on Gender calls on States to exercise gender equality and equity, inclusiveness, women right to dignity, empowerment, access to justice and equality before the law; and prohibition of discrimination and gender and all forms of violence in like basis.<sup>44</sup> In terms of action, partner states are called upon to review and implement national action plans, policies, and laws to end GBV.<sup>45</sup>

The adoption of this Policy in just like the experience with SADC is suggestive of the process towards adoption of the law on gender, in the context of the EAC. A Draft Protocol on Gender is already in place to sooner or later be adopted.<sup>46</sup> In the upshot, the next level is set to consider the laws of Tanzania on the rights of women.

(vi) **General Principles of law**

This may include such legal principles that are common to a large number of systems of municipal law. "General principles of law are basic rules whose content is very general and abstract, sometimes reducible to a maxim or a simple concept. Unlike other types of rules such as enacted law or agreements, general principles of law have not been 'posited' according to the formal sources of law. Yet, general principles of law are considered to be part of positive law, even if they are only used as subsidiary tools."<sup>47</sup>

## 1.5. Judicial Decisions and Juristic Writings

The ICJ also applies judicial decisions and teachings of highly qualified jurists as a subsidiary means of determining rules of law. In the case of **Bernado s/o Ephraim vs Holaria Pastory & Another** decided in Tanzania<sup>48</sup>, the High Court held that "*the principles contained in the human rights instruments constitute a standard below which any civilized nation will be ashamed to fall*" The court applied international human rights standards set by the UDHR, to confirm that women have equal rights as men to inherit clan land under customary law.

## 1.6. Domestication of International Law in Tanzania

Tanzania has not only ratified various international Treaties and Charters, but also domesticated into local statutes some provisions of the ratified Conventions. This is demonstrated in the adoption of the UDHR in the Constitution of the URT, and recent enactment of the Law of the Child Act. The spirit of the ratified Conventions is also evidenced in recent amendments of statutes such as the Evidence Act, CPA, PCCB Act the Penal Code, the Persons with Disabilities Act, HIV/AIDS Act, the Anti-Trafficking in Persons Act and the ELRA. The Law of the Child Act, which consolidated several laws, is a good example of direct domestication.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Supra*, note 44.

<sup>46</sup> See, Draft (Protocol on the Establishment of) The East African Community Protocol On Gender Equality, available at, <https://www.eassi.org/wp-content/uploads/2018/08/DRAFT-EAC-PROTOCOL-ON-GENDER-EQUALITY.pdf> Last accessed on 19/04/2019. See generally, Malanczuk.,P. (1997) *Akherust's Modern Introduction to International Law*, London and New York: Routledge, pp. 61-62; Brownlie,I. (2008) *Principles of Public International Law*, London: Oxford University Press, pp. 31-34; Shaw,M. (2008) *International Law*, Cambridge University, New York, pp121-124

<sup>47</sup> <https://www.oxfordbibliographies.com>.

<sup>48</sup> Mwanza (HC) Civil Appeal No 70/1989, (unreported).

## 1.7. Application of International Law by Domestic Courts

There are two systems of applying international law, i.e. dualism and monism.<sup>49</sup> Under the monist system, domestic courts are legally allowed to use international law once ratified. In the dualist system, the municipal courts are not allowed to directly use international law even if ratified, unless such laws are domesticated. In this sense, domestication means turning the covenants into statutes passed by parliament.

Tanzania, like most other common law countries, takes the dualist approach. This means that for Tanzania, ratification alone does not automatically make international law applicable. International law certainly complements domestic law in more than one way. However, the ascertainment of the extent to which international law is applied in Tanzanian courts is discerned through approaches taken by the courts of law in applying the rules of international law. International law thus complements the laws of Tanzania.

The Tanzanian Constitution does not make a very sharp provision in this regard compared to the Constitutions of other jurisdictions, such as Kenya and South Africa, to mention a few. It specifically provides in imperative terms, that the parliament shall ratify the international rules (instruments) and that whenever their application requires a law, the Parliament shall enact law to enable the provisions of the said instruments to be applied in Tanzania<sup>50</sup> or incorporate the provisions of international legal instruments within the local laws. For instance, in the Anti-Trafficking in persons and the Refugees Act, among other laws, one sees the provisions of the international legal instruments incorporated therein.

The judiciary has also played a remarkable role in this aspect. It has established jurisprudence of passive incorporation of human rights standards contained in international instruments, where no active incorporation has taken place in Tanzania. Two cases may be cited. **Bernados/o Ephraim vs. Holaria d/o Pastory**,<sup>51</sup> and **Transport Equipment vs. Valambhia**.<sup>52</sup> While in **Valambhia's** case it was held that: "the fact that an International Convention to which Tanzania is a party is not incorporated into Tanzanian law does not absolve the government of its duty to adhere to its undertakings in the agreement,"<sup>53</sup> in **Bernado s/o Ephraim**, it was held that "the principles contained in the human rights instruments constitute a standard below which any civilized nation will be ashamed to fall". The Draft Constitution<sup>54</sup> also did propose some significant developments in the area of the relationship between international law and municipal law, especially the human rights area. It declared them part of the Constitution, save where reservation shall be entered.<sup>55</sup> This was a very positive development on the manner and extent to which International Human Rights instruments were to be accorded weight in Tanzania. It took a monistic approach other than the dualistic one which existed before.

<sup>49</sup> See, Malanczuk, P. (1997) *Akherust's Modern Introduction to International Law*, London and New York: Routledge, pp. 61-62; Brownlie, I., (2008) *Principles of Public International Law*, London: Oxford University Press, pp. 31-34; Shaw, M. (2008) *International Law*, Cambridge University, New York, pp.121-124.

<sup>50</sup> See *Ibid.*

<sup>51</sup> [1990] TLR 106; this is supported by various decisions of the High Court of Tanzania, see *infra*, Ch. 3 and 4.

<sup>52</sup> Civil Application No.18 of 1993, Court of Appeal of Tanzania at Dar es Salaam (unreported).

<sup>53</sup> *Ibid.*

<sup>54</sup> *The Draft Constitution of United Republic of Tanzania, Published by the Constitutional Review Commission in December 2013.*

<sup>55</sup> *Ibid.* Article 53(3)

## 1.8. Tanzania Municipal Law on Women's Rights

The rights of women in Tanzania are addressed in a number of laws. There is no specific law as such. Albeit in this regard the discussion is not concerned with the effectiveness of the law or otherwise,<sup>56</sup> but just a description of the relevant law. In other words, the manner in which Tanzania's international obligations have been translated into law. The most relevant ones specifically examined in this Bench Book are: the Constitution of the United Republic of Tanzania of 1977; the Law of Marriage Act, Cap. 29; the Penal Code, Cap. 16; the Law of the Child Act No. 21 of 2009; the Prevention and Combating of Corruption Act, Cap. 329, the Anti-Trafficking in Persons Act, No. 6 of 2008, and many others.

Tanzania and other Commonwealth countries have strategically adopted certain principles for the application of international law even if they have not been domesticated. This is stated in the case of **Christopher Mtikila & Another vs. The Republic, Criminal Appeal** No. 90 of 1990 (unreported) where the court observed that:

- i) "We have no doubt that international Conventions must be taken access in interpreting not only our constitution but also other laws, because Tanzania does not exist in isolation. It is part of country of nations. In fact the whole of the Bill of Rights was adopted from those promulgated in the Universal Declaration of Human Rights..." See also the case of **Director of Public Prosecution vs Daudi Pete**, [1993] TLR 22 where it was stated that:
- ii) "In interpreting our Bill of Rights and duties introduced into our Constitution under the Fifth Amendment, account must be taken of the principles underlying the African Charter on Human and Peoples' Rights".  
In addition, in the case of **N.N. Munuo Ng'uni vs. Judge In Charge and The Attorney General** [1998] TLR 464, the court stated that:
- iii) "We feel committed to call in and apply comparative case law from foreign courts and international Bill of Rights. That is precisely the path those eminent jurists who attended the judicial Colloquium at Bangalore India in 1988 have exhausted us to treat in the forms statement issued known as the Bangalore Principles. These principles have been confirmed, endorsed and re-affirmed in subsequent colloquia in Harare (1989), Banyire (1990), Abuja (1991) attended by some justices of our Court of Appeal. As correctly absorbed in the Bangalore Principles there is at the present times plenty of judicial decisions and impressive copies of international and national jurisprudence in the Commonwealth concerning the interpretation and application of human rights and freedoms which of practical value to judges and lawyers generally".

It is clear from the above cases that domestic courts may have recourse to international law based on the principles set out in the Bangalore Principles of 1989.<sup>57</sup>

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<sup>56</sup> See *Tanzania Women Lawyers Association (TAWLA), (2014) Review of Laws and Policies Related to Gender Based Violence of Tanzania Mainland, Dar es Salaam: TAWLA.*

<sup>57</sup> *Bangalore Principles issued at a Judicial Colloquium on the Application of International Human Rights Norms held in Bangalore, India, from 24 – 26, 1988, Available in TAWJA's Course Materials for the Institute of Judicial Administration, Lushoto, 2016.*

# CHAPTER TWO

## INTERNATIONAL INSTRUMENTS, LOCAL STATUTES AND CASE LAW FOCUSING ON WOMEN'S RIGHTS IN TANZANIA

### 2.0. Introduction

The issue of the rights of women and the obligations of States under international law to take steps to prevent violence against women, to punish perpetrators and to provide support for the survivors have been consistent topics for discussion and action at the international level over the last past several decades. Despite the many legal policy and other measures adopted at the international and national levels and the advances that have been made, gender-based violence against women continues to be widespread and present in all regions and countries, in familiar and new forms. Not only have new forms of violence emerged such as cyber violence (including cyber stalking, online threats of violence, and revenge porn), but longstanding forms of violence persist and legal and practical failures to address violence are ubiquitous. Many countries still have laws and cultural, customary or religious norms, practices and attitudes which are conducive to or legitimize violence against women. There are many examples of laws making it extremely difficult or effectively almost impossible to prove criminal cases of sexual violence (for example, restrictive evidentiary rules); impunity for acts of violence committed by both State and non-State actors are commonplace.

Acts of Sexual and Gender-Based Violence (SGBV) range from domestic violence, arbitrary killings, torture and mutilation, sexual violence, forced marriage, forced prostitution and forced impregnation to forced termination of pregnancy and sterilization. For women it may be narrowed down to Violence against Women. Violence against Women has been defined in the UN Declaration on the Elimination of Violence against Women of 1993 (DEVAW). The essence of that definition was adopted by the Banjul Charter's Maputo Protocol.<sup>58</sup>

Violence against women (VAW) is a major problem in realization of women's rights in Tanzania, taking different forms, such as sexual, physical and psychological violence. It includes rape, sexual harassment at work, trafficking in women and girls, forced prostitution, trafficking in women, beatings, torture, and harmful traditional practices such as female genital mutilation (FGM).

<sup>58</sup> Article 1(j) of the Maputo Protocol. Also see UN Declaration on the Elimination of Violence Against Women (DEVAW), adopted by the General Assembly under resolution 48/104 (1993), Article 1. See Preamble to DEVAW.

VAW is a form of discrimination and constitutes human rights violation,<sup>59</sup> violating rights such as right to life; right to physical integrity; right to liberty and personal safety; right against torture or cruel, inhuman or degrading treatment or punishment; and right to health.<sup>60</sup>

*'Violence against women means any act of violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women. It also includes threats which such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'*

## 2.1. UN Declaration on the Elimination of Violence Against Women 1993 (DEVAW)

Given that VAW is a human rights violation, states have an obligation under international human rights law to address and respond to all acts of violence against women<sup>61</sup>, including gender-based violence<sup>62</sup>. They have a duty to prevent, investigate, and punish acts of gender-based violence, whether such acts are perpetrated by State officials or by private persons.<sup>63</sup> Under the Maputo Protocol, Tanzania has a duty to take several effective measures to address violence against women, including enacting and enforcing laws prohibiting all forms of violence against women; and identifying the causes and consequences, and taking appropriate measures to prevent and eliminate such violence. More International Regional and National Instruments shall be dealt with below.

## 2.2. Women's Rights under International, Regional and National Instruments

### 2.2.1. At the International Level

- (i) The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>64</sup> prohibits any distinction, exclusion or restriction based on sex, or marital status, which is either intended to, or has the effect of, impairing women's fundamental rights and freedoms, in any field. It obliges governments to prohibit discrimination against women on the one hand, and ensure their equality on the other, equality being one of the Convention's goals. The United Republic of Tanzania signed CEDAW<sup>65</sup> on 17<sup>th</sup> July 1980 and ratified it on 20<sup>th</sup> August 1985.<sup>66</sup>

<sup>59</sup> United Nations Human Rights, Office of the High Commissioner, Violence Against Women, Information Series on Sexual and Reproductive Health and Rights, available at [http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_VAW\\_WEB.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_VAW_WEB.pdf) accessed on 19th October, 2018.

<sup>60</sup> See Nieves Rico, Gender-Based Violence: A Human Rights Issue, available at <http://www.cepal.org/mujer/noticias/paginas/9/27409/genderbasedviolence.pdf>, accessed on 19<sup>th</sup> October, 2018; Amnesty International, Violence Against Women Information, available at <https://www.amnestyusa.org/our-work/issues/women-s-rights/violence-against-women/violence-against-women-information>, accessed on 19<sup>th</sup> October, 2018.

<sup>61</sup> United Nations Human Rights, Office of the High Commissioner, Violence Against Women, Information Series on Sexual and Reproductive Health and Rights, available at [http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_VAW\\_WEB.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_VAW_WEB.pdf) accessed on 19th October, 2018

<sup>62</sup> *Ibid.*

<sup>63</sup> Article 4 of the UN Declaration on the Elimination of Violence Against Women 1993; Article 4(2) (e) of the Maputo Protocol.

<sup>64</sup> Article 1 of CEDAW.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

The Convention obliges nations to pass laws to ensure the equality of women, and allows them to create “temporary special measures aimed at accelerating *de facto* equality between men and women”-affirmative action or positive discrimination, in other words , until equality is actually achieved.<sup>67</sup>

Since the ratification of CEDAW, the government of Tanzania has continued to intensify efforts to review or amend or enact legislation and policies in accordance with CEDAW Committee recommendations. For instance, efforts noted by the Committee were the enactment of laws pertaining to women's dignity, property, criminal and sexual abuse.<sup>68</sup> Awareness creation and sensitization of women and men on this law has brought some changes whereby women and men go to court for their rights, while stiff sentences are given to culprits to deter others against breaching the law.

(ii) **The Declaration on the Elimination of Violence Against Women (DEVAW)**<sup>69</sup> gives detailed information on violence against women.

*Article 1* of the DEVAW provides that “violence against women” means 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. According to this Instrument, violence against women encompasses, but is not limited to:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation, widow cleansing and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.<sup>70</sup>

The DEVAW also requests organs and specialized agencies of the UN system, within their respective fields of competence, to contribute to the recognition and realization of the rights and the principles set forth in the DEVAW to foster cooperation with state parties of the UN. Tanzania is a state party to the United Nations and therefore required to cooperate with UN Organs and agencies to implement the provisions of DEVAW.

<sup>67</sup> See Article 2 of CEDAW.

<sup>68</sup> The enactment of the Special Offences Special Provisions Act, 1998 (SOSPA).

<sup>69</sup> The Declaration on the Elimination of Violence against Women (DEVAW) was adopted by the UN General Assembly at its 85<sup>th</sup> Plenary Meeting on 20<sup>th</sup> Dec., 1993. See Resolution 48/104 of the UN General Assembly of 20<sup>th</sup> Dec. 1993.

<sup>70</sup> Article 2 of CEDAW.

### 2.2.2. At the Regional Level

- The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa<sup>71</sup> provides for the protection of women's rights comparing to the African Charter. Apart from the broad provisions regarding the right to equality and freedom from discrimination, the Charter contains one specific provision referring to women in its 68 Articles which states that:

*"...the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in the international declarations and conventions."*

### 2.2.3. At the National Level

In Tanzania, the policy and legal regime on human rights and violence against women and children is comprised of the following:

#### (i) **The Constitution of the United Republic of Tanzania**

Article 9 of the Constitution requires the State and its agencies to direct its policies towards ensuring freedom, justice, fraternity and concert, human dignity and elimination of all forms of injustice, intimidation, discrimination, corruption, oppression or favouritism. Moreover, Article 11 to 24 of the Constitution lists down a number of rights which the people are entitled to, which are basically divided into four, namely:

- The right to equality (articles 12 and 13)
- The right to life (articles 14-17)
- The right to freedom of expression (articles 18-21)
- The right to work (articles 22-24)

#### (ii) **The Penal Code**

In 1998, the National Assembly passed the Sexual Offences Special Provisions Act (SOSPA) which amended several provisions of the Penal Code<sup>72</sup>, to enhance penalties for rape and all types of sexual abuse/assaults but also to re-categorize several other offences. SOSPA was intended to criminalize all types of sexual violence against women and children. It introduced and widened the offences of sexual violence (rape and related offences), trafficking in persons; sexual harassment; and prohibition of FGM, most of which were introduced for the first time in Tanzania to take legislative action against the practice. SOSPA also introduced severe punishments.

#### (iii) **The Law of the Child Act, 2009**

The adoption of the provisions of Convention on the Rights of the Child was also demonstrated by the enactment of the Law of the Child Act, No. 21 of 2009. It is clearly stated in its preamble that its intention was to give effect to international and regional Conventions on the rights of the child. Section 158 creates several offences that may be committed by child abusers.

<sup>71</sup> It was adopted in Maputo, Mozambique, in 2003 and entered into force in 2007.

<sup>72</sup> The laws amended include the penal code. Criminal Procedure Act; Cap 20, Evidence Act, Cap 6; and Children and Young Persons Ordinance, Cap 13.

The law has taken consideration of almost all issues related to the rights of children who are considered to be under the age of eighteen. However, it is silent about the marriage age at 15 years for girls. Other laws recognize a person of this age to be a child. Early marriages can have negative impact on the long-term prospects of girls, as they often do not complete their education. It is likely that these girls will become mothers at a young age which increases risks to their health during pregnancy and delivery. Early marriage supports and perpetuates gender power imbalances that already exist in society.

The foster parent aspects of the Law of the Child Act need caution to ensure that the child is fostered by a kind and loving parent to protect the child from being mistreated and abused. The foster parent is only required to fill and send the application form to the Commissioner who grants approval. There is need for thorough investigation by Social Welfare Officers to make follow up and substantiate information in the application form and to physically see the home of the applicant where the fostered child will stay in order to approve or disapprove.

**(iv) Employment and Labour Relations Act (ELRA) No. 6 of 2004**

Section 7 of the ELRA prohibits any form of discrimination at the workplace and the employer is obliged to register with the Labour Commissioner a plan to promote equal opportunity and to eliminate discrimination at workplace. Section 5(4) of the Act prohibits child labour, while under section 33 and 34, the Act provides for maternity and paternity leave.

**(v) The Prevention and Combating of Corruption Act (PCCA), Cap 329 of 2007**

The PCCA prohibits all types of corruption incidents including those which are gender related such as demand or offer of sexual favours in exchange for official services, promotions and other labour selected rights. Section 125 of the PCCA 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.”*

**(vi) The Anti-Trafficking in Persons Act No. 6 of 2008**

This Act is also intended to reflect the United Nations Convention against Transitional Organized Crime and to prevent, suppress, and punish trafficking in persons and children. Section 4(1) lists down acts of trafficking in persons and section 5 criminalize any such acts. Section 6(2) provides a stiff sentence for persons found guilty of severe trafficking in persons, whose definition includes an act of trafficking where the victim is a child below the age of six or an adoption is effected for purposes of prostitution, sexual exploitation, or forced labour.

**(vii) The Law of Marriage Act**

- (a) This law provides for polygamous marriages, but it does not explain under what circumstances the husband could marry another wife and how to protect the first wife from being alienated by the husband once he marries another wife. More often than not, earlier wives are not informed by their husbands about the husbands' intentions to marry other wives. Many women who are affected by this practice, especially those in the rural areas, are unaware about the Law of Marriage or this particular provision. Besides, the customs and traditions on polygamous marriages are so strong that the first wife cannot question her husband's decision to take another wife. Those who dare would often receive severe beatings from the husband and being ridiculed as a jealous wife by other family members.
- (b) The law recognizes customary law and traditions in the division of properties between husband and wife when divorce occurs. Customs and traditions do not provide for equal share, in that women get very little or nothing. There are many cases where women have been thrown out of their matrimonial homes in cases of separation and divorce due to customs and traditions which favour men. This situation has, at times, led to violence against women when they insistently pursued their fair share of property. It is a paradox that, property division is a serious matter especially to the female partner or wife when the male partner or husband dies, but that is not the case when the female partner or wife dies, as all the property automatically stays intact with the male partner or husband and in rare cases does anyone query.
- (c) The law has made a provision for the court to order a man to pay maintenance for the benefit of his child where he has refused or neglected to adequately provide for a child. This provision applies to children born in various circumstances, including those born out of wedlock. This is a good initiative, but it will only be applicable when the men admit that they are the fathers of those children. There are many men out there who do not agree that they fathered such children, resulting in the burden of caring for those children being carried by their mothers alone. Often, these women may not be capable of carrying the responsibility because of poverty. Limited ability to provide for the children may lead to children born out of wedlock becoming destitute and ending up in the streets where they are groomed to be vagabonds.
- (d) The law is silent on how to handle stepchildren within a marriage. The media has reported many cases where such children have been severely abused by stepparents in the majority of cases. Stepparents' situations affect many children who end up being neglected. Their needs, including being properly fed, clothed and accessing necessary items for school, are often not properly met. Some children have died due to physical abuse by stepparents, others are molested sexually by their stepfathers and others are overworked, while insulting language is used against some, which affects them psychologically. Many children run away from such abuses and become street children.

- (e) The revised Marriage Act of 2002 has not changed the age of marriage for girls from 15 years. This is contrary to the African Charter on the Rights and Welfare of the Child, 1990, which provides that: "... child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years." Activists such as NGOs promoting gender equality and the Ministry of Community Development, Gender and Children have raised this concern on many occasions. At the age of 15, a girl is still a child and needs to be attending school. At this age, the child is not mature enough to take up responsibilities of a wife, taking care of a home and bearing children which can result in neonatal and maternal mortality. Abuse by husbands, including his relatives, can also occur because of inability to effectively undertake responsibilities of marriage. The Marriage Act contradicts the Law of the Child Act which states that a child is a person below the age of 18 years.
  
- (f) The law declares that "Notwithstanding any custom to the contrary, no person has any right to inflict corporal punishment on his or her spouse." However, domestic violence which is also termed as spousal battery is widespread in Tanzania. The statement above does not address domestic violence and causes thereof. The LHRC reports that 50 percent of women in Tanzania were beaten on a daily basis by their partners and 25 percent interviewed in a 2006 study reported being subjected to non-spousal battery. Spousal battery in which men beat their wives or partners results in injuries that range from mild to severe. A 2006 World Health Organisation (WHO) study found that 30 percent of survivors of spousal battery ended up with serious injuries due to severe beatings.<sup>73</sup> One of the reasons for the high incidence of spousal battery is the existence of customs and traditional practices that ignore harassment and abuse of women. The normalization and acceptance of spousal battery hinder adequate steps to be taken because of the reluctance by women to report domestic violence which is aggravated by cultural, social and family pressures.

**(viii) Anti-Trafficking in Persons Act, 2008**

Severe trafficking should include and give priority to pregnant women, children and people with disabilities. Care and support given to children and persons with disabilities should also be provided to pregnant women who are caught in trafficking situations because of their delicate condition. The law is not explicit about the trafficked persons within the country especially girls from the rural areas who are sent into towns and cities for domestic labour and prostitution. In most cases, girls by themselves are convinced to move to towns with promises to be educated and provided with jobs as domestic workers by their relatives or people who come from their neighbourhood. It is usually people they know. However, they end up being exploited by providing cheap labour as domestic workers/house-girls and others are used in brothels as sex workers. For example, they may not be paid their salaries, be physically abused with repeated beatings, be subjected to abusive language, be survivors of sexual molestation by the members of the family they work for, not being allowed to eat family food, not provided with proper medical care and have their movements restricted. Some live like slaves.

73 Legal and Human Rights Centre Report LHRC 2009.

This has been a long-term concern and some measures have been initiated to address domestic workers' plight. The introduction of ward level secondary schools has also reduced the number of girls who move to towns, as well as increasing enrolment of girls into secondary schools.

**(ix) The HIV and AIDS Prevention and Control Act, 2008**

Section 25 of this Act specifically seeks to prevent transmission of HIV/AIDS from mother to child, and section 26 provides for post-exposure prophylaxis particularly in cases of sexual abuse. The damage caused by violence against women and children is addressed through the legislation cited above.

Women and girls continue to bear the higher burden of HIV than men and boys in the country, close to double that of their male counterparts, especially for adolescents and young people. Certain HIV/AIDS government plans and reports, such as Tanzania National Multisectoral Strategic Framework for HIV and AIDS 2018/19 to 2022/23 (NMSF 1V), CEDAW 2016, Tanzania HIV Impact Survey (THIS) 2016-2017, recognize VAW as the main contributing factor to HIV transmission, stigma and discrimination among women. However, Tanzania HIV/AIDS Prevention and Control Act does not include sections that address directly how VAW is linked with HIV. Similarly, the HAPCA 2008 has no specific provisions to deal with violent incidents that put women at risk of HIV. For example, Part vi, Section 21 (1) and (2) includes important elements that could be used to highlight the risk of HIV transmission caused by VAW. The Section provides that, "Any person who abuses his spouse or sexual partner either verbally, physically or conduct in connection with compliance with the provisions of this Act commits an offence". Yet, the Act does not lay out the penalties for the offence. In Tanzania, surveys show that 4 in 10 women experience physical violence; while 1 in 5 women from the age of 15 reported having experienced sexual violence in their lifetime.<sup>74</sup> As a result, there is growing evidence that a large share of new cases of HIV infection is due to gender-based violence in homes, schools, the workplace and other social spheres.<sup>75</sup>

- (a) Insufficient recognition of the linkages between HIV and VAW, especially in the national gender strategies and plans, hinders efforts to prevent violence as a key driver of the epidemic.<sup>76</sup> A requirement has been made by the law for mainstreaming gender into HIV and AIDS plans. One problem is that the funding allocation for HIV has been low for a long time resulting in few HIV and gender activities being implemented. This occurs especially at Council, Ward and Village levels where usually funds are not sufficient.

The Act states that every pregnant woman and the man responsible for the pregnancy or spouse shall be offered voluntary HIV testing: "... *any person who has knowledge about being infected by HIV shall immediately inform his/her sexual partner or spouse.*" This means that the woman is responsible to bring the man involved, but this is often difficult, and many men do not comply.

<sup>74</sup> *Ibid.*

<sup>75</sup> TACAIDS *Gender Audit on Tanzania National Response to HIV and AIDS* (2009) 2.

<sup>76</sup> *Gender Assessment of the National HIV/AIDS Response Tanzania (Mainland) 2020*.

Women cannot force men to go for testing and in the rural areas it is worse because of observed norms and traditions that give men more power. Women are also afraid of being beaten and thrown out of their homes if they tell their spouses of their HIV positive status. Although it is a crime by this law for any person to physically abuse his spouse or use derogative language because of disclosing HIV status, this is particularly problematic for married women. The husband can turn around and accuse the wife of unfaithfulness and she can be beaten or thrown out of the house. This goes back to discriminating cultures that are deeply encroached in the society. The majority of men are still believing that, a husband is justified to beat his wife. This tendency is rampant in the rural areas. In addition, many people may not know about this law. Moreover, women are usually afraid and do not know how to go about telling their husbands for fear of being attacked. As such, they decide to keep silent.

- (b) The law promotes the use of condoms but there are gendered differences in the use of condoms due to various factors. Knowledge of condoms as a preventative measure is higher among boys and men than among women and girls.<sup>77</sup> Women's condoms are still not easily accessible to them. Again, women, particularly in the rural areas, do not have skills to negotiate with men on the use of condoms for safe sex and in addition, the women fear the consequences of requesting condom use because they do not have power in the relationship. As a result, condom use is significantly lower for women compared to men.
- (c) Prevention of mother-to-child transmission (PMTCT) of HIV through breast feeding can be challenge to poor women who may not afford to buy substitute milk for their babies. The law states that a Person Living with HIV (PLHIV) *has the responsibility not to infect others....*,” which is a crime with a penalty. However, many women are infected by their spouses and partners, because once the husband knows that he is HIV positive he conceals it due to stigma and discriminatory and deeply rooted cultures.
- (d) Provider Initiated Testing and Counselling (PITC), couple testing and index-and self-testing have all been tried to various degrees and succeeded in Tanzania as a means to identify cases for linkage to care. With the 2019 amendments of the HAPCA, provisions have been made for pregnant women, together with their male partners or spouse responsible for pregnancy, to be offered HIV counselling and testing. However, this practice falls short of response from among men due to prevailing stigma and discrimination.

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<sup>77</sup> *Ibid.*

## 2.3. Forms of Violence Against Women

According to the World Report on Violence on Women and Violence by 2002 by the World Health Organization the most common types of violence against women are:

**(i) Sexual Harassment/Abuse**

Sexual harassment in the workplace or the demand or imposition of sexual favours on subordinate staff or those who need a person in authority to exercise authority for services, employment, and promotion, is a common complaint at workplaces and community at large. Employers abuse their authority to seek sexual favours from their female co-workers or subordinates, sometimes promising promotions or other forms of career advancement or simply creating an untenable and hostile work environment. Women who refuse to give in to such unwanted sexual advances often run the risk of anything from demotion to dismissal.

This has been shown in the case of **Mussa Zanzibar v. the Republic**.<sup>78</sup>

**(ii) Sexual Assault within Marriage**

In many countries, sexual assault by a husband on his wife is not considered to be a crime: a wife is expected to submit. It is thus very difficult in practice for a woman to prove that sexual assault has occurred unless she can demonstrate serious injury.

**(iii) Female Genital Mutilation**

In 1998, Tanzania amended the Penal Code with a specific section prohibiting Female Genital Mutilation (FGM). Section 169A "Cruelty to children" provides: "(1) Any person who, having the custody, charge or care of any person under eighteen years of age, ill-treats, neglects or abandons that person or causes female genital mutilation or procures that person to be assaulted, ill-treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement, commits the offence of cruelty to children. (2) Any person who commits the offence of cruelty to children is liable on conviction to imprisonment for a term of not less than 5 years and not exceeding 15 years or to a fine not exceeding 300,000 shillings or to both the fine and imprisonment and shall be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person."

Enforcement of the anti-FGM law in Tanzania has been variable, and there is an absence of comprehensive information on the number of cases brought to court and the outcome of any prosecutions. It has been reported that most police stations do not have sufficient documented records on FGM cases and this undermines efforts to eradicate the practice.<sup>79</sup> Lack of evidence and social pressures on victims often mean cases are withdrawn before reaching court or witnesses fail to appear.

<sup>78</sup> Criminal Appeal No.287 of 2012, Court of Appeal of Tanzania (unreported). See also the case of Seif Mohamed El-Abadan vs. the Republic Criminal Appeal No 320 of 2009 at Tanga.

<sup>79</sup> Camilla Yusuf and Yonatan Fessha (2013) 'Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania', African Human Rights Law Journal (2013).

Media reports over the last few years reveal that police in the northern districts of Tanzania, such as the Mara Region, have made a number of arrests during the December 'cutting season'. Examples include:

- (a) December 2013: police in northern Tanzania broke up an illegal FGM ceremony and rounded up 38 people, including 7 cutters, 21 girls and their parents. Some were due to appear in court, but no further case details are available.<sup>80</sup>
- (b) December 2016: eight women were arrested and charged with performing FGM on hundreds of girls in the Tarime District.<sup>81</sup>
- (c) December 2016: two women were charged with FGM on a 14-year-old girl in the Serengeti District. The women – her grandmother and the cutter – were sentenced to three years in prison and fines of 300,000 shillings each and were ordered to pay the teenage victim 2 million shillings each as compensation upon completion of their sentences.<sup>82</sup>
- (d) January 2017: a 16-year-old single mother and her great-grandmother were arrested in the Manyara Region after the death of a new-born girl following the performance of FGM by the older woman on the infant when she was just five days old. No further case details are available.<sup>83</sup>

**(iv) Domestic Violence**

Violence against women in the family occurs in developed and developing countries alike. It has long been considered a private matter by bystanders, including neighbours, the community and government.

**(v) Rape**

Rape can occur anywhere, even in the family, where it can take the form of marital rape or incest. It occurs in the community, where a woman can fall prey to any abuser, including husband or intimate partner.<sup>84</sup>

**(vi) Custodial Violence against Women**

Violence against women by the very people who are supposed to protect them – members of the law enforcement and criminal justice system is widespread. Women are physically or verbally abused; they also suffer sexual and physical torture. According to Amnesty International, thousands of women held in custody are routinely raped in police detention centres worldwide. Examples of such cases in Tanzania include the following:

<sup>80</sup> BBC News (2013) Tanzania police raid FGM ceremony in Same district, 17 December. Available at <http://www.bbc.co.uk/news/world-africa-25422612>.

<sup>81</sup> Mugini Jacob (2016) 'Tanzania: Eight Women Arrested Over Female Genital Mutilation Practice', all Africa, 21 December. Available at <http://allafrica.com/stories/201612210060.html>.

<sup>82</sup> CGTN Africa (2016) two women face prison in Tanzania for performing FGM on teenage girl, 20 December. Available at [https://www.youtube.com/watch?v=ivCWFz9\\_iIE](https://www.youtube.com/watch?v=ivCWFz9_iIE). - Louis Kolumbia (2017) 'Report: More than 4,000 girls saved from FGM in Serengeti', The Citizen, 7 May. Available at <http://www.thecitizen.co.tz/News/Report--More-than-4-000-girls-saved-from-FGM-inSerengeti/1840340-3916980-60g0o0/index.html>.

<sup>83</sup> Kizito Makoye (2017) 'Baby girl dies in Tanzania after FGM by great-grandmother', Reuters, 1 February. Available at <https://www.reuters.com/article/us-tanzania-fgm/baby-girl-dies-in-tanzania-after-fgm-by-great-grandmother-idUSKBN15F2DB>.

<sup>84</sup> See the case of *Seif Mohamed Al Abadan vs. The Republic*, Criminal Appeal No. 320/2009.

- (a) **Onesphory Materu vs. the Republic**, Criminal Appeal No. 334 of 20III09 at Tanga. A Police Officer raped a female inmate remanded at the Police Station promising that he would release her from custody which he failed to do. He was convicted and sentenced to 30 years in prison.
- (b) **Juma s/o Nyambega vs. the Republic**, Criminal Appeal No 319/2015 at Iringa). A female guest attendant at Kizota Guest House was accused of stealing a mobile phone. She was arrested by a police officer and taken into custody. While in custody the police officer locked her up in a room and raped her, threatening her not to reveal the incident to anyone. He was convicted and sentenced to 30 years' imprisonment. On appeal, the court dismissed his appeal in its entirety.

**(vii) Sexual Assault within Marriage**

In many countries sexual assault by a husband on his wife is not considered a crime: a wife is expected to submit. It is thus very difficult in practice for a woman to prove that sexual assault has occurred unless she can demonstrate serious injury.

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# CHAPTER THREE

## GENDER AND ACCESS TO JUSTICE

### 3.0. Introduction

Access to justice is simply the ability to seek and obtain a remedy through a formal or informal justice system and/or institution.<sup>85</sup> This right emanates from human rights standards that require among others, for there to be equality for all before the law and the right to be treated fairly by any tribunal.<sup>86</sup> The significance of access to justice was underscored by the Court of Appeal in the case of **Julius Ishengoma Ndyanabo vs Attorney General**,<sup>87</sup> where it was held, *orbiter*, that:

“... The Constitution of the United Republic of Tanzania rests on three principle pillars, namely (i) Rule of Law (ii) Fundamental Rights and (iii) Independent, impartial and accessible judicature. It is access to justice which gives life to the three pillars.”

The Court also went on to define the essence of access to justice in the following words:

“Access to justice does not mean the mere filing of pleadings and paying the required court fees, but also includes the right to present one’s case before the courts.”

This chapter forms a continuum from chapter one on Human Rights and International Law - by establishing the purpose of access to justice of allowing realization of human rights while highlighting the prohibition of any form of discrimination<sup>88</sup> based on gender as established in the Constitution of the URT. Barriers concerning access to justice and achievements made in the country are clarified. The chapter addresses, in addition, gender discrimination, policies and laws, evidential and procedural aspects and gaps, judicial discretion and approaches in addressing VAW. The chapter accommodates vulnerable person’s needs as required by the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities by covering the introduction of the juvenile justice procedural system and furthermore, highlighting on CJ circulars/directives, the importance of legal literacy and public education, application of the Overriding Principles and Legal Aid.

The chapter also includes an analysis of women within the justice system while addressing GBV survivors as users/victims and actors of the courts. VAW is a violation of rights of women in any form. Under international law persons whose human rights have been violated and abused have a right to effective remedies from the courts and tribunals established by the state. This is the whole purpose of access to justice. In other words, access to justice is an avenue for victims of human rights abuses and violations to get effective remedies and reparations. Access to justice is therefore important, not only in realizing the human rights of women and children, but also all fundamental rights guaranteed by the Constitution.

<sup>85</sup> URT, Ministry Constitutional and Legal Affairs (MoCLA) National Human Rights Action Plan 2013-2017 p18.

<sup>86</sup> Universal Declaration of Human Rights Articles 6, 8, 9, 10 and 11.

<sup>87</sup> (2004) TLR 2004 pg. 14.

<sup>88</sup> *Ibid.*, Article 13(4).

### 3.1. Components of Access to Justice

- (a) **Equality for all before the law** – Article 13 (1) of the Constitution of the United Republic of Tanzania declares equality of all persons before the law and their entitlement to equal treatment by public authorities.
- (b) **Accessibility to Courts** – the Rule of Law doctrine as espoused by Dicey<sup>89</sup> demands that, there should be in existence, ordinary courts of law that are accessible to all and manned by impartial and independent personnel. Article 107A (2) and 107B of the Constitution creates an impartial and independent judiciary. We have a hierarchy from a subordinate courts system which has at the base, courts known as Primary Courts presided by Primary Court Magistrates (PCMs). Prior to recent reforms, this cadre of judicial officers possessed only basic knowledge of the law which is no longer the case. A law degree is now the basic requirement for one to qualify to serve as a Primary Court Magistrate. The definition of a court must include the element of competency in law and, for all intents and purposes Primary Courts Magistrates should be competent in law. The new development of phasing out lay magistrates for the sake of justice is timely. There will, however, remain the problem of proximity in terms of geographical distance considering the huge land mass the country possesses. The reforms that have resulted in increased competences of Primary Court Magistrates would release the High Court from exercising original jurisdiction in many cases. As a court of second appeal, the High Court could then be presided over by top calibre judicial officers for timely dispensation of Justice.

These should have sufficient graduate education and should be highly specialized and experienced.

- (c) **Social Economic Needs** – in addressing equitable access to justice, one must take note of the fact that women are not a homogenous group and have different needs and interests depending on age, disability, location, access to resources, decision-making powers and reproductive capacity. Nevertheless, generally the majority of women remain at the lowest ladder of social, civil, cultural, political and economic spheres of development. Different laws have considered reaching substantive female representation in education, in decision-making through affirmative action, in access to land, related rights in employment and labour relations, to mention a few. Judicial innovativeness could be articulated in applying the related laws in improving access to justice to the vulnerable.
- (d) **Fair Treatment and Timely Dispensation of Justice** – Article 13 (6) of the Constitution requires that courts or other lawful authorities charged with the duty of dispensing justice should ensure the concerned individuals should have the right to be heard fully, the right to appeal and the right to any other relief that the court may provide.

<sup>89</sup> Per Samatta J.K. as he then was, in *Mwalimu Paul Muhozya vs. The Attorney General* (High Court Civil Case No. 206 of 1993. See also Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> Ed. 1961).

### 3.2. Barriers to Access to Justice

Key factors which impede access to justice is by and large, societal and cultural barriers, including, illiteracy, poverty, geographical proximity to court buildings, traditions, beliefs and customs that marginalize women and legal procedures and technicalities which overwhelm vulnerable sections of society. In addition, legal and social-economic and political discrimination, poor capacity of judicial staff in matters of adjudication and corruption deter vulnerable groups to seek justice. Other challenges include institutional barriers, such as insufficient governmental resources to guarantee or facilitate access to justice, inadequate organizational structure of justice institutions, limited legal assistance and representation for the poor. Another is related to insufficient application of international human rights standards in some of our laws and slow response by government to pro-active judicial decisions.

Moreover, some judicial officers remain insensitive to women's rights including VAW due to apathy, stereotypical perceptions, and inadequate knowledge on gender issues which result in lack of trust in the judicial system by the citizenry. Another significant gap is that although the Constitution guarantees basic human rights, some of the rights established by several international Conventions are not included in the Bill of Rights and therefore, not enforceable.

*One of the most significant gaps is that although the constitution guarantees basic human rights as established in several international Conventions, some are not included in the bill of rights, for instance, the right to education. Although Tanzania has passed the Law of the Child Act, it has failed to effectively promote and command respect for the rights and welfare of a child.*

Despite the enactment of the Law of the Child Act, of 2009.<sup>90</sup> the violation of children's rights are increasing for various reasons, e.g., inadequate coordination between the ministry responsible for children and the ministry of home affairs and the police department, especially gender and children desks. These are some of the reasons why the law fails to effectively promote and command respect for the rights and welfare of the child in Tanzania.<sup>91</sup>

### 3.3. Addressing Barriers to Access to Justice

The most important step Tanzania has taken is to incorporate the Bill of Rights in the Constitution of the United Republic of Tanzania, 1977 which, among other things, prohibits discrimination against women and guarantees equality and protection of all before the law without any discrimination.<sup>92</sup> In order to have access to justice in case of violation of those rights, there is in place the Basic Rights and Duties Enforcement Act [Cap 3 R.E 2002] which sets down procedure for accessing the High Court in seeking redress when one's rights are violated. This statute is an important milestone in access to justice.

<sup>90</sup> Cap. 13 (R.E. 2002).

<sup>91</sup> Tanzania Human Rights Report, 2012 at page 164.

<sup>92</sup> Article 13(1).

The State has also enacted and amended several statutes in order to promote access to justice, which include the following:

- a) **Statutes Enacted and Amended to Meet the International Law Standards:** The Penal Code through SOSPA, amendments to the Law of Evidence Act, the CPA, introduction of special courts for juveniles, Land Disputes, mobile courts, recent amendments to the Legal Aid Act and the new rules recognizing the presence and role of paralegals in providing support to the poor. Other areas include the enactment of the Law of the Child Act, amendment of the Appellate Jurisdiction Act, and the Civil Procedure Act which have introduced the use of overriding principles and the PCCB Act to criminalize sextortion. ADR, if used properly, can expedite the legal process.
- b) The judiciary has also been active in addressing gender-based violence and discrimination. There are several court decisions related to this, for instance, **Onesphory Materu vs. Republic**,<sup>93</sup> which has been discussed earlier on. In the case of **Pius Felix Mawala vs. the Republic**,<sup>94</sup> the girl, the subject of the offence of defilement was under the age of ten, and the trial court and the first appellate court erred by failing to impose a sentence of life imprisonment as mandated by section 131 (3) of the Penal Code and instead gave a thirty years' sentence and six strokes of the cane. The Court of Appeal (Juma, JA (as he then was) (now Chief Justice) pointed out that the law creating punishment for the offence of rape specifically provides that where the victim is under the age of ten, the punishment is life in prison and not thirty years. The relevant provision states:

*"...131 (3) Notwithstanding the preceding provisions of this section whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment...."*

The Court of Appeal thus enhanced the sentence accordingly. A punishment of thirty years in prison and six strokes of the cane was clearly illegal in this case. Life imprisonment was the appropriate response, given the gravity of the offence and as a deterrent against such grave abuse of children of tender age. Oftentimes, the Court of Appeal has said that it will not allow an illegal sentence to stand, having been made aware of the illegality and procedural mistakes. In situations where the Court of Appeal is faced with an illegal sentence, it has invariably invoked its revisional powers under section 4(2) of the Appellate Jurisdiction Act, 1979,<sup>95</sup> to set aside the sentence and impose the proper sentence. The Court of Appeal has done so, for instance, in **Herman Henjewe vs Republic**<sup>96</sup>, to quash the sentence of 30 years imprisonment, which was illegal, and substituted it with the correct sentence of life imprisonment.

<sup>93</sup> The case of *Onesphory Materu vs. Republic* (CA) at Tanga, Criminal Appeal No. 334 of 2009 where a police officer on duty at the 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 filled charges giving the 'release note' as part of her evidence of the illicit unfulfilled promise.

<sup>94</sup> Criminal Appeal No. 24 of 2010.

<sup>95</sup> Cap. 141.

<sup>96</sup> *Herman Henjewe vs. Republic*, Criminal Appeal No. 164 of 2005 (unreported).

Under sections 119, and 120 of the Law of the Child Act,<sup>97</sup> the only permissible punishments on a convicted child are a discharge, a repatriation order, a custody order to a fit person or institution, or committal to an approved school. The Court of Appeal in the case of **Joseph Lazaro and 2 Others vs the Republic**<sup>98</sup> had to exercise its revisional powers and revise the proceedings of the High Court by quashing and setting aside all the proceedings of that court for erring in confirming convictions and sentences on the third and fourth counts and part of the judgment of the trial court for not entering convictions and sentencing a child to imprisonment, contrary to section 119 (1) of the Law of the Child Act, which provides- “...119 (1) *A child shall not be sentenced to imprisonment...*”

With regard to the illegal sentence and unprocedural steps, to fill gaps, the Court of Appeal always uses its discretionary power of revision to correct the mistake. The position of the Court of Appeal is to stop gender discrimination and accord relief to victims, despite the fact that there are challenges to such remedies after the offence is committed and the accused is sentenced to jail.

- c) Again, in responding to gender concerns and increasing of access to justice, on 24<sup>th</sup> January, 2019 the Chief Justice issued Circular No. 1 of 2008<sup>99</sup> and appointed District Delegates under section 5 of the Probate and Administration of Estate Act.<sup>100</sup> In the Circular, the CJ appointed every Resident Magistrate sitting at the District Court and Resident Magistrate's Court, to be a District Delegate effective from 24<sup>th</sup> January, 2018.

This will help disposal of matters involving small estates, in which women, children and vulnerable groups are the main victims.

- d) Other positive steps by the government include: new and renovated court buildings, training of judicial staff to enhance their legal capacity, formulation of government policies and also CJ Circular, administrative circulars, strengthened judicial human power, decreasing case backlogs, and the introduction of computerized case management system.
- e) In February, 2019, the Chief Justice promulgated new rules on the Court aimed at improving access to justice by vulnerable groups.<sup>101</sup> The Rules require the prioritization of cases involving disadvantaged people, and deadlines are set for finalizing such matters. The Rules are set to apply to all court proceedings in Mainland Tanzania and are aimed at speeding up the finalization of cases involving “vulnerable groups”. They provide a time limit of 6 months within which to finalize cases. Only in exceptional circumstance may the court extend the time for a further three months. The Rules also indicate that cases involving “a person from a vulnerable group” must be given priority over other cases by the presiding judge or magistrate.

<sup>97</sup> Cap. 13.

<sup>98</sup> Crim. App. No. 118 of 2014-Massati, JA as he then was.

<sup>99</sup> Circular No. 1 of 2008.

<sup>100</sup> Cap. 352.

<sup>101</sup> The Judicature and Application of Laws (Practice and Procedure of Cases Involving Vulnerable Groups) Rules, 2019-GN. 110 dated 1st February, 2019.

This applies at all stages of a case, including admission, hearing and determination. Moreover, arrangement of suitable places has been included in the Rules by the presiding officer being given powers to choose any place to conduct proceedings, where court premises seem not user-friendly to cases involving people from vulnerable groups and where the proceedings are to be conducted in accordance with the Law of the Child Act.<sup>102</sup>

Another significant rule sets up a system to ensure that cases involving vulnerable groups are dealt with appropriately: a “desk officer” is designated to identify matters where these Rules must be applied and to pass on this information to the presiding officer assigned the case. The desk officer must also “establish and maintain” a database of such cases.

Accordingly, the newly promulgated Rules will help to impart awareness of civil rights and this awareness in turn will require every person, including judges and magistrates, to ensure that everyone has the right to readily access justice. This is the intention of the new Rules, which seek to ensure that disadvantaged people are not left out of court-driven developments that protect civil and human rights.

#### **f) Protecting Child Rights**

- (i) In order to promote and protect child rights as embodied in CRC, FGM among others, child abuses and violation of child rights are criminalized while the judiciary has been steadfast in protecting the rights of school-going children.
- (ii) Special Courts for Juvenile Justice – The Law of the Child Act applies to all trials relating to a child. However, section 116 (1) of the Law of the Child Act<sup>103</sup> refers to a juvenile court. A juvenile court is established under section 97 of that Act. Under section 98 (1) (a) of the Act, a Juvenile Court has jurisdiction to hear and determine criminal charges against a child. Its procedure is prescribed under section 99. The conditions governing trials of juveniles include, among others, that the proceedings be held in camera under section 99(1)(b), in the presence of a social welfare officer under section 99(1)(d), and the right of a parent or guardian to be present under section 99(1)(e). Where the trial involving a child is conducted and the trial court sits as an ordinary, and not as a juvenile court, all the proceedings will be termed illegal and improper. The Juvenile Court is created by the Law of the Child Act and its designation was established by the

Law of the Child (Designation of Juvenile Courts) (Amendment) Notice, 2017<sup>104</sup>. The Notice designated premises of primary courts prescribed in the second column of the Schedule as Juvenile Courts for the districts specified therein. However, this notice revoked GN. No. 314 of 2016 and qualified the Juvenile Court to be duly constituted when presided over by a resident magistrate having jurisdiction in the district court of the district in which the premises of the primary court designated as Juvenile Court are situated.

<sup>102</sup> Rule 7(1)(a)(b) & (2).

<sup>103</sup> Cap. 13.

<sup>104</sup> GN. No. 367 dated 22<sup>nd</sup> November, 2017.

The establishment of the Juvenile Court at all primary courts' premises are amongst the initiatives of the Judiciary of Tanzania and the Government to continue making reforms that will promote and ensure the enjoyment by children their rights to access justice.

### **g) Introduction of Overriding Principles**

The Court of Appeal has been criticized of unduly relying on technicalities with little regard to substantive justice and access to justice. In response to these criticisms, the Judiciary, at the initiative of the Chief Justice and its Judiciary Rules Committee, sought for ways to solve the growing disquiet over procedural technicalities and denial of access to justice.<sup>105</sup> The Chief Justice again in his "Talking Notes" to Justices of Appeal at Bagamoyo on March, 2018 had this to say-

*"...Time has come for this Court as apex court, court of law and court of justice to revisit its so many decisions which have turned on procedural technicalities without going into substantive justice expected from the matter before us..."*

As a result of these efforts, the Written Laws (Miscellaneous Amendment) Act. No. 3 of 2018 was promulgated and the Civil Procedure Code<sup>106</sup> and the Appellant Jurisdiction Act<sup>107</sup> were amended to introduce the "overriding objectives" which are geared towards the achievement of substantive justice for all people with cases before our Courts, including women and children. The Civil Procedure Code was amended in order to expedite the disposition of civil cases. The amendments are intended to reduce procedural hurdles for the purposes of expediting both trials and appeals. They would reduce incidences of dealing with unnecessary objections in favour of encouraging and insisting on the disposal of cases on merit, thereby improving access to justice. The amendments to Civil Procedure Code introduced the principle of "overriding objectives of attaining substantive justice", and give statutory effect to Article 107A (2) (e) of the Constitution. The said Article requires the courts to determine cases without undue regard to technicalities.

The Appellate Jurisdiction Act<sup>108</sup> deals with appeals at the Court of Appeal from the High Court or Tribunals. The apex court is guided by procedural laws contained in the Appellate Jurisdiction Act, other written laws creating the right of appeal to the Court of Appeal, the Court of Appeal Rules, 2009 and other specific Rules and Regulations. The amendment to the Appellate Jurisdiction Act are expected to expedite the process of adjudicating disputes, by removing obstacles, and cutting down delays in the Court of Appeal. Despite the provisions of Article 107A (2) (e) of the Constitution directing the courts in Tanzania to dispense justice without undue regard to technicalities, so many appeals, revisions, reviews and other applications have been struck out on grounds of procedural irregularities, making the jurisprudence of the Court of Appeal overly reliant on procedural technicalities instead of substantive justice as expected by the Constitution.<sup>109</sup>

<sup>105</sup> *CRDB Bank Limited vs Isaack B. Mwamasika and 2 Others*, Civil Appeal No. 139 of 2017 (unreported).

<sup>106</sup> Cap. 33.

<sup>107</sup> Cap. 141.

<sup>108</sup> Cap. 141.

<sup>109</sup> A paper on "Technicalities: A Comparative Overview on Judicial Approaches in East Africa" by Hon. Justice Dr. Fauz Twaib an earlier version of which was published in the *Zanzibar Year Book of Law* (2014).

Apart from delaying or even eliminating the possibility of attaining substantive justice, the striking out of matters on procedural technicalities increase the costs of litigation, as the parties are invariably forced to initiate the matter afresh, by going back to the High Court to seek extension of time and then much later the same matter can come back to the Court of Appeal for determination on merit.

The amendments, which introduced the principle of “overriding objectives of attaining substantive justice” are thus giving statutory effect to Article 107A (2) (e) of the Constitution which requires the courts, when applying rules of procedure that are couched in mandatory terms to actively take into account the wider interests of substantive justice to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. However, the amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms, but rather to ask the Court before striking out a matter on ground of procedural irregularity, to weigh the wider interests of substantive justice and decide whether there is an alternative available instead of striking out the matter altogether from the court record.

#### **h) Legal Aid**

The right to legal aid is found in regional and international human rights instruments that Tanzania has ratified, such as the UDHR (Articles 10 and 11), the ICCPR (articles 14), the Convention on the Rights of the Child (Articles 37(d)) and the African Charter on Human and Peoples' Rights (Article 7).

In administering of access to justice, legal aid has been introduced in Tanzania Mainland by law<sup>110</sup> and extend to women, children and vulnerable groups. This law recognizes the need for legal aid to assist the indigent and other vulnerable groups by providing legal aid. It repealed the Legal Aid (Criminal Proceedings) Act. The law governs the provision of legal aid and the regulation of legal aid providers and paralegals in giving service to the public. Further, the government promulgated the Legal Aid Regulations<sup>111</sup> to regulate practice and procedures of legal aid providers in giving legal assistance to the public. The Act defines a person under section 3 to mean a person who has been given legal aid. However, under the same provision of the law, an indigent person has been defined to include a person whose means are insufficient to enable him to engage a private legal practitioner and includes other categories of persons where the interests of justice require.

The Act therefore recognizes other groups of people who might not be able to engage a private advocate. Those groups might be women, children and people from vulnerable groups. The law has come at a time when so many laws are being reformed to ensure equality to access to justice by all in Tanzania. On 1<sup>st</sup> February, 2019, the Legal Aid (Remuneration of Advocates) Rules, 2019<sup>112</sup> were also promulgated by the Chief Justice. These new rules aim at changing the environment and improve the quality of service that advocates render to aided persons.

<sup>110</sup> The Legal Aid Act. No. 1 of 2017.

<sup>111</sup> GN.44 of 2018.

<sup>112</sup> GN.109 of 2019.

The rules set out the manner in which an advocate assisting an aided person in criminal matters would be remunerated by the Judiciary through the Chief Court Administrator.<sup>113</sup> The Rules will apply to all court proceedings in Mainland Tanzania and are aimed at improving legal services and to speed up the finalization of cases to aided persons. The improvement of legal aid service in the country will greatly help access to justice to aided people who, because of adverse social, economic, cultural and other social practices, are weak and marginalized or those who have “traditionally been victims of violations”. These include “widows, children, elderly people and persons with disabilities.”

### i) Gender Discrimination

Gender discrimination has been recognized by top officials in Tanzania and the State is aware of the problem, which is the result of inequality and discrimination of women and children. In addition, the legal framework has made some progress on promoting women's rights. Tanzania is a state party to most of the international and regional human rights treaties and at the national level law reform has been effected. For instance, the Sexual Offences (Special Provisions) Act of 1998 and a number of by-laws (initiated by Local Governments Authorities in Tanzania) provide for harsh penalties for perpetrators of sexual violence. Under Article 30(3) of the Constitution, discrimination is illegal, as the provision allows a party to file petition for invalidation of all laws found to be improper, discriminatory and unconstitutional. The Tanzania Court of Appeal has recognized that the discriminatory laws can be declared void for being unconstitutional.<sup>114</sup> Under Article 18(3) of the Constitution, discrimination on account of sex is prohibited.

These efforts aim at reducing discrimination and Gender Based Violence among communities. At the domestic level, the Constitution clearly provides for equality between men and women.<sup>115</sup> However, safeguards are also well enshrined in legislation. For example, the Employment and Labour Relations Act, 2004 very clearly emphasizes on non-discrimination in employment opportunities and the right to maternity leave.<sup>116</sup> In land matters, the Land Act, 1999 and the Village Land Act, 1999<sup>117</sup> both recognize rights to own property to every citizen. However, despite the above efforts, based on pieces of legislation and to date since 1992 when the Policy on Women Development was set in place, no single of protection has been enacted. In addition to the above, the Government has adopted a NPA-VAW/C 2017/2018 to 2021/2022 which suggests progressive judicial actions in which Implementation and Enforcement of Laws Related to VAW/C Operational Targets are set as follows:

- (i) Increase VAW cases convicted from 8% to 50%;
- (ii) Increase VAC cases convicted from 7% to 50%; and
- (iii) Reduce length of VAW/C judicial proceedings from 4 years to 12 months.

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<sup>113</sup> Rule 5.

<sup>114</sup> *Haji Athuman Issa vs Rweutama Mituta*, Court of Appeal of Tanzania, Civil Appeal No. 9 of 1988 (unreported).

<sup>115</sup> Article 12.

<sup>116</sup> Sections 7(4) and 33 of Act. No. 6 of 2004.

<sup>117</sup> Section 19(1)(Act. No. 4 and 5 of 1999).

# CHAPTER FOUR

## FAMILY AND GENDER RELATIONS

### 4.0. Introduction

This chapter deals with family relationships such as marriage, annulment, marital rape, separation, and divorce together with child rights, child proceedings before court of law and precautions to be taken by courts when dealing with children. Other aspects covered include family/gender matters, i.e. early marriages, FGM and domestic violence.

### 4.1. Legal Aspects of Marriage

(i) **Definition of Marriage** - *“Marriage means the voluntary union of a man and a woman, intended to last for their joint lives”* - Section 9 (1) of the Law of the Marriage Act 1971 R.E. 2002 (the LMA).

(ii) **Types of Marriages**

In Tanzania, laws, customs and religious practices recognize heterosexual marriages which can be monogamous or polygamous. These are contracted through three regimes namely, civil, religious and customary. Marriages/weddings can be celebrated in any of the three forms of marriage, i.e. civil, customary and religious, as the parties may choose. Same sex marriage is not recognized in Tanzania.

(a) Section 9 (2) of the LMA defines a monogamous marriage as a union between one man and one woman.

(b) On the other hand, according to Section 9 (3) of the LMA, a polygamous marriage is a union in which the husband may during the subsistence of the marriage be married to or marry another woman or women.

To prove these marriages, the married parties have to be registered with the Registrar General of Marriages and Divorces within the Registration, Insolvency and Trusts Authority (RITA).

(iii) **Capacity to Marry**

Capacity to marry is acquired, for a man, at the attainment of the age of eighteen years, while for a woman at the age of fifteen years.<sup>118</sup> However, the courts have discretionary power upon application to grant leave for a marriage where the parties thereto have not attained the required age. - Section 13 (2) of the LMA.

(a) **Freewill and Consent to Marriage**

Parties to the marriage have to freely consent thereto - Section 16 and 17 of the LMA However, where the female has not obtained the apparent age of eighteen years, his father, mother or guardian may consent to the marriage.

<sup>118</sup> Section 13 (1) of the LMA.

(b) Pre-requisites to Marriage

Section 18 of the LMA has provided for preliminaries to marriage which include among other things, a 21-day notice which includes the description of the parties (names, age and residence). The notice also includes a statement indicating that parties are not within the prohibited relationships. as provided in section 14 of the LMA.

- (iv) **Bride Price** - Moreover, there has been practice in all three regimes of marriage in Tanzania – civil, religious and customary — to give a bride price or dowry prior to the marriage ceremony; though non –compliance to the payment of the bride price or dowry will not invalidate the marriage – Section 41 (a) of the LMA. Most of the customs in Tanzania require a man to give bride price prior to the marriage, impliedly as a custom meant to honour the woman and her family and also as a way to stabilize marriage, because in some communities/tribes men require refund of bride price upon divorce. This discriminatory requirement has been provided in the First Schedule of Declaration of Local Customary Law Chapter One Bride price Order 38. Article 13 (4) of the Constitution of the United Republic of Tanzania 1977 has prohibited any type of discrimination based on sex, colour, tribe, place of origin, religion. Article 16 of CEDAW imposes responsibility upon the State Party 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 rights to enter into marriage; (b) the same rights and responsibilities during marriage and at its dissolution.

In the Ugandan case of **MIFUMI (U) Ltd and 12 others v. Attorney General and Kenneth Kakuru, Constitutional Petition No. 12 of 2007** the Supreme Court held that the customary practice of refunding bride price as a condition precedent to a valid dissolution of marriage violated Articles 31(1)(b), 32(2) and 33(1) of the Ugandan Constitution.

(v) **Conflict of Laws as to the Capacity to Marry**

The marriage age as provided by the Law of the Marriage Act is contrary to the age of the Child as provided in the Law of the Child Act 2009, which has set below 18 years to be the age of the child – Section 4(1) of the Law of the Child Act 2009. Again under the Law of Contract, a person below the age of 18 years has no capacity to enter into contract. In addition, Article 16 (1) of CEDAW provides that:

*“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.”*

(vi) **New Legal Developments**

Recently, the Court of Appeal in the landmark case of **Attorney General vs Rebeca Z. Gyumi**,<sup>119</sup> upheld the High Court's decision which declared that section 14 and 17 of the LMA are unconstitutional and ordered the Government to amend the law as ordered by the High Court and make 18 years to be the minimum age of marriage.

## 4.2. Presumption of Marriage and Cohabitation

**Section 160 (1) of the of LMA** provides that where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married. Here, the law does not require mandatory registration of the marriage. It only relies on presumption of marriage to determine the rights of the parties. The first application of this rule in Kenya was applied in **Hottensiah Wanjiku Yawe vs Public Trustee C.A.** 13 of 76,<sup>120</sup> - where Yawe, a Ugandan resident in Nairobi was killed in a road accident in Uganda in 1972. After his death, the appellant Wanjiku claimed to be his widow and claimed that she had 4 children with him. Some Ugandan claimants, however, denied that she was his wife and that the deceased was not married. Evidence was called which showed that the deceased lived with the appellant as a wife and also when he applied for a job, he had named the appellant as a wife and the two were reputed as man and wife and cohabited as man and wife for over 9 years. The court held that long cohabitation as man and wife gives rise to presumption of marriage and only cogent evidence to the contrary could rebut such a presumption.

## 4.3. Promise to Marry

Promise to marry is another kind of relationship provided for under section 69 of the LMA, the breach of which would give aggrieved party a right to file suit for damages provided the party was not below the age of eighteen years at the time when the promise to marry was given. Limitation of action for this kind of breach is confined to one year after date of the breach.<sup>121</sup> In contemplation of the marriage which would not be contracted, in case one party gives gifts to the other party, the giver may bring suit for return of the gifts - section 71 of the LMA.

## 4.4. Grounds for Annulment, Separation and Divorce

Under **Section 12 of the LMA**, a marriage can come to an end in the following circumstances: annulment, divorce and death. Moreover, there is an intermediate stage of **separation** that can come up while the marriage subsists prior to divorce or death – See Sections 76, 81, 99,105 and 106 of the LMA.

<sup>119</sup> Civil Appeal No. 204 of 2017.

<sup>120</sup> [Joshua Nyawa](https://www.academia.edu/30218609/712/2019), "Presumption of Marriage; Recognition of The Contribution of Common Law in Developing Family Law in Kenya" (<https://www.academia.edu/30218609/712/2019>).

<sup>121</sup> Section 70 of the LMA.

**(i) Annulment**

Section 38 of the LMA has provided for the grounds under which the marriage can be annulled or be a nullity from the very beginning, namely:

- *if either party thereto is below the minimum age for marriage;*
- *if the parties thereto are within the prohibited relationships;*
- *if either party is incompetent to marry by reason of an existing marriage;*
- *if the consent of either party was not freely and voluntarily given;*
- *if both parties knowingly and willfully acquiesce in a person officiating thereat who is not lawfully entitled to do so; or*
- *if the wife was a widow or a divorced woman prior to the marriage, and her previous marriage having been contracted in Islamic form, she contracts the other marriage during the customary period of "iddat."*

Unlike divorce, annulment has retrospective effect in the sense that the marriage which has been subjected to annulment is considered to be invalid from the very beginning almost as if it had never taken place.

**(ii) Separation and Divorce**

The process of termination of matrimonial affairs is initiated by the way of petition before a court of law; such termination can first start with petitioning for decree of separation or both separation and divorce on the ground that the marriage has broken down, but no decree of divorce shall be granted unless the court is satisfied that the break-down is irreparable - Section 99 of the LMA. However, the petition for decree of divorce can only be filed once the petitioner has referred the dispute to the Marriage Reconciliation Board (section 101 of the LMA) and that should happen after subsistence of marriage for a period of two years (section 100 of the LMA). It is only in very exceptional circumstances that the court would consider dissolving the marriage before the expiry of the two years. The court may accept any one or more of the following grounds as evidence that a marriage has broken down, as provided in Section 107 (2) of the LMA.

- i) continued adultery committed by the respondent despite protest;
- ii) sexual perversion on the part of the respondent;
- iii) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;
- iv) wilful neglect on the part of the respondent;
- v) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;
- vi) voluntary separation or separation by decree of the court, where it has continued for at least three years;
- vii) imprisonment of the respondent for life or for a term of not less than five years;
- viii) mental illness of the respondent, where at least two doctors, one of who is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery; or
- ix) change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that, faith a change of religion dissolves or is a ground for the dissolution of marriage.

Where the parties were married in Islamic form, upon the marriage conciliation board certifying failure to reconcile the parties, if either of them has done any act or thing which would, but for the provisions of the Act, have dissolved the marriage, the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce – Section 107 (3) of the LMA. However, the court shall refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing - Section 107 (1) (a) of the LMA.

In case of adultery, the petitioner may make a person with whom adultery was committed a co-respondent - Section 105 (2) of the Law of the Marriage Act. As to what should be the contents of the petition for divorce or separation - Section 106 (1) and (2) of the LMA is relevant for that purpose. The court has major role to play in hearing petition for separation or divorce, such role and duties have been provided in section 108 of the LMA. And where in the petition, there are allegations of adultery and such allegations founded or not section 109 of the LMA will be relevant, before the same court makes final determination as provided in section 110 of the same Act.

**(iii) Effects of Decree of Separation**

A decree of separation shall relieve the parties of the duty to co-habit and to render each other help – section 109 of the Law of the Marriage Act.

**(iv) Effects of Decree of Divorce**

Section 112 of the Law of the Marriage Act has provided for the effects of decree of divorce. However, the courts have been given powers to set aside or vary decrees of separation – Section 113 of the Law of the Marriage Act.

## 4.5. Other Rights and Liabilities after Grant of Divorce

**i) Duty to Maintain Each Other**

The duty to maintain each other is provided by section 63 (a) and (b) of the LMA. The law imposes on the husband the duty to maintain his wife or wives, to provide them with food, accommodation, clothing till such time the former wife/wives remarry; However, the court may order the husband to provide maintenance to the former wife/wives under section 115 (1) of the LMA. Even for a woman whose marriage has arisen 'out of presumption of marriage', shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more.

**ii) Custody of the Children**

Section 125 (2) of the Law of the Marriage Act provides that in deciding in whose custody, an infant should be placed the paramount consideration shall be the welfare of the infant and subject to this, the court shall have regard to the wishes of the parents of the infant, to the wishes of the infant where he or she is of the age to express independent opinion, to the customs of the community to which the parties belong. However, section 125 (3) of the LMA has provided that in case the child is below seven years, there shall be a rebuttable presumption that it is good of an infant to be with her mother. In addition, sections 37 and 39 of the Law of Child Act and Regulation 73 and 75 also prescribe how to handle cases of custody of children.

**iii) Maintenance of the Children**

Pursuant to Section 129 (1) of the LMA, unless it is ordered or agreed otherwise, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof; where the man is dead or his whereabouts unknown or he is unable to maintain them, it shall be the duty of a woman to maintain or contribute to the maintenance of her infant children. The Court under section 130(1) of the LMA may at any time order a man to pay maintenance for the benefit of his infant child (a) if he has refused or neglected to adequately provide for him or her; or children (b) if he has deserted his wife and the infant is in her charge; or (c) during the pendency of any matrimonial proceedings; or (d) when making or subsequent to the making of an order placing the infant in the custody of any other person. Besides, sections 8(1) to (6), 9 (1) to (4), 26 and 41 of the same Act also regulate the right of children to maintenance.

## **4.6. Related Traditional Practices**

Parallel to the efforts of addressing matters that have been denying women and girl children their rights, on the other side, there are bad traditional practices that have been going on.

**(i) Early Marriages**

The tendency not to allow girl children of school age to proceed beyond primary schools has been a common thing despite efforts by the central and local Government to intervene creating awareness among parents about sanctions if they marry off their girl children or allow them to travel to urban areas to work as housemaids- **Education Act Cap. 353 R.E 2002** (the Education Act) was amended in 2016, by adding section 60A which has prohibited marrying or impregnating a primary or a secondary pupil. It has also made it unlawful under any circumstance for any person to marry a primary or secondary school girl or a school boy; or a primary or secondary school boy to marry any person. Any person who commits such offence shall, on conviction, be liable to imprisonment for a term of thirty years; any person who impregnates a primary school or a secondary school girl commits an offence and shall, on conviction, be liable to imprisonment for a term of thirty years; any person who aids, abates or solicits a primary or secondary school girl or a school boy to marry while pursuing primary or secondary education commits an offence and shall, on conviction, be liable to a fine of not less than five million shillings or to imprisonment for a term of five years or to both.

**(ii) Female Genital Mutilation**

Female Genital Mutilation (FGM) for children has been criminalized, but it is not an offence when performed on adult women. Section 169A of The Sexual Offences Special Provisions Act, 1998 has criminalized Female Genital Mutilation.

**(iii) Domestic Violence**

Domestic violence is normally perpetrated against women's wishes and may include such kind of behaviour as frightening, intimidating, terrorizing, manipulating, hurting, humiliating, blaming, injuring and even wounding a woman. The list of these acts manifesting domestic violence is not exhaustive, it may cover forced sex, withholding money, destroying properties of the woman and use of threats and intimidation. Battery, causing harm to someone, insulting and all such kinds of domestic violence that would result in causing harm to anyone, regardless they are in a marital relationship or otherwise, have been criminalized in the Penal Code, specifically, under (FN) sections 240 to 241 of the Code, punishment for assaults that range from one year to five years' imprisonment. Should the domestic violence result in death of another intimate partner, the perpetrator will be charged with murder as per section 211 of the Penal Code. In addition, Section 66 of the LMA has prohibited inflicting corporal punishment on one's spouse. However, in some cases when the victims go to report incidents of domestic violence, police depending on severity of the injury would decide to prosecute otherwise advice the couple to go and reconcile.

**(iv) Marital Rape**

It is a general belief that once a man and woman enter into marital relationship, the man and woman have an obligation to provide sex to each other as and when the other party demands from the other; impliedly, then, sex is the major reason a man and woman would get married. In that situation, for married couple, the subject of coerced sex in marriage is a difficult one. Nevertheless, there are situations which would give rise to coerced sex such as when the woman is in her menstrual period, when she is sick and tired or when the husband is heavily drunk; when the man coerces his wife to have sex in such situations, it is not only disgusting, but a coerced sex, hence a marital rape. According to CEDAW Committee's Recommendation No. 18 VAW is defined as:

*“Violence directed against a woman because she is a woman or which affects a woman disproportionately. It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”*

In this situation, marital rape falls within the ambit of VAW because it inflicts sexual harm and deprives a woman of her liberty. Unfortunately, in Tanzania, the Penal Code has not criminalized marital rape.

**4.7. Family and Children****(i) Rights of the Child**

The Law of the Child Act, 2009 (the Child Act) provides for the rights of the children that relate to paternity, child custody, child maintenance, foster care and child support. In addition, the LMA provides for child custody and child maintenance in the event a husband or wife petitions for separation or divorce. The Child Act has made provisions that enable courts to make such orders that would establish the paternal relation of the child and would include undertaking DNA test to establish the biological father of the child. Should the test be positive, the father would be obliged to provide maintenance to the child - sections 35 and 36 of the Act.

Section 37 of the Child Act provides for custody of the child in case a parent, guardian or relative would wish to take the custody of the child. Also, where the former parent, guardian or relative was taking care of the child and would wish to have access to the child, he/she can have that right through a court order - section 38 of the Law of the Child Act, 2009.

Sections 52 and 53 of the Child Act provide for foster care of the child, requiring a person intending to become a foster parent to a child to be above 21 years of age, of high moral character and proved integrity and shall have to make his/her application to foster a child to the Commissioner for Social Welfare. Upon being granted a child to foster, the person shall have the same responsibilities in respect of the child's maintenance as the parent of the child. Section 125 of the LMA has also made provisions on the custody and maintenance of children. The said section provides that:

*“125-(1) The court may, at any time, by order, place an infant in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare.*

- (2) *In deciding in whose custody an infant should, be placed the paramount consideration shall be the welfare of the infant and, subject to this, the court shall have regard-*
  - (a) *to the wishes of the parents of the infant; and*
  - (b) *to the wishes of the infant, where he or she is of an age to express an independent opinion; and*
  - (c) *to the customs of the community to which the parties belong.*
- (3) *There shall be a rebuttable presumption that it is for the good of an infant below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of an infant by changes of custody.*
- (4) *Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each child independently.”*

Section 40 of the Child Act, 2009 prohibits removal of the child from lawful custody, and makes it a punishable offence.

**(ii) Child Protective Proceedings**

Tanzania has ratified the **African Charter on the Rights and Welfare of the Child** (ACRWC) which defines and recognizes a child to be every human being below the age of eighteen years. The Charter, among other things, provides for non-discrimination and best interests of the child under articles 3 and 4.

*Article 3: Non-Discrimination*

*“Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”*

***Article 4: Best Interests of the Child***

***In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.***

***In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views/ and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings/ and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.***

**4.8. Establishment of the Juvenile Court**

Section 97, 98 and 99 of the Child Act provide for the establishment of the Juvenile Court, its jurisdiction, and the procedures for conducting proceedings in the court. The Juvenile Court may exercise jurisdiction in cases of criminal charges against a child; applications relating to child care, maintenance and protection, and jurisdiction that may be conferred by any other written law. Section 97 of the Child Act was subsequently amended by the Written Laws (Miscellaneous Amendment) Act No. 8 of 2019, which designates all District and Residents' Magistrates' Courts as Juvenile Courts.

The following are the salient features of procedures in the Juvenile Court:

- (i) Proceedings of the Juvenile Court should be in separate chambers, or otherwise held at different timings and it is necessary that the arrangement of the court be simple and friendly to the child;
- (ii) The proceedings shall be held in camera;
- (iii) The proceedings shall be informal;
- (iv) A social welfare officer shall be present;
- (v) Parent, guardian or next of kin shall be present;
- (vi) The child shall have the right to give account and express his or her opinion;
- (vii) The right of appeal shall be expressed to the child;
- (viii) At the discretion of the court, other parties and witnesses to the case and their advocates may be allowed attendance;

#### **4.8.1. Court Proceedings in Cases of Child Abuse and Neglect**

**(i) Non-disclosure of Identities of Children**

In cases of child abuse and neglect, the same procedures and rule of proceedings discussed above will be applied and in addition, particularly in cases of child abuse, the identities of the victims will not be disclosed as per circular of the Chief Justice issued to that effect.<sup>122</sup>

**(ii) Evidence of Children in Criminal Proceedings**

Section 127 of the Evidence Act was amended in 2016 to provide that, where in any criminal proceedings the only independent evidence is that of a child of tender age, the court shall receive the evidence, and may, after assessing the evidence of the child of tender age on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender age is telling nothing but the truth.

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<sup>122</sup> Chief Justice's Circular No. 2 of 2018 ("Direction on the Protection of identities of children in matter before the court; of Parent and Guardian of the Child in Adoption Proceedings, and of Victims of Sexual Offences of Whatever Age" dates 20 March 2018)

# CHAPTER FIVE

## LEGAL CONTEXT SPECIFICS ON WOMEN'S RIGHTS IN EMPLOYMENT AND LABOUR RELATIONS

### 5.0. Introduction

This chapter starts by introducing the interface between gender, the Tanzanian transformation in employment and labour sector in light of the various established social relations/policies, the national, regional and international human rights commitments and the domestic legal framework. The “gender” concept within employment and labour relations is captured with the understanding that what is conceived to be male and female roles and activities are not natural outcomes of biological differences but are socially constructed based on the gendered power relations in society which manifest themselves in employment and labour relations.

The chapter continues to outline seventeen (17) all-inclusive subject matters that relate to women's rights and VAW in employment and labour relations e.g., discrimination, matters of equal pay for equal work, conditions of work, etc. In this chapter, salient terms are also defined as per domestic and international law. After identifying the main areas that can become subject matters of the law, the third part of the chapter unpacks the international, regional/sub-regional instruments and domestic instruments and proceeds to show how the challenges are addressed by Tanzania's sources of law.

### 5.1. Addressing Causes of Gender Discrimination in Employment and Labour Relations

In matters of women's rights, employment and labour relations, the judiciary is encouraged to consider the prevailing gender dynamics and principles that tend to influence men and women differently in employment and occupations and the decisions made with an aim of addressing gender-based violence and gender biases at places of work. The aim is to promote effective, efficient, and fair justice for all. Key points to take into consideration include:

- (i) Within the judiciary in Tanzania, it is treasured that: *“Gender equality and an effective judiciary are both essential to achieving economic development and building strong societies”*<sup>123</sup>
- (ii) Women remain disadvantaged in employment in public and private sectors. They are underrepresented in senior positions across a range of jobs; and there is still a substantial pay gap between men and women;
- (iii) Deep rooted stereotypes and negative perceptions about women's capacities and lives can lead to unlawful discrimination. The individual should not be assumed to hold the characteristics which are associated with women as a group;

<sup>123</sup> Statement made by the Chief Justice of Tanzania during the Joint Conference of the Judiciary of the Republic of Tanzania and the World Bank on Gender and the Judiciary in Africa on June 10-14, 2018.

- (iv) Factors such as social/economic class, disability and age, reproductive work and gender division of labour affect women's experience and the types of drawbacks to which they might face at places of work;
- (v) Assumptions should not be made that all women's experiences are the same;
- (vi) Women have particular difficulties in accessing the justice system;

Women's experiences as victims of violence at places of work are in many respects different to those of men. Specific forms of VAW at workplaces include: sexual coercion, gender-based workplace discrimination, unequal treatment and differential treatment, stigmatization, job segregation, exclusion, sexual harassment and intimidation (sextortion), sexual exploitation and abuse, human trafficking for forced labour and sex work within and across borders.

Despite the gender equality achievements registered in relation to employment, it is to be observed that a number of issues in the administration of justice concerning women's rights and VAW in employment and labour relations still persist. These cannot be ignored by the judiciary as women are constrained by the prevailing gender relations. Majority of women's production work is in agriculture, domestic/unpaid work and in the informal sectors of the economy. The capacity of labour laws to provide a stable framework for protection of such workers remains elusive. Women still have to negotiate their way through gender-based violence in the places of work, adverse gender stereotypes, and the sexual division of labour, limited access to decision making positions and control of resources and low education levels.

The gender issues in employment and labour relations place the majority of women in the lowest levels of formal employment hierarchy. They also face discrimination, gender inequalities and unequal power relations with men, which significantly affect women and men differently in their participation in the labour market, the quality of their participation, and how labour disputes that ensue are dealt with. Even though workplace violence affects all sectors and categories of workers, the health sector where women make up the majority is the one that illustrates seriousness of physical and psychological violence from patients, colleagues, visitors and superiors. Violence at workplaces is also associated with privatization, which brings with it increased flexibility to attract investors and decreased strict adherence to regulations<sup>124</sup>.

It is imperative for the law officer to recognize the necessity for gender sensitive judicial proceedings based on the facts that registering violation of labour related *rights of women*, girls and female with disabilities and VAW complaints/cases particularly by women at places of work is an uphill battle because of the fear of going against common cultural practices and those with power and with authority. In addition, there are inadequate mechanisms to deal with sexual assaults, humiliations, gender discrimination, differential treatments and bullying at workplaces because of the power relations between men and women in society. The blame can easily turn against the woman, may be from the way she dresses, how she talks, or stereotypical attributes of weaknesses associated with being female which means it could be interpreted that she asked for the mistreatments and the negative perceptions.

<sup>124</sup> The Citizen Newspaper (Veronica Montufar), "Women most likely Victims in Work Place Violence", 25 November 2018.

## 5.2. Implementing International Standards on Women's Rights in Employment and Labour Relations

Adding up to what is noted generally on international law sources in human rights, this part of the chapter considers the CEDAW, CRC and a number of conventions specific under the auspices of the ILO, other key international and regional conventions, declarations, and national action plans, which have a bearing on gender equality, women's rights, women's employment and labour relations. The main aim is to appeal to law officers to be innovative in applying regional and international law and jurisprudence in employment and labour relations matters while building on domestic legislation and filling up gaps. Implementing international law and standards on sexual and gender-based violence at the court level is an important step in systematically addressing the problem of violence against women and girls through a strong legal framework and other measures involving multiple stakeholders at the local level. However, a positive change in cultural attitudes should also be reflected in the domestic implementation of legislation.

A court case one would consider relevant in relation to sexual harassment, protection against discrimination in employment and occupation is - a fundamental rights suit at a workplace under the Constitution of Nigeria and the African Charter on Human and People's Right - **Ejike Maduka vs. Microsoft Nigeria Limited & Microsoft Corporation, National Industrial Court of Nigeria, 2013, Case No. NICN/LA/492/2012**. International law was used as a guide for interpreting domestic law.

Due to the absence of legislation on sexual harassment in Nigeria, CEDAW, ILO Discrimination Convention No. 111 and African Charter on Human and Peoples' Rights that protects human dignity and freedom from discrimination were used by the court as guides to interpret the applicant's constitutional rights and determine the domestic laws applicable to sexual harassment. The court held in the case, that sexual harassment constituted assault and trespass on the person of the victim/applicant (2013).<sup>125</sup> In conclusion, by referring to international law to interpret domestic law, the Industrial Court of Nigeria found that the applicant's rights to human dignity and freedom from discrimination had been violated and ordered the payment of general damages by the Country Manager as well as Microsoft Nigeria and Microsoft Corporation.

## 5.3. Tanzania's Key Commitments to Gender Equality at International, Regional and National Levels

### (i) The Convention on the Elimination of All Forms of Discrimination against Women (1979)

CEDAW provides the basis for realizing equality between women and men through ensuring women's equal access to opportunities in public life as well as in education and employment.<sup>126</sup>

<sup>125</sup> ILO, National Industrial Court of Nigeria, *Ejike Maduka v. Microsoft*, 19 December 2013, Case No. NICN/LA/492/2012, in <http://compendium.itcilo.org/en/compendium-decisions>.

<sup>126</sup> See, article 11 (a)-(f) of the CEDAW.

Access to justice is consequently an indispensable component of rule of law and a means for women to dynamically claim the entire range of human rights articulated in the CEDAW. The convention obliges Tanzania as a State Party to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on the basis of equality: - the right to equal employment opportunities, including the application of the same criteria for selection in matters of employment, the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training.<sup>127</sup>

Other state obligations relate to the right to equal remuneration - including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; the right to social security, particularly in situations of retirement, unemployment, sickness, invalidity and old age and other incapacities to work, as well as the right to paid leave; the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.<sup>128</sup>

Consensus is reached in matters of equality between men and women in employment assuming a number of measures are taken into consideration: - ranging from prohibition of imposition of sanctions, e.g., dismissal on the grounds of pregnancy or of maternity leave and discrimination in termination of employment grounded on marital status. Other procedures take account of seniority or social allowances, provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; and to provide special protection to women during pregnancy in types of work proved to be harmful to them.<sup>129</sup>

In assessing Tanzania's situation on employment and labour relations, the CEDAW Committee in its concluding observations of 7<sup>th</sup> March 2016 after state submission of 7<sup>th</sup> and 8<sup>th</sup> reports, expressed concerns at persistent discrimination against women in the labour market.<sup>130</sup> The same CEDAW Committee in its concluding observations of 2016 reiterated its concern that the Constitution of the United Republic of Tanzania (URT) of 1977 definition of discrimination is still not in line with articles 1 and 2 of the Convention, which prohibits direct and indirect discrimination in the public and private spheres.<sup>131</sup>

<sup>127</sup> See article 11 1(c) and 13 of the CEDAW.

<sup>128</sup> *Ibid.*, article 11(2).

<sup>129</sup> CEDAW/C/TZA/CO/7-8, 7 March 2016 (i.e. part of concluding observations on the combined seventh and eighth periodic reports of the United Republic of Tanzania).

<sup>130</sup> CEDAW/C/TZA/CO/7-8, 7 March 2016

<sup>131</sup> *Ibid.*

**In particular, the CEDAW committee was concerned about:**

- (a) the high rate of unemployed young women and their marginalization from formal labour markets;
- (b) continuing horizontal and vertical occupational segregation and the concentration of women in low-paid jobs;
- (c) the lack of implementation of the principle of equal pay for work of equal value and the persistent gender wage gap;
- (d) the lack of information on labour inspections on women's working conditions, particularly as regards women working in the private and informal sectors.

**(ii) The Convention on the Rights of the Child**

This is another important human rights instrument in regard to child protection. The Convention on the Rights of a Child (CRC)<sup>132</sup> obliges the State Parties to recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community in a manner that prepares him/her for employment and recreation opportunities. Efforts ought to be conducive to the possibility of the child achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.<sup>133</sup>

In addition, child protection is key in shielding the child from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. In specific terms, the State obligation relates to taking legislative, administrative, social, and educational measures to ensure the implementation of the relevant articles in the CEDAW. To this end and having regard to the relevant provisions of other international instruments, States Parties shall, in particular: (a) Provide for a minimum age for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment.<sup>134</sup>

**(iii) ILO Conventions**

Tanzania is also a state party to a number of other key international conventions, declarations and action plans which have a bearing on gender equality and women's employment and labour relations. The International Labour Organisation (ILO) provides protection in the following instruments:

**(a) The (ILO) Convention on the Elimination of Discrimination in Employment and Occupation (1958 No. 111)**

Tanzania is a state party to this Convention since 26 Feb 2002.<sup>135</sup>

<sup>132</sup> Convention on the Rights of the Child, *supra*.

<sup>133</sup> *Ibid.*, article 23(1)(3).

<sup>134</sup> *Ibid.*, Article 32.

<sup>135</sup> Discrimination (Employment and Occupation) Convention, 1958 (No. 111) concerning Discrimination in Respect of Employment and Occupation (Entry into force: 15 Jun 1960) ([www.ilo.org/dyn/normlex](http://www.ilo.org/dyn/normlex)).

*The (ILO) Convention on the Elimination of Discrimination in the Employment and Occupation describes discrimination to include:*

*“Any distinction/exclusion/ or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin/ which have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and such other distinction/ exclusion of preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member States concerned after consultation with representative employers’ and workers’ organizations.”*

Tripartite consultations between the Government, trade unions and employers’ associations are the best practices in promoting the acceptance and observance of the ILO policy.<sup>136</sup>

**(b) The ILO Convention on Equal Remuneration for work of Equal Value (1951 No. 100)**

This Convention was adopted in Geneva.<sup>137</sup> Tanzania is a party to it since 26 Feb 2002. Relevantly, this Convention defines: (a) the term remuneration to include the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment; and (b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.<sup>138</sup>

Tanzania State obligation in this regard is to adopt appropriate means for implementing the requirements of the Convention in order to determine the rates of remuneration, promotions and, in so far as is consistent with such methods, ensure the application to all workers, the principle of equal remuneration for men and women workers for work of equal value.<sup>139</sup>

**(c) The ILO Convention on Maternity Protection (2000 No. 183)<sup>140</sup>**

Tanzania has not ratified this Convention, despite provision of maternity leave in the context of the ELRA. As for the maternity leave, the law provides for a minimum of 12 weeks, however a state at ratification of the ILO Convention may specify exactly how many weeks.<sup>141</sup> In addition, the Convention also allows sick leave in case of complications before or after the maternity leave.<sup>142</sup>

According to the Tanzania Employment and Labour Relations Act (ELRA) of 2004, female workers are entitled to at least twelve weeks (84 days) of fully paid **maternity leave** or 100 consecutive days (in case of multiple births) within a **leave** cycle of 36 months. The same statute provides for paid **paternity leave** of at least 3 days (in a **leave** cycle of 12 months) for a new father if this **leave** is taken within the seven days of the birth of a child.

<sup>136</sup> *Ibid.*, Article 3.

<sup>137</sup> 34<sup>th</sup> in ILC session (29 Jun 1951) and entry into force: 23 May 1953.

<sup>138</sup> *Ibid.*, Article 1.

<sup>139</sup> *Ibid.*, Article 2(1).

<sup>140</sup> The ILO Convention on Maternity Protection (2000 No. 183) ([www.ilo.org](http://www.ilo.org)).

<sup>141</sup> See, *ibid.* article 4(1) and (2).

<sup>142</sup> *Ibid.*, article 5.

This Convention comes with a prohibition of discrimination and protection of employment due to pregnancy, maternity leave, and breast-feeding breaks. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave and that maternity does not constitute a source of discrimination in employment.<sup>143</sup> The burden of proving that the reasons for termination of employment was unrelated to pregnancy or childbirth and the consequences, shall rest on the employer.<sup>144</sup>

*The Convention makes it unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Article 4 and 5 or during a period following her return to work to be prescribed by national laws or regulations/ except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing.*

Breastfeeding and mothers of newborns are allowed daily breaks during work hours. The duration for nursing breaks that are remunerated and counted as working time and the procedures for the reduction of daily hours of work are determined by national laws and practices.<sup>145</sup>

**(d) ILO Convention on Worst Forms of Child Labour (1999 No. 182)**

As for protection of child in labour related issues, this Convention, of which Tanzania is a party, is relevant.<sup>146</sup> Children in Tanzania engage in the worst forms of child labour, including in mining, quarrying, and domestic work, sometimes as a result of human trafficking. Children also perform dangerous tasks in agriculture. Hence, Tanzania's state obligation in this regard is to take immediate measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency. The Convention defines the worst form of child labour to comprise of: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.**<sup>147</sup> Recommendation No. 190, which accompanies Convention No. 182, establishes that any definition of "hazardous work" should include: work which exposes children to physical, psychological or sexual abuse; work underground, underwater, at dangerous heights or in confined spaces; work with dangerous machinery, equipment and tools or carrying heavy loads; exposure to hazardous substances, agents or processes, or to temperatures, noise levels or vibrations that is damaging to health; and work for long hours, night work, and unreasonable confinement to the premises of the employer.<sup>148</sup>

<sup>143</sup> *Ibid.*, article 8(2) and article 9.

<sup>144</sup> *Ibid.*, article 8.

<sup>145</sup> *Ibid.*, article 10.

<sup>146</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Entry into force: 19 Nov 2000) Adoption: Geneva, 87th ILC session (17 Jun 1999).

<sup>147</sup> *Ibid.*, article 3.

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

(e) **ILO Convention Concerning Minimum Age for Admission to Employment, 1973. (C. No.138)**

This is another labour instrument in the same contexts of protecting children that Tanzania has ratified<sup>149</sup>. As any other member State, she has undertaken to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons in the best interest of the child. It establishes the minimum age of 18 years. However, States are at liberty to set their own minimum age, while observing the threshold of the Convention which sets the general minimum age for admission to employment or work at 15 years (13 for light work) and the minimum age for hazardous work at 18 (16 under certain strict conditions). It provides for the possibility of initially setting the general minimum age at 14 (12 for light work) where the economy and educational facilities are insufficiently developed.<sup>150</sup>

## 5.4. Regional and Sub-Regional Instruments

(i) **The 1990 African Charter on the Welfare of the Child**

This Charter prohibits child labour and child abuse while stating in clear terms the child's right to protection from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.<sup>151</sup> In practical terms, State Parties have the obligation to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including different forms of sexual abuse like FGM.<sup>152</sup>

(ii) **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).**

Relevantly for economic, social and civil rights, state Parties are under obligation to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, (a) they need to promote equality of access to employment; (b) promote the right to equal remuneration for jobs of equal value for women and men; (c) ensure transparency in recruitment, promotion and termination of employment of women; (d) prevent and address sexual harassment and sextortion in the workplace; (e) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers and in violating and exploiting their fundamental rights as recognized and guaranteed by Conventions, laws and regulations in force; (f) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector; (g) establish a system of protection and social insurance for women working in the informal sector and sensitize them to embrace it; (h) introduce

<sup>149</sup> Convention concerning Minimum Age for Admission to Employment (Entry into force: 19 Jun 1976) Adoption: Geneva, 58th ILC session.

<sup>150</sup> *Ibid.* article 2 and 3.

<sup>151</sup> See, the Maputo Protocol, article 5.

<sup>152</sup> *Ibid.*, article 15.

a minimum age for work and prohibit the employment of children below that age, and prohibit, prevent and punish all forms of exploitation of children, especially the girl-child; (i) take the necessary measures to recognize the economic value of the work of women in the home and guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors; (j) recognize and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children; (k) recognize that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility; and (l) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.<sup>153</sup> States also have obligations in respect of older women, to take specific measures that commensurate with their physical, economic, and social needs as well as their access to social protection; ensure the right of older women and women with disability<sup>154</sup> to freedom from violence, including sexual abuse, discrimination and the right to be treated with dignity.<sup>155</sup>

**(iii) The 2008 SADC Protocol on Gender and Development**

In its revised versions, this Protocol requires states to review and amend laws and develop policies that ensure that women and men have equal access to wage employment, to achieve full and productive employment, decent work including social protection and equal pay for work of equal value for all women and men in all sections in line with the SADC Protocol on Employment and Labour.<sup>156</sup> This shall be enabled by adapting a number of principles, such as equal pay for work done, eradication of occupational segregation and discrimination, recognition of economic value and protection of persons engaged in domestic work, and appreciation of minimum remuneration of domestic work.<sup>157</sup>

## 5.5. Soft Law Instruments

Another instrument of relevance in this context is a soft document, the Beijing Declaration and Platform for Action (1995).<sup>158</sup> Tanzania expressed commitment to address all twelve (12) Areas of Critical Concern, nevertheless, has chosen to concentrate on women's access to education and employment among four themes identified as priority areas after the Beijing Conference in 1995. Tanzania has taken bold actions towards achieving the Sustainable Development Goals including SDG 5 on Gender Equality, recognizing the fact that gender inequality continues to hold women back and deprives them of basic rights and opportunities in the world of work.

Tanzania is also a party to regional instruments which could enhance effective ways of addressing structural concerns such as unfair patriarchal social norms that affect women and girls – including Southern African Development Community (SADC) Gender Declaration (1997) and its Addendum on the Prevention and Eradication of Violence against Women

<sup>153</sup> See, article 13.

<sup>154</sup> *Ibid.*, article 23.

<sup>155</sup> *Ibid.*, article 22.

<sup>156</sup> See article 19(1) SADC Protocol, *supra*.

<sup>157</sup> *Ibid.*, article 19(2).

<sup>158</sup> The Beijing Declaration and Platform for Action (1995).

and Children (1998); the Solemn Declaration on Gender Equality in Africa, (SDGEA) 2004, SADC Protocol on Gender and Development (2008) and its addendum on the prevention and eradication of Violence against Women and Children; AU Agenda 2063 which aspires that by 2063, Africa would have undergone deepening changes of the culture of good governance, democratic values, respect for human rights, justice and the rule of law, and gender equality in all spheres of life.<sup>159</sup> Furthermore, employers' or workers' and certain other organizations (not individuals) of the United Republic of Tanzania may be advised to file complaints through the ILO procedures in relation to those Conventions which the United Republic of Tanzania has ratified.

## 5.6. Domestic Laws and Policies

Sources of Employment and Labour Relations law are related to the sources of law in general as mentioned in preceding chapters. Among the formal sources are:

### (i) **The Constitution of United Republic of Tanzania**

The Constitution, in the context of employment, establishes that every person has the right to work.<sup>160</sup> Albeit selective to citizenry, it adds that every citizen is entitled to equal opportunity and right on equal terms to hold any office or discharge any function under the state authority.<sup>161</sup> Relevantly to remuneration, it guarantees without discrimination that all persons working, based on their abilities, shall be remunerated according to the measure and nature of the work done.<sup>162</sup> Under Article 63 (3) (e) of the Constitution, it is implied that contents of ratified treaties and domesticated by Parliament are applicable in Tanzania. In the Bill of Rights, it is provided in Article 13 (1), that:

*“All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.”*

Article 13 (5) defines discrimination as:

*“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 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.”*

The Constitution establishes the ‘right to work’ and ‘just remuneration’ as a basic right.

<sup>159</sup> See, the AU – Agenda 2063.

<sup>160</sup> *Ibid.*, article 22(1).

<sup>161</sup> *Ibid.*, article 22(2).

<sup>162</sup> *Ibid.*, article 23.

Article 22 (1) states:

*“Every person has the right to work. Every citizen is entitled to equal opportunity and right on equal terms to hold any office or discharge any function under the state authority.*

Article 23-(1) states:

*“Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and nature of the work done.*

(2) *Every person who works is entitled to just remuneration”*

**(ii) The Employment and Labour Relations Act (2004)**

The ELRA is another source of labour law that takes into account the relevant statutes and judicial decisions. The enactment of the Act and the Labour Institutions Act, both of 2004, were preceded by repealing several labour laws. The main objective was to provide a framework for the resolution of disputes by mediation, arbitration and adjudication; and also, to provide the legal framework for effective and fair employment relations and minimum standards regarding conditions of work.<sup>163</sup> The ELRA introduced mediation in dispute resolution, which is a useful tool in saving resources when parties are acting in good faith.

The comprehensive law has also strengthened minimum labour standards and streamlined procedures for lockouts and strikes in reducing surprise industrial action, which may negatively affect investments and employees' wellbeing.

The Employment and Labour Relations Act emphasizes equality between men and women in employment.<sup>164</sup> The Act prohibits discrimination of any kind and mentions sex, gender, marital status, age, and disability among several factors prohibited to be used as a basis for discrimination.<sup>165</sup> The Act has made it mandatory for employers to have an Employment Policy, which specifically states how the workplace will provide for equality in employment in the labour market. The ELRA establishes legal principles on equal pay for equal work, maternity and paternity leave, breast feeding breaks during working hours, workers' safety and non-discrimination on jobs and remuneration.<sup>166</sup>

**(iii) The Employment and Labour Relations (General) Regulations, 2017**

The government gazetted new labour regulations in 2017 to govern a variety of work-related issues, among others, prohibition of child labour and employment standards. An employment standard constitutes a term of contract with an employer. A provision on wage determination that stipulates a minimum term and condition of employment

<sup>163</sup> Mwalongo, F., Labour Disputes Handling Procedure in Tanzania, Available at <http://www.academia.edu/5217671> (Last Accessed on 26/04/2019).

<sup>164</sup> Section 7(1) LMA, *supra*.

<sup>165</sup> Section 7 (4).

<sup>166</sup> *Ibid*.

is an employment standard.<sup>167</sup> Regulation 15 provides for female employees' right to breastfeed their babies during working hours, and they are now allowed to take a break of maximum two hours at their convenience during working hours. This right extends uninterrupted for a period of six months after maternity leave. The previous labour law did not provide a period for breastfeeding, although in practice the two hours were granted. This provision now places uniformity to all employers, which previously would have varied.<sup>168</sup>

**(iv) The National Employment Policy (2008)**

The policy document stresses the need to create more and better occupations and professions, enhance gender equality, and improve access to employment opportunities by all. One of its policy statements commits the Government that: *"Affirmative action will be undertaken to facilitate easy access to productive employment opportunities among women in both wage and self-employment in Public and Private Sectors."*

**5.6.1. Dimensions of Law on Employment and Labour Relations on Gender, Women and Children**

Specific forms of VAW at workplaces include: sexual coercion, gender-based workplace discrimination, unequal treatment, stigmatization, job segregation, exclusion, sexual harassment and intimidation (sextortion), sexual exploitation and abuse, human trafficking for forced labour and sex work within and across borders. Within the judiciary in Tanzania, it is established that: *"Gender equality and an effective judiciary are both essential to achieving economic development and building strong societies"*.<sup>169</sup> Despite the existence of conducive legal and policy frameworks aimed at protecting employees from discrimination, sexual harassment and violence, their implementation and resulting effects are found to be limited. A study conducted to assess sexual harassment and sexual violence at public sector workplaces in Tanzania revealed that 21% of women and 12% of men have experienced sexual harassment personally.<sup>170</sup> Half of the study population was aware of the existing regulations. The study found that the majority of public servants who had knowledge of the issue had learned about sexual harassment in the context of an HIV/AIDS workplace programmes. This finding indicates that well-designed workplace interventions can play an important role in creating awareness, addressing gender stereotypes, and informing employees about their personal rights and responsibilities.<sup>171</sup>

It is reported that among unpaid family helpers in agriculture there are more than twice females (4.8 million) than males (2.1 million). While males spend less time in agriculture but are the main landowners and main actors in selling farm crops and commercial agriculture.<sup>172</sup> Gender gaps in employment include labour force participation rate and defining economically active populations, time allocation, income, decision making concerning expenditure, access to resources, entry and upward movement in different types of employment.

<sup>167</sup> Chale, V.T. (2014) HR Policies and Labour Laws in Tanzania - 25 September 2014.

<sup>168</sup> Government Notice No. 47 of 2017.

<sup>169</sup> World Bank, Gender and the Judiciary in Africa, the Joint Conference of the Judiciary of the Republic of Tanzania and the World Bank, Arusha, Tanzania, June 10-14, 2018 (<https://www.worldbank.org/en/events/2018/06/10/gender-and-the-judiciary-in-africa>).

<sup>170</sup> Vuckovic, M., *et al*, (2017) "Sexual harassment and gender-based violence in Tanzania's public service: A study among employees in Mtwara Region and Dar es Salaam", International Journal of Workplace Health Management, Vol. 10 Issue: 2 (undated)

<sup>171</sup> *Ibid*.

<sup>172</sup> FAO report of 2014 - Gender Inequalities in Rural Employment in Tanzania Mainland: An Overview, pg 113.

Women have a different life cycle from men, in terms of their childbearing responsibilities, lower status within the family and society and in employment where they can face job segregation.<sup>173</sup> The Employment and Labour Relations Act does not include guidelines for employers to adhere to while preparing the non-discrimination plan to guide them on how to maintain minimum standards for both men and women.

Court decisions can reinforce commitments against discrimination and achieving equality. In a case before the High Court of Tanzania, Labour Court Division between **Rose Mbele vs. Akiba Commercial Bank**, Labour Dispute No. 9 of 2013,<sup>174</sup> the complainant filed a dispute with the Labour Court under sec. 94 (1) of the ELRA because she was promoted to the position of Head of Marketing and Communication Department with the bank but after five years, she was demoted to the position of a Marketing Officer. The Court found the demotion of the complainant not justified because misconduct was not proved.

The demotion was declared illegal and unfair. In addition, it was established that there were procedural irregularities and reinstatement was ordered to the position of Head of Marketing and Communication Department without loss of salary and benefits from the date of unfair demotion to the date of final payment.

## 5.7. Legal Principles

This section outlines the basic legal principles underlying the Tanzania legislation. Court decisions are cited, theories and good practices are examined.

### (i) Gender Equality and Non-Discrimination

The two are related. Non-discrimination allows the voices of women and other marginalized groups at work to be heard and to participate in development while making use of opportunities and abilities. According to the Constitution of United Republic of Tanzania, Articles 12, 3, 7, 23 and the ELRA) 2004, all human beings are born equal and are equal before the law. The law also recognizes the right to work and the right to just remuneration and requires every employer to take steps for ensuring that men and women workers are paid equally for work of equal value. Section 7 of the same law also prohibits discrimination on the basis of colour, nationality, tribe or place of origin, race, national extraction, social origin, political opinion or religion, sex, gender, pregnancy, marital status or family responsibility, disability, HIV/aids, age or station of life.

**The level of wages sometimes depends on the bargaining capacity of workers and the balance of power between employers and employees which is always against workers and particularly those at the bottom of the ladder who are not unionize and mainly women.**

<sup>173</sup> *Ibid.*

<sup>174</sup> *Labour Court Case Digest of 2015 Part 1, Mary Mbele vs. Akiba Commercial Bank*, Labour Dispute No. 9 of 2013 09/10.2015, Mashaka J. pp. 120 to 123.

According to ILO, there are four fundamental principles and rights at work. These categories are:

- (a) freedom of association and the effective recognition of the **right** to collective bargaining;
- (b) the elimination of forced or compulsory labour;
- (c) the abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

The African Charter on Human and People's Rights echoes the same principles of non-discrimination while recognizing that the African woman is faced with poverty and the burden of work. Concurrently, societal norms, rules, and roles encourage men to value or devalue women even in places of work although there are anti-discrimination laws in place to discourage discrimination of any kind. The objectives of non-discrimination principles in employment are to: protect the core rights of all employees; provide minimum standards that can be flexibly varied by either collective bargaining or individual contracts but within carefully considered limits, e.g., hours of work, and recognize the diversity of the modern labour market.

At the local level, labour disputes must be referred to the Commission for Mediation and Arbitration (CMA) for mediation. The Commission is established under section 12 of the Labour Institutions Act of 2004.<sup>175</sup> Under the ELRA and the Labour Institutions (Mediation and Arbitration) Rules of 2007 the mediator is required to resolve the dispute through mediation within 30 days, unless the parties agree to a longer period. Employees who have been unfairly discriminated against, treated differently, or that an employer has contravened the laws, can lodge complaints with the Commission for Mediation and Arbitration (CMA) within 60 days of the alleged unfair discrimination having taken place. If the CMA is not able to resolve the dispute through mediation, the matter can either be referred for arbitration and to the High Court (Labour Court Division) for adjudication. If the alleged act of discrimination was committed by a fellow employee, it can first be dealt with internally as a grievance. Employees can also lodge complaints with the National Human Rights Institution which is the Commission for Human Rights and Good Governance (CHRAGG) which has the mandate to conduct investigations and determine any misuse of power, mismanagement and violation/abuse of human rights and recommend remedial actions and ways of resolving matters brought before it.

Subject to the Constitution of the United Republic of Tanzania, 1977, the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of ELRA and to decide upon the following: (a) appeals from the decisions of the Registrar; (b) reviews and revisions of arbitrator's awards and decisions of the Essential

Services Committee; (c) reviews of decisions, codes, guidelines or regulations made by the Minister under the Act; (d) complaints, other than those that are to be decided by

<sup>175</sup> The conduct of mediation and arbitration is governed by the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and Labour Institutions (Mediation and Arbitration Guidelines) Rules GN No. 67 of 2007 while the conduct of mediators and arbitrators is regulated by the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules GN. No. 66 of 2007.

arbitration under the provisions of the ELR Act; (e) any dispute reserved for decision by the Labour Court under the Act; and (f) applications including declaratory orders in respect of any provision of the Act and a court injunction. Where the employee makes out a *prima facie* case of discrimination by the employer on any grounds prescribed above, it shall be the duty of the employer to prove that the discrimination did not take place or that the discriminatory act or omission is not based on any of the grounds established in the law.

The labour law requires an employer to promote an equal opportunity in employment and strives to eliminate discrimination in any employment policy or practice. The employer is required to register a plan to promote equal opportunity and to eliminate discrimination with the Labour Commissioner.

In the case of **Patricia M. Rwagatare vs. Dorcas Albert Minja**, Revision No. 272 of 2009 High Court, Labour Division, Dar es Salaam,<sup>176</sup> the applicant was employed as a sales person by the respondent at her shop. While in the course of business, the Respondent was informed by other workers and neighbours that they suspected the applicant to be responsible for ill doings. The respondent conducted a private investigation of the matter; she was convinced that it was the applicant who stole the goods. She ultimately terminated the applicant's employment. The applicant referred the matter to the Commission for Mediation and Arbitration (CMA). She was aggrieved by both the reason and procedure for her termination. She indicated in the referral Form; F.1 that: "*There is no evidence or any loss I caused to the employer*" and on the procedural part she stated that "*the employer does not have any proof of financial loss allegations*". The applicant challenged the Arbitrator's award, among other things, that the Code of Good Practice GN No. 42/2007 on fairness of the procedure was not followed. She alleged that principles of natural justice were not applied as she was not heard before a disciplinary proceeding took place; and that there was no evidence in support of the award and no basis for granting the awarded sum. *The Court decision was that the award was improperly procured.*

*The CMA proceedings were quashed and the award was set aside. The arbitration was ordered to start 'de-novo' in accordance with the law.*<sup>177</sup>

In dealing with discrimination and gender inequality, it is essential to note in the enforcement of the law, it is essential to observe that affirmative action could be taken consistent with the promotion of equality or elimination of discrimination in the workplace or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.<sup>178</sup> In addition, the underlying causes of violation of women's rights and sexual harassment at workplaces are mainly because women are often overrepresented in temporary, lower paying, and lower status jobs with limited decision-making or bargaining powers over the terms and conditions of their labour including salary negotiations.

<sup>176</sup> High Court Labour Division, Dar es Salaam, Rev. No. 272 of 2009, 06/06/2011, S. C. Moshi, J.

<sup>177</sup> *Labour Court Case Digest*, 2011 – 2012.

<sup>178</sup> *Mywage.org/Tanzania, Discrimination, 2018.*

### 5.7.1. Examples of Criminal Cases on Rape/Sextortion 179

The three cases below illustrate situations where people in authority may take advantage of their positions to sexually abuse those under their authority or power at the place of work.

(i) **Seif Mohamed El-Abadan vs. The Republic, Criminal Appeal No. 320 of 2009, CAT at Tanga**

The appeal was dismissed in which a medical doctor had been convicted of raping his female patient on the examination table. The Court of Appeal established sextortion and went on to say:

*“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”.*

(ii) **Ally Hussein Katua vs The Republic, Criminal Appeal No.99 of 2010. 2.**

The appellant was a traditional healer who took advantage of his position and committed rape against a girl who was seventeen years old. The Court determined that with the inclusion of section 130 (e) of the Penal Code, consent was no longer relevant where the victim was under eighteen years of age. The Court of Appeal confirmed rape conviction against the accused.

(iii) **Onesphory Materu v. The Republic, Court of Appeal of Tanzania, Criminal Appeal No. 334 of 2009**

Appellant was a police officer charged for rape of a girl below 18 years old inside a police cell with a promise to release her. The Court of Appeal confirmed rape conviction against the accused.

### 5.7.2. Prohibition of Child Labour

The ELRA and the Child Act, in full realization of Convention on the Rights of the Child and ILO Convention on Minimal Age of Employment, prohibits the employment of children under the age of fourteen (14 years).<sup>180</sup> A child of 14 years may only be employed to do light work which is mostly and likely not harmful and hazardous to the child's health and development and does not impede the child's rights. A child under 18 years of age shall not be employed in a mine, factory or as a crew on a ship or in agriculture where work conditions may be hazardous. Employment of children above 14 years should not prejudice the child's attendance at school, participation in vocational orientation or training programmes approved by the competent authority or the child's capacity to benefit from the instruction received.

<sup>179</sup> Jebra Kambole, “The Law on Sextortion: The Serious Silent Corrupt Practice in Tanzania”, April 2012, Johannesburg, available at <https://www.academia.edu>.

<sup>180</sup> Section 5 ELRA.

### 5.7.3. No Forced Labour

The Constitution of United Republic of Tanzania prohibits all forms of forced labour. The ELRA also prohibits all forms of forced or bonded labour: *Any person, who procures, demands, or imposes forced labour, commits an offence.*<sup>181</sup> A person who unlawfully compels others to labour against their will commits an offence. The Law of the Child Act of 2009 prohibits imposition of forced labour or bonded labour on children.<sup>182</sup> A person who contravenes the provision related to forced labour in the Law of the Child Act commits an offence and is, upon conviction, liable to a fine of not less than two hundred thousand shillings (200,000) or to imprisonment for a term of six months or to both.

### 5.7.4. Maternity Protection

Maternity leave and protection of the infant breast feeding is covered under the Employment and Labour Relations Act, 2004.<sup>183</sup> Paternity leave is found in Section 34.<sup>184</sup> An employee becomes eligible for maternity or paternity leave after completion of six months' work from the commencement of her/his employment contract. Another criterion for eligibility of Maternity leave is the requirement of the law for an employee to give written notice to the employer of her intention to take maternity leave at least three months before the expected date of birth. The law is silent, however, on what will happen to an employee who does not give the required notice. Such notice must be supported by a medical certificate.

In Tanzania, female employees are entitled to 84 days within 36 months in addition to the annual leave. Maternity leave may be increased to 100 days if more than one baby is born. Moreover, an employee is entitled to an additional 84 days in case of infant death within a year of birth. Section 33 of the ELRA requires an employer to grant paid maternity leave to an employee only four times during the entire duration of her service. As per the law, pregnant and nursing workers cannot work at night, in hazardous places and it is prohibited in section 37 of the Employment and Labour Relations Act to terminate an employee's employment on grounds of pregnancy. In addition to individuals lodging their complaints that relate to obstacles in maternity and paternity benefits, Trade Unions have the duty of gathering information about specific reproductive health hazards, such as pesticides, situations that can cause accidents and take advantage of access to justice for legal actions in the courts and press for compensation for workers who have been harmed by such hazards at work. Through Collective Bargaining Agreements, Trade Unions have managed to entrench the implementation of the ELRA through collective bargaining agreements.

### 5.7.5. Rights of Domestic Workers

The ILO Domestic Workers Convention, 2011 (No. 189), defines a domestic worker as: *"any person engaged in domestic work within an employment relationship"*. The Tanzania domestic worker/servant is defined as: *"any person employed wholly or partly as a cook, house servant, waiter, butler, maid, cleaner, bar attendant, groom, gardener, washman or*

<sup>181</sup> See, section 6 of the ELRA.

<sup>182</sup> See, section 80 of the Cap 13.

<sup>183</sup> Section 33 (1) to (8) of the ELRA.

<sup>184</sup> Section 34 of the Employment and Labour Relations Act of 2004 (ELRA), states that an employee is entitled to at least three days of paid paternity leave if the leave is taken within seven days of the birth of the child and the employee is the father of the child. At least four days of paid leave are accorded in case of sickness or death of the employee's child.

*watchman*".<sup>185</sup> The majority of domestic servants are women and girls. Currently, there is no specific law which strictly applies to domestic workers alone. Domestic workers under Tanzanian laws are considered together with other employees, so their rights are provided for under the Employment and Labour Relations Act, 2004 and Regulations on Wages and Terms of Employment Order, 2010. Domestic workers continue to be hidden in informal arrangements, and the numbers are increasing to 7 percent of total working age population<sup>186</sup> but without necessarily being recognized as workers and therefore are not able to enjoy their labour rights to the fullest.<sup>187</sup>

Experience has shown that many employers of domestic workers do not adhere fully to labour laws, dignity and rights of employees. Research has shown that this is due to poverty, internal trafficking and lack of bargaining power and protection mechanisms. Often, the employers of domestic workers are employees in the public and private sectors, and some could be receiving minimum wages and therefore cannot afford to provide minimum wages to their own domestic workers.

Additionally, the majority of domestic workers themselves are not aware of their employment rights. They cannot therefore demand these rights in the workplace and cannot afford legal representation when needed.<sup>188</sup> Protection from long hours of work, low wages and child labour, negative perceptions, mistreatments and poor working conditions, non-provision of rest periods, annual leave, social security, and dispute resolution are the main issues to reckon with. Domestic workers are demanding written employment contracts and being able to lodge their complaints with appropriate authorities when they are mistreated.

In Tanzania, one trade union, CHODAWU (Conservation, Hotel, Domestic and Allied Workers Union) represents, amongst others, interests and concerns of domestic workers. However, most domestic workers have not joined this trade union. The reason behind this is partly due to a lack of coordination amongst domestic workers, especially since they do not work in the same places so it is difficult to organize collectively.<sup>189</sup> Another deterrent is that most living-in domestic workers, regardless of kinship, are regarded as family members of the employers. In addition, some domestic workers are distant or even close relatives of the employers, and where this kind of affiliation exists, the working environment becomes intricate.<sup>190</sup>

### 5.7.6. Business and Human Rights

It is essential to observe that companies and businesses are required to adhere to human rights as part of voluntary agreed UN principles while conducting their businesses. In 2008 the United Nations Human Rights Council sanctioned the existence of a corporate responsibility to respect human rights by unanimously "welcoming" the "**Protect, Respect and Remedy**" Framework for Business and Human Rights developed by the UN. The framework includes respecting rights of workers, protecting the environment and transforming situations in dealing with violations and abuses. One of the obvious observations made by LHRC in its

<sup>185</sup> Regulation of Wages and Terms of Employment Order, 2010.

<sup>186</sup> ILO, Country Office, Dar es Salaam in <http://www.idwfed.org/en/resources/domestic-workers-in-the-united-republic-of-tanzania-summary-of-findings-of-a-situational-analysis-2013>.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> <https://mywage.org/tanzania/in-the-workplace/domestic-workers> (accessed on 28/04/2019).

<sup>190</sup> *Ibid.*

Business and Human Rights Report of 2017 in Tanzania Mainland was the gap between male and female employees.<sup>191</sup> The report on business and human rights also revealed forms of violence that are common at workplaces as part of discrimination, especially against women. These include physical assault, sexual harassment and threats and bullying as a form of psychological violence. Women in both formal and informal sectors face such violence, including unwanted touching of body parts.

Awareness about women's rights is lower among women in the informal sector, leaving them at greater risk of violence at workplaces. Women traders, such as women selling in the market and food vendors also experience economic violence at their business places, including customers refusing to pay for food services. They are also more likely to experience verbal abuse or

insults compared to their counterparts in the formal sector. Women employed in the selling of alcohol and hospitality sector also face various forms of violence, including verbal abuse and sexual violence.

Most women are reluctant to report and denounce acts of violence for different reasons, including fear of losing their sources of income, business spaces and customers, not knowing where to get help and believing that no action will be taken against perpetrators. This further perpetuates intolerable situations of violence at work and business places. Others tend to fear not being taken seriously when they report sexual harassment, as revealed by legal aid clients attended by LHRC<sup>192</sup>. Promoting the change of attitudes and perceptions towards women and children using human rights-based approach and mainstreaming of gender equality by law officers are good practices as the entry points required in addressing rights of women in labour and employment relations at any level of the judicial system.

## 5.8. Barriers that Affect Women in Employment and Labour Relations

Despite the gender equality achievements registered in relation to employment, the chapter observes that a number of challenges still persist which cannot be ignored by the judiciary as women are constrained by the prevailing gender relations:

- ***Generally, women and girls in all sectors face obstacles in seeking employment and in pursuing upward labour movement. In addition, women face difficulties in transitioning from one employment to another, appointment to higher positions of decision making, allocation of duties and in dispute resolution.***
- ***In seeking employment, upward movement and fair share of benefits women (mainly) in subordinate positions face situations where persons in superior/supervisory positions and public trust could request sex favours.***

<sup>191</sup> Legal and Human Rights Centre, Tanzania Human Rights and Business Report 2017, : Industrialization Drive and Workers' Rights in Tanzania, Justice Lugakingira House, Kijitonyama, Dar es Salaam, Tanzania, July 2018.

<sup>192</sup> *Ibid.*

- *Discrimination and deferential treatment manifest themselves from hiring, on the job or when demanding payment of terminal benefit upon leaving the job. The main hurdle is patriarchy, which manifests itself in antagonistic and contradictory attitudes, gender stereo types and expectations about women in society and their competencies that are different and sometimes devalued.*
- *When the proportion of employed female is compared to the proportion of employed males in the working age and “economically active” populations, the gender disparity becomes visible in favour of males. In Government, parastatal and private sectors, males have a higher share of employment. Women are concentrated in low salary jobs, in agriculture and unpaid work. Challenges manifest themselves in the dispensation of equality rights/ in workplaces, thereby exposing VAW/C.*
- *Girls are commonly employed as domestic servants, sometimes by force or lured by their would-be employers or agents. Poor children in particular are trafficked internally for commercial sexual exploitation.*
- *Women and men in the informal and domestic spheres do not access the application of employment and labour law, social security, maternity and paternity benefits*

**(i) Matters of Equal Pay for Work of Equal Value**

Issues of Equal pay for Equal work are related to unequal balance of power between women and men which remains one of the overarching root causes of gender discrimination. It was expressed as a matter of concern by the CEDAW Committee in its review of Tanzania's adherence to its non-discrimination obligation. CEDAW noted that:

*“Tanzania lacks implementation of the principle of equal pay for work of equal value and the persistent gender wage gap”.*<sup>193</sup>

The average Tanzanian man earns 39 per cent more than what the average woman receives in total, according to the Global Gender Gap Report 2017 published by World Economic Forum.<sup>194</sup> Women are over-represented in vulnerable employment which is a relatively new concept that combines both “own-account work” and “contributing to family work”, both of which are employment statuses that are associated with low levels of development and high levels of poverty. The level of vulnerable employment is also related to the level of working poverty, low education and informality of employment.<sup>195</sup>

**(ii) Gender Bias**

The principle of equal pay for work of equal value addresses discriminatory structural gender biases in labour markets which lead to horizontal and vertical occupational segregation by sex.<sup>196</sup> By far the most damaging form of gender bias in places of

<sup>193</sup> CEDAW recommendation on United Republic of Tanzania, *supra*.

<sup>194</sup> *The Citizen* newspaper (Tanzania), 8 March 2018.

<sup>195</sup> ILO, (Naoko Otake), *Resource Guide on Gender Issues in Employment and Labour Market Policies: Working Towards Women's Economic Empowerment and Gender Equality*, Geneva 2014 and ILO STAT, *Paid Employment vs Vulnerable Employment: A Brief Study of Employment Patterns by Status in Employment*, n° 3–June 2018.

<sup>196</sup> ILO, *ABC of Women Workers' Rights and Gender Equality*, Geneva, Second edition, 2007.

work is triggered by motherhood, which includes descriptive stereotyping and the traditional sexual division of labour that result in strong assumptions that women lose their work commitment and competence after they have children.

Because of unconscious gender biases in administrative and legal processes women often have to prove themselves by providing more evidence of competence than men in order to be seen as equally capable. Based on gender stereotypes, women often find themselves walking on a thin rope between being seen as being too feminine to be competent—or too masculine and assertive to get the approval. Consequently, women often find themselves pressured to take on dead-end roles, from administrative assistants to being expected to take care of everyone.

### (iii) Sex Discrimination

Sex discrimination in employment and opportunity against a person (typically a woman) is one of the various areas of discrimination. Women are affected by multiple and intersecting forms of discrimination including: sex, age, race and ethnicity, nationality/migrant workers, religion, pregnancy, disability, equal pay, harassment and sexual harassment, genetic/family information e.g., inherited diseases in hiring and firing, political opinion, HIV/AIDS status, social origin and life style. The elimination of discrimination in respect of employment and occupation is one of the central and most important concerns of the ILO and the judiciary as an arm of government. Anti-discrimination features prominently in the Declaration of Philadelphia of 1944, annexed to the Constitution of the ILO, which states that:

*“All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;”*<sup>197</sup>

Non-Discrimination is also pivotal in the Tanzanian labour law although the word “*discrimination*” has not been defined under the Employment and Labour Relations Act. Article 1 (a) and (b) of ILO Convention No 111 on Discrimination (Employment and Occupation) Convention, 1958 defines discrimination to include:

*“Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.*

Sex discrimination is by far the most prevalent and women are by far the largest discriminated group. Although more and more women are working, in addition to the “glass ceiling”, the “pay gap” between women and men is still significant in Tanzania like in most countries. Women are also more likely to be stuck in lower-paid and least secure jobs. They face higher unemployment rates. Discrimination can occur at every stage of employment, from recruitment to education and remuneration, occupational segregation, and at times of layoffs.<sup>198</sup>

<sup>197</sup> Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Concerning Discrimination in Respect of Employment and Occupation (entry into force: 15 Jun 1960) ([www.ilo.org/dyn/normlex](http://www.ilo.org/dyn/normlex)).

<sup>198</sup> ILO, *op. cit.*

One effect of discrimination is marginalization of women in the formal labour markets. Care work in the formal sector, e.g., in education, health, social work, domestic servant work and cleaning are normally perceived as traditionally women's roles. Professionals like nurses – majority of whom are women, are confronted with low wages and unsuitable working conditions, and are likely to be exposed to discriminatory practices. Domestic workers experience some of the worst kinds of working conditions across the care workforce and are particularly vulnerable to human trafficking, exploitation and abuse. The status, pay and benefits of early childhood development personnel are less favourable than those of primary and secondary teachers. Care work is perceived from a gender perspective that is socially constructed and dependent on social norms and material conditions because the gendered division of labour between paid employment and domestic work emanates from the traditional male breadwinner and female housewife mode and unpaid domestic work.<sup>199</sup>

A case that verified the right to non-discrimination as provided in the Constitution was decided by the High Court of Tanzania, Labour Division - Dar es Salaam. It was **Anthony Francis Munyigo vs. Total Tanzania Ltd**, Complaint No 30 of 2009.<sup>200</sup> The key issue for decision in this case was: what constituted unlawful employment discrimination and harassment. The other part of the claim was for payment of an employment benefit alleged to be due but unpaid. The complainant believed he was being paid a discriminatory salary, that is, Tshs 418,000/= per month while employees doing comparable work were earning Tshs 800,000/=. He alleged that if it was not because of discriminatory practices, his salary ought to have been shillings 1,500,000/= since January 2007. According to the employee, another manifestation of harassment and discrimination was the act of withdrawal of a Standing Imprest, which he used to receive to help him effectively perform his duties. That imprest was withdrawn without due process; and by then, he had already used his own funds to do the employer's work to the tune of Tshs 3,782,140/=. The employer refused to reinstate his entitlement to the Standing Imprest or to refund the amount already spent. The employee's harassment claim was also based on the allegation that when he was making a follow up on his grievances and claims with the employer's assigned officers, they rudely refused to deal or make any response to his grievances and generally behaved in a manner which caused him emotional distress.

When the facts were considered, the discrimination claim was dismissed as the complainant had failed to establish differentiation in treatment. One reason was that the employee produced no promotional letters or any document indicating applicable salary rates per position. However, the claim for payment of Tshs 3,782,140/= was proved. Employer was ordered to pay that amount to the complainant. The case is a good example of the difficulties that employees face in establishing differential treatment and discrimination which occur at workplaces without written evidence and without further examination by judicial officers.

<sup>199</sup> ILO CareWork and Care Jobs for the Future of Decent Work, Geneva, 2018.

<sup>200</sup> Complaint No 30 of 2009

**(iv) Segregation and the Concentration of Women in Low-Paid Jobs**

There is gender disparity in employment in government, parastatal and other private sectors with more than twice of employed males (1,555,562) than females (716,384). This implies that females are more engaged in employment with less income and security<sup>201</sup>. There is a significant gender gap with more females than males in elementary occupations with 27.0 and 12.8 per cent respectively<sup>202</sup>. In relation to status in employment, women are over-represented in the unpaid and underpaid employment.

Discrimination is apparent in the workplace where women are frequently subjected to indirect or covert discrimination by both sexes. Qualified women may not be eligible for promotions because of pregnancy and jobs may be offered to a less qualified male applicant just because he is male. Women are also more likely to be judged by their looks and how they dress than their male counterparts.<sup>203</sup>

**(v) Sexual Harassment/Sextortion at Places of Work**

Another challenge is sextortion which refers to the broad category of sexual corruption in explaining sexual abuse and exploitation, in which abuse of power/office is the means of coercion. According to the Tanzania Association of Women Judges (TAWJA) the term 'sextortion' is the misuse of authority to sexually abuse and intimidate others for corrupt purposes<sup>204</sup>. Demand or imposition of sexual favours on subordinate staff for the benefit of those in authority, either for services, employment, promotion or other employment-related favours, is a common complaint at workplaces and in the community at large. Elements of extortion or pressure in addition to corruption are associated with the concept that there is "no service without something" – "*quid pro quo*", which means a favour for a favour and reliance by persons who manage others and with authority on psychological coercion rather than physical power.<sup>205</sup>

The main challenge with sextortion is that many of these cases are slipping through cracks in the law and not brought out to be heard due to dynamics of power relationships between men and women, vulnerability and the prevailing culture of secrecy and stigma surrounding the sexual corruption issue in the society while the law demands that there must be proof beyond reasonable doubt. The easiest way is when the victim is prepared to gather evidence by, for example, taking some photos, record videos or voices and save mails or telephone messages. The standard of proof may have to be amended or shift burden of proof to the accused to prove his innocence.<sup>206</sup>

<sup>201</sup> URT, Integrated Labour Force Survey of 2014 (ILFS), Analytical Report, 2015; URT, ILFS, 2014, Analytical Report 2015.

<sup>202</sup> URT, ILFS, 2014, Analytical Report 2015.

<sup>203</sup> Labour Court Case Digest of 2015 Part 1, Rose Mbele vs. Akiba Commercial Bank, Labour Dispute No. 9 of 2013 09/10.2015, Mashaka J. pp. 120 to 123

<sup>204</sup> TAWJA *et. al.*, "Stopping the Abuse of Power for the Purpose of Sexual Exploitation: Naming, Shaming and Ending Sextortion, A Toolkit", available at [www.scribd.com/document/146680496/Sextortion-Toolkit](http://www.scribd.com/document/146680496/Sextortion-Toolkit) (accessed on 24/04/2019).

<sup>205</sup> Kambunga Y. (2016) "Sextortion in Education Sector and Response to Criminal Legal System in Tanzania", *Asia Pacific Journal of Education, Arts and Sciences*, Vol. 3 No.1, pp. 56-63.

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

**(vi) Gender Inequality**

Gender inequality is another barrier to fulfilling women's rights in employment and labour relations. ILO report shows that many who suffer from discrimination - especially on the basis of their sex or colour -face a persistent "equality gap" that separates them from dominant groups who enjoy a better life, or even from their own peers who have benefited from anti-discrimination laws and policies.<sup>207</sup> In employment issues, ELRA from a gender point of view include the public and the domestic domains whereby the workplace is traditionally considered male dominated. Domestic caring work, informal economic sector, subsistence and non-mechanized agriculture have remained to be women's work. Female reproductive function is not protected fully and hence ILO saw the need to put in place particular anti-discrimination instrument that contain special provisions of protecting the female reproductive work and awareness about rights and labour dispute procedures.

Recognizing the need for special protection for expectant and nursing mothers, the international community, through ILO, developed some international labour standards on maternity protection, stipulated under various ILO Conventions - including the Maternity Protection Convention, (supra) which has not been ratified by Tanzania. Domestically, labour standards on Maternity leaves are adequately covered under the Employment and Labour Relations Act 2004.

The (ELRA provides legal coverage for maternity leave which means the majority of women who are not under wage employment are not covered, particularly those in the rural areas. Key elements of maternity protection: reflect the concern that women's work does not pose risks to the health of the woman and her child and those women's reproductive roles do not compromise their economic and employment security. These elements include the right to maternity leave; cash benefits to ensure the mother can support herself and her child during leave; medical care; protection of the health of pregnant and breastfeeding women and their children from workplace risks; protection from dismissal and discrimination; and time out for breastfeeding upon their return to work.<sup>208</sup> However social protection that targets all women and their maternal situation is yet to be in place in Tanzania. What is provided is that maternal health, newborn and child health strategy extends free health services to pregnant mother and children below five years of age.

Associated with the above is trafficking in person which affects young women and young men internally and across the borders and including children, problem of serious organized crime, violation of law and order, immigration laws and border control. By its very nature human trafficking also involves rape, loss of dignity, forced labour, exploitation and mistreatment. Most times the human trafficking and movement of persons affects domestic work internally and outside the country, working in small businesses, tending to livestock and petty trading, farm work, forced labour and prostitution which amount to grave human rights abuses. Low earnings which affect women un-proportionally are still a problem in the labour force despite the fact that Tanzania has had high economic growth rates over the past ten years. Unfortunately, this trend in economic growth has not been reflected to the same extent in job creation.

<sup>207</sup> ILO: "Workplace Discrimination, A Picture of Hope and Concern, May 2003 ([www.ilo.org/global/about-the-ilo/newsroom/features](http://www.ilo.org/global/about-the-ilo/newsroom/features)).

<sup>208</sup> ILO, Maternity Protection Resource Package, <http://mprp.itcilo.org/pages/en/index.html>.

Poverty is still widespread with approximately 12 million Tanzanians living below the poverty line and mostly affecting women and children.<sup>209</sup>

The main issue in child labour is poverty which tends to justify the necessity for children to work/labour in farms, in mines, fishing, work at home and run errands in urban centres. Drawing the line between child labour and teaching child life and survival skills is one of the concerns. Engaging a child for long hours deprives him or her of spiritual as well as educational development.

Child Labour fundamentally deprives children of their rights to education and recreation in violation of international Conventions.<sup>210</sup> Gender analysis however is necessary as girls and boys are affected differently. Women are simultaneously forced to negotiate social approval in light of gender role expectations and gender stereotypes and hence assertiveness in some contexts is compromised. Further, workers who do not conform to stereotypical social norms for what a “man” or a “woman” should be or do for their livelihood, or who practice diverse gendered behaviours, can become targets of work-related discrimination, stigma, harassment, exploitation, and abuse.

**Occupational health and safety and gender:** the relevant and direct legislation is the Occupational Health and Safety Act, 2003. The Act is aimed at protecting workers' rights in health and safety in the workplace. It also provides for the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with activities of persons at work, and to provide for connected matters. Injuries and violence and their potential for affecting female employees in identified sectors e.g., domestic workers, women at the conveyer belt in factories, in factories with poor working conditions, where they have to remain standing for long, slippery floors and poor sanitary conditions.<sup>211</sup>

Emotional abuses in the place of work - the hostile verbal and nonverbal behaviours that are not explicit are otherwise tied to sexual violence that affect female employees. Examples of these behaviours include yelling or screaming, use of derogatory names, the “silent treatment,” withholding of necessary information and aggressive eye contacts. Many victims of such abuses suffer in silence.

#### **Discrimination at work on Marital Status,**

Using data from the 2016 ILO-Gallup survey, the *World Employment and Social Outlook – Trends for Women 2017* assessed the extent to which personal preferences, socio-economic constraints, and gender role conformity were driving gender gaps in the labour market. It was reported that in developing countries, however, the effect of having a spouse/partnership/marriage has a positive effect on participation (3.3 percentage points)<sup>212</sup>. In addition, the sexual division of labour, gender stereotypes, patriarchy and the negative perceptions about women and early marriages are acceptable social, biological and economic behaviours.

<sup>209</sup> ILO, Decent Work for Sustainable Development in Tanzania, October 2017 (<https://www.ilo.org/>).

<sup>210</sup> ILO, Country Office Dar es Salaam, *op. cit.*

<sup>211</sup> ILO, Gender and Occupational Safety and Health, [www.ilo.org/safework/areasofwork/gender-and-occupational-safety-and-health](http://www.ilo.org/safework/areasofwork/gender-and-occupational-safety-and-health).

<sup>212</sup> ILO, What Causes Gender Gaps in the Labour Market?, [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_566891/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_566891/lang-en/index.htm).

At places of work marital status for women could be used positively or adversely against women and could result into causing the gender wage gap. Below is a case where marital status and the perception about it became part of legal issues before a court of law.

A case of unequal payment and discrimination on the basis of marriage was heard by the High Court of Tanzania, Labour Division - Dar es Salaam, between **Registered Trustees of Benjamin William Mkapa HIV/AIDS Foundation as the Applicant vs. Oliver Murembo**, Revision No. 395 of 2015.<sup>213</sup> The legal issue that was in this application was, discrimination of an employee at the work place on marital status. The respondent Oliver Murembo was employed by the applicant - The Registered Trustees of Benjamin Mkapa Foundation, first as Administrative Assistant and Human Resources. Despite a promotion to Office Manager, she was getting lower salary compared to the former employee who was holding the same position and some junior staff were paid higher salaries compared to her. In an incident during a meeting convened by the CEO, the respondent was interrupted while asking a question by CEO who said, *“do you think I am crazy? I am a lion, “wewe unajua mwanaume?” Are you married? “Hujaolewa wewe”, you are not married, you will not be married...”*

The respondent filed a dispute before CMA and the arbitrator concluded that the employee was discriminated against by the employer on an account of her marital status, as she was directly and indirectly harassed (which is a form of discrimination) contrary to section 7 (5) of the ELRA. She was granted general damage of 50,000,000/= Tshs as compensation. The revision application by the employer before the High Court, Labour Division was dismissed based on evidence tendered at the CMA, and its decision. The Court established that the respondent was discriminated against by the CEO on marital status to the extent clearly shown by the Arbitrator, and the Court found that the award of Tshs 50,000,000/= was appropriate to the circumstances because there was discrimination; of a female employee at a workplace.<sup>214</sup>

### **Conclusion:**

The chapter on Women's Rights in Employment and Labour Relations has provided reference information and guiding principles for use by court officials when determining cases where women's and children's labour rights are involved. This section of the Gender Bench Book on women's rights has attempted to bring into the judicial agenda some women's rights issues in employment and labour that impede access to justice for all. Some of the areas of rights violations and issues include different types of discrimination in places of work, equality and equity, sextortion and sexual harassment, child labour, domestic workers' rights, business and human rights obligations that employers and employees have and procedures in resolving disputes. The main aim is promoting a balanced gender perspective into the judicial procedural processes.

<sup>213</sup> Revision No. 395 of 2015.

<sup>214</sup> High Court of Tanzania, Labour Division – *Case Digest* of 2015, Revision No. 395 of 2015; between Registered Trustees of Benjamin William Mkapa HIV/AIDS Foundation as the Applicant Versus Oliver Murembo as the Respondent. (Original/CMA/DSM/ILA/239/13/536), Dar es Salaam, 2015.

The main lesson learnt is that despite the policy and legal provisions, violation of women's rights and discrimination in places of work in the formal and informal sectors is still rampant and the judiciary has a big role to play. The situation calls for a need to mainstream a balanced gender perspective and women's rights into judicial decision-making processes at all levels and in a sustainable fashion as part of achieving long-term goals in the development of the country.

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# CHAPTER SIX

## PROPERTY RIGHTS AND LAND OWNERSHIP

### 6.0. Introduction

Right to property is one of the most important social and economic rights to be enjoyed by an individual. This right is linked to several other rights, including the right to a livelihood, the right to health, and the right to improved standards of living. There has been also increasing recognition of the importance of the right to property, as regards the situation of women in general and in relation to their access to justice and economic emancipation. Due to its cross-cutting nature, the right to property requires prominence in the practice of law.

This chapter examines the right to property and land ownership from a different angle. The right to matrimonial home, property and assets on dissolution of marriage, spouse's consent in mortgages of a matrimonial home were examined in chapter three where properties were acquired developed and disposed of as an incident of an existing or failed marriage as a special relationship. But under the law, property can also be acquired by other means. One way is by direct acquisition. The other way is by succession. The present chapter highlights some of the most topical issues on the acquisition and realization of this right and how it relates to gender equality and women's power in relationships and reduce violence against women.

### 6.1. Protection of Property Right and Land Ownership

In Tanzania, the right to own property is both a constitutional as well as a statutory right. Pursuant to Article 24 (1) of the Constitution of the United Republic of Tanzania, 1977 all citizens of majority age have the right to own properties in their individual capacities and in accordance with the law. This article guarantees the right to own property regardless of its mode of acquisition provided it is lawful. The said Article provides:

*“Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law”.*

#### 6.1.1. Direct Acquisition - The Case of Land Ownership

In law, property could be movable or immovable. In Tanzania, one of the most important resources for the economic emancipation of all persons, but especially women and children, is land, which is an immovable property. The constitutional right to own property is echoed in the provisions of the country's major land statutes.<sup>215</sup> Section 3(2) of the Land Act and Section 3(2) of the Village Land Act both map out the equality in land ownership between men and women. The two sections carry the principle of equality between men and women in the ownership of land and stipulate that:

<sup>215</sup> The Land Act, Cap. 113 R.E 2002 and the Village Land Act, Cap. 114 R.E 2002.

***“The right of every adult woman to acquire, hold, use and deal with land shall, to the same extent and subject to the same restrictions, be treated as a right of any man”.***

Furthermore, section 19 (1) of the Land Act provides for a grant of right of occupancy to an individual and group of two or more citizens who have complied with all the required conditions under the law.<sup>216</sup> Therefore, in land ownership there are individual rights of occupancy and/or co

–occupancy.<sup>217</sup> Co-occupancy is divided into *tenancy in common* and *joint tenancy*. Sections 25 - 35 of the Land Act cover procedures, duration and conditions for the grant of the letter of offer, and the right of occupancy. If allowed, the right of occupancy may be granted for a term up to, but not exceeding ninety-nine (99) years usually with an option for renewal. It may also be granted from year to year or for a period of less than one year. Any person intending to dispose of or transfer his/her right of occupancy must give notice by filing the form and send it to the Commissioner for Lands for consent. The Commissioner may grant or refuse the consent if the required procedures have not been complied with and if the said transfer or disposal is meant at denying other party or parties (e.g. a party to the marriage, company or partnership), the right to occupy the respective land.<sup>218</sup>

## 6.2. Right to Property in a Matrimonial Relationship

In the course of subsistence of the marriage, married couples are free to acquire or own properties separately or jointly. Therefore, in furtherance of protection and promotion of property rights and land ownership, courts in Tanzania are empowered under section 114 of the Marriage Act, when granting orders for divorce or separation of spouses to order for the division of matrimonial properties acquired during the subsistence of the marriage. Section 114 (1) provides specifically that:

***“the court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of the sale. ”***

Furthermore, section 56 of the Law of Marriage Act provides for equal rights in acquiring and owning properties for both husband and wife. While section 58 of the same Act is specific on empowering the said spouses to acquire those properties in their separate names, there is a *rebuttable presumption* that such property belongs *solely* to that spouse. Therefore, before deciding on division of those properties, the court has to establish first whether such properties were acquired separately or jointly. In order to protect the interests of the said spouses in the properties registered in the name of one party, section 59 of the Act provides for a requirement of *consent in the processes of sale, lease and mortgage*. Section 59 of the Law of Marriage Act, provides that:

<sup>216</sup> See sections 24 – 35 of the Land Act.

<sup>217</sup> *Ibid.*, section 160.

<sup>218</sup> *Ibid.*, Sections 36 – 43, Section 61 -76 and Sections 159 – 162. See also Sections 56 – 60 of the Law of Marriage Act, Cap.29 [R.E.2002].

***“Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.” (Emphasis added).***

In the same spirit, section 60 of the Act protects spouses' interests in all other properties acquired by one spouse in his/her own name. It provides that:

***“Where during the subsistence of a marriage, any property is acquired–***

***(a) in the name of the husband or of the wife, there shall be a rebuttable***

***presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; (b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal”.*** [Emphasis added].

To rebut the said presumption, the trial court is expected and required to evaluate the evidence tendered by the parties, and to ascertain the extent of their contributions towards the acquisition of the said property, if any. Section 114 (2) (b) of the Act, provides that:

***“In exercising the power conferred by subsection (1), the court shall have regard– (b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets”.*** [Emphasis added].

However, the above section does not make clear what constitutes a 'contribution' towards the acquisition of matrimonial assets. In the event, the interpretation of the said section has been a subject of contention in case law.<sup>219</sup> In the acquiescence of the law, the jurisprudence of the Court of Appeal of Tanzania in this regard is remarkable. The Court's most celebrated decision, among others, is the case of ***Bi. Hawa Mohamed vs. Ally Sefu***.<sup>220</sup> The Court determined the issue of 'whether domestic services of a housewife amount to contribution in the acquisition of matrimonial assets.' The Court applied the principle of equity by holding that:

***“Since the welfare of the family is an essential component of the economic activities of a family man or woman, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets. The ‘joint efforts’ and work towards the acquiring of assets have to be construed as embracing the domestic ‘efforts’ or ‘work’ of husband and wife.”*** [Emphasis added].

<sup>219</sup> Mtengeti-Migiro, R., *The Division of Matrimonial Property in Tanzania* the *Journal of Modern African Studies*, Vol. 28, No. 3, Cambridge University Press Sep., 1990), pp. 521-526.

<sup>220</sup> (1983) TLR 32 at page 35.

The court took into account the “*substantial*” contribution made by the wife. Following this principle, in subsequent cases, some courts have adopted the positive approach and equally recognized each spouse’s contribution towards acquisition of properties and this contribution may be direct, where it is monetary or indirect where a spouse offers domestic services, including, household chores, bearing and rearing of children, making the home comfortable for the husband and the issues. When distributing the property of a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other as this case clearly showed that while the husband was the financial muscle behind all the wealth acquired, the contribution of the wife is no less important than that made by the husband.<sup>221</sup> In some cases courts have even found it difficult to task the spouses to account for, and narrate evidence on what they have contributed toward the matrimonial assets during the happy days of their marriage. For instance, in the case of **Victoria Sigala vs. Nolasco Kilasi**,<sup>222</sup> Shangali J stated:

*“Indeed, there is no fast and hard rule in deciding on the amount of contribution and division of the matrimonial assets. Where the matrimonial assets were acquired during the happy days of subsistence of marriage and in the joint efforts of the spouses there is no need of requiring one spouse to give evidence to show the extent of his/her contribution. The distribution of such assets should automatically proceed in equal terms”.* [Emphasis added].

As it has been indicated above, section 56 allows parties to first establish *whether the house in question is matrimonial home or not*. The law is very clear and self-explanatory on this matter. Under section 2 of the Law of Marriage Act, the definition of a matrimonial home is provided to mean “*the building or part of a building in which the husband and wife ordinarily reside together...*” In **Samwel Moyo vs. Mary Cassian Kayombo**<sup>223</sup> the Court held that:

*“under section 114(1) the Law of Marriage Act, 1971, the court may order division of assets only if the assets are matrimonial assets acquired by the parties during the marriage and through joint efforts.”*

However, in other situations while considering the same issue, the Court adopted a progressive approach. In **Yokobeti Simon Sanga vs. Yohana Sanga**<sup>224</sup> Uzia. J, stated:

*“it is also my considered view that, the appellant is entitled to the share of the matrimonial properties, to be specific the appellant deserves 50% of all matrimonial properties for the entire period of the life of their marriage and the distribution is on 50% of the market value...”*

The above examples demonstrate how courts can creatively and constructively move the situation to address the issue of unequal distribution of matrimonial assets between and among the marriage couples, hence promotion and protection of the right to property for both spouses.

<sup>221</sup> See cases of **Lawrence Mtefu vs. Germana Mtefu**, Civil Appeal No. 214 of 2000, **Guliya Mohamed vs. Makamo**, Civil Appeal No. 45 of 2001, **Bibie Mauridi vs. Mohamed Ibrahim**, (1989) TLR 162 and **Mariam Tumbo vs. Harold Tumbo** (1983) TLR 293.

<sup>222</sup> PC Matrimonial Appeal No. 1 of 2012 High Court of Tanzania, Iringa Registry (unreported), at page 8 of the typed judgment.

<sup>223</sup> [1999] TLR 197.

<sup>224</sup> Matrimonial Appeal No. 1 of 2010, High Court Iringa Registry (unreported).

### 6.3. Presumption of Marriage and the Right to Property

It is common in Tanzania, as is the case elsewhere in the world, that a man and a woman may cohabit or choose to live under one roof as husband and wife for many years without contracting any formal marriage. Hence, they would not have any marriage certificate to prove the existence of a marriage relationship between them. Therefore, the only resort, to determine the status of such couple and protect their interest in the properties jointly acquired is under the presumption of marriage. Section 160 (1) and (2) of the Law of Marriage Act, provides that:

160 (1)“*Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*”

(2) “*When a man and a woman have lived together in circumstances which give rise to a presumption provided for in sub-section (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more and the court shall have jurisdiction to make order or orders for maintenance..... and such other reliefs including, ... dissolution of marriage or order for separation as the court may think fit...*” (Emphasis added).

The rationale and main purpose of the above provisions of the law is to protect the interests of men and women with long cohabitation without having gone through any formal ceremony of marriage. However, in order for the parties to establish the said presumption, there are some factors to be proved before the Court, such as, *parties have cohabited and lived together under the same roof for more than two years; parties have acquired a reputation of husband and wife and that, at the time of cohabitation there was no existing marriage on each one of them and that when they met, all of them had the capacity to marry.*

In some cases, courts, by relying on the evidence obtained from the testimonies of the parties themselves and their witnesses, have considered other factors such as, *the number of children, gaps and/or sequencing of their birth dates and the duration of cohabitation, since in some cases parties do not even remember how many years they have cohabited.* It is also a fact that during that long time of cohabitation the woman, without hesitation, uses her efforts, energy and all love and affection to protect and care for the husband and children. She comforts the husband at the time of happiness and sadness to ensure that he is happy and capable to work, but it is sad to note that, in some cases the woman end up being exhausted for nothing. In such circumstances, courts have held that it is prudent for each party to have an equitable share in each of the said properties acquired during the subsistence of their marriage. Justice demands each party to have an equitable share in the division of the said assets. In the case of **Lucas Nganilevanu vs. Magdalena Salingwa**,<sup>225</sup> Sameji J (as she then was) while considering the issue of division of matrimonial assets to the man and woman who cohabited for more than twenty-one (21) years, i.e., from 1975 to 1996 and blessed with ten (10) issues, observed that:

<sup>225</sup> DC, Matrimonial Appeal No. 01 of 2016, High Court of Tanzania at Iringa Registry.

*“It is therefore my considered view that, though the appellant denied to have lived together with the respondent for more than two years under the same roof, other factors such as the number of children, gaps, sequencing of their birth dates and the fact that, the appellant himself admitted to have cohabited with the respondent for many years, which he could not even remember are issues to be considered to establish the presumption of marriage between them. There is no doubt in my mind that, they have acquired the reputation of a husband and wife. In his own words the appellant at page 35 of the trial court proceedings, during cross –examination by Mr. Rwezaula testified that, “Ever since, I stopped relationship with the petitioner in the year 1996, I only visited her to maintain the children especially in giving them school accessories. I did not see Magdalena Salingwa with another man from the year 1975 – 1996”. This in a way support that, the appellant and respondent at some point were living together under the same roof as husband and wife... As for the division of matrimonial assets and considering the fact that there were other wives and children, the Court said, “The respondent should continue to own the house she was since allocated and occupied from 1975 to-date together with the 8 acres of the land. The appellant is ordered to utilize proceeds and profits obtained from the Makambako houses to maintain the respondent and her family.”[Emphasis added].*

#### 6.4. Disposition and Mortgage of a Matrimonial Home and Spouse's Consent

Pursuant to section 59 of the Law of Marriage Act,<sup>226</sup> men and women are granted the same rights to “acquire, hold and dispose of property.” However, neither spouse is permitted to alienate the other by selling or mortgaging the matrimonial home. In the case of **Chakupewa vs. Mpenzi**,<sup>227</sup> the Court upheld the above provision together with section 114 of the Law of Marriage Act by reasoning that, *the sale of joint property without the consent of the wife was void*. In addition, the court reasoned further that because the property was a matrimonial home, acquired through spouses' joint efforts, it could not be sold without the consent of the wife. Furthermore, the court noted that the wife had contributed more than just money in regard to the matrimonial property. A wife's love, comfort and consolation all “go a long way to contribute to the acquisition of property which is acquired through the joint efforts of the parties.”<sup>228</sup>

In addition, section 161 (1) (2) and (3) the Land Act provides for further protection, as follows:

*161(1) Where a spouse obtains land under a right of occupancy for the co-occupation and use of*

*both spouses, or where there is more than one wife, all spouses, there shall be a presumption that, unless a provision in the certificate of occupancy or certificate of customary occupancy clearly states that one spouse is taking the right of occupancy in his or her name only or that the spouses are taking the land as occupiers in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted in the manner stated in this subsection, the Registrar shall register the spouses as occupiers in common;*

<sup>226</sup> See also sections 114 of the LMA.

<sup>227</sup> 1 EA Tanzania High Court No. 32 of 1999. See also *Mtumwa Iddi*, Civil Appeal No. 32 of 1993 CA.

<sup>228</sup> *Supra*.

*161(2) Where land held for a right of occupancy is held in the name of one spouse only, but the other spouse or spouses contribute by their labour to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered; and 161(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then—*

- (a) *where that disposition is a mortgage, the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage in accordance with the provisions of section 59 of the Law of Marriage Act;*
- (b) *where that disposition is an assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer ... and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b), the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition” [Emphasis added].*

In the case of **Saida Gadau vs. Festo Nziku**,<sup>229</sup> Sameji, J (as she then was) considered a disposition of a matrimonial home where the wife of the seller (husband) did not give her consent and did not sign the sale agreement. The Judge invoked the provisions of sections 58, 59 and 60 of the LMA and nullified the sale agreement by stating that:

*“Section 59 provides for equal rights in acquiring and owning properties for both husband and wife. Section 58 is specific on empowering the said spouses to acquire those properties in their separate names. However, in order to protect interests of the said spouses in the properties registered on a name of one party, Section 59 is providing a requirement of consent in the processes of sale, lease and mortgage. Furthermore, Section 60 is as well protecting the interests of spouses in all other properties acquired by one spouse in his/her own name. Therefore, and pursuant to the above provisions of the law, the fact that, the suit property was in the name of the late Amani Sagila Gadau, the consent of his wife was necessary in the said transaction and short of that, the sale agreement, even if could have been produced, would have been invalid in the eyes of the law.” [Emphasis added].*

<sup>229</sup> Land Appeal No. 06 of 2016, High Court of Tanzania at Iringa Registry (unreported).

## 6.5. Mortgage of a Matrimonial Home and Spouse's Consent

Part X of the Land Act deals with “*Mortgages*” and it was repealed and substituted by section 6 of the Land (Amendments) Act, No. 2 of 2004.<sup>230</sup> It was further amended in 2008 through the enactment of the Mortgage Financing (Special Provisions) Act, 2008.<sup>231</sup> Under the said amendments an occupier of land under a right of occupancy and a lessee may mortgage his interest in the land or part thereof to secure the payment of a loan on fulfillment of some conditions. However, one of the fundamental amendments is in relation to the *mortgage of a matrimonial home* which includes a *customary mortgage of a matrimonial home*.

**Section 112 of the said amendment define matrimonial home to mean:**

***“the building or part of a building in which the husband and wife ordinarily reside together and includes –***

- (a) ***Where a building and its cartilage are occupied for residential purposes only, that cartilage and any outbuildings thereon; and***
- (b) ***Where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by the husband or the wife, as the case may be to his or her spouse for her or his exclusive use.***

Therefore, pursuant to the above provisions a mortgage deed of a matrimonial home shall be valid only if:

- (a) ***The application form has been signed and assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home.***
- (b) ***The contract document used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and his spouse or spouses living in the matrimonial home.***<sup>232</sup>

It is the responsibility of the mortgagor to disclose that he has a spouse or not and upon such disclosure, the mortgagee is given responsibility under the law to take reasonable steps to verify the status. But the position of the law is such that, he is allowed to rely on the affidavit or any written and witnessed document containing a statement of the existence of the spouse as proof thereof.<sup>233</sup> In practice, most banks have standard forms which go by the name of “***Spouse Consent***” which contain a declaration of the spouse of the applicant giving consent to the mortgage. It is important to note that, this is still a grey area, as there are challenges arising from the conduct of some mortgagors and some bank staff. *Therefore, while dealing with issues of mortgage of a matrimonial home Judges should be extra carefully and should read all amendments of the law together with case law.* A good example is the case of **Samwel Olung’a Igogo and 2 Others vs. Social Action Trust Fund and Others**<sup>234</sup>, where the Court held that:

<sup>230</sup> The Land (Amendments) No. 2 of 2004 at pages 521 – 548.

<sup>231</sup> The Mortgage Financing (Special Provisions) Act, 2008 published on 26<sup>th</sup> December 2008.

<sup>232</sup> *Ibid.*, section 114 (1).

<sup>233</sup> *Supra.* sections 114 (2) and (3).

<sup>234</sup> Commercial Case No. 3 of 2004 (unreported).

*“The mortgage of a matrimonial home will only be valid if any document or form used in applying for such mortgage is signed or there is evidence from the document that it has been asserted to, by the spouse of the borrower living in the matrimonial home.” [Emphasis added].*

Again, in the case of **National Bank of Commerce Limited vs. MM Worldwide Trading Co.**

**Limited and 2 Others**<sup>235</sup>, where again in considering as whether or not the mortgage of Plot No. 538 Block E. Mbezi Area in Dar es Salaam, a matrimonial home, was valid or not, the Court said:

*“The plaintiff has not tendered any instrument executed by the 3<sup>rd</sup> defendant (the wife) for her to mortgage her right of occupancy. Exhibit P4 as I said was only executed by the plaintiff and 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant did not execute it. Thus if 3<sup>rd</sup> defendant is a joint occupier and she is not amongst the parties who executed exhibit P4 then the mortgage deed cannot be valid. If the mortgaged property is a matrimonial home then, as correctly submitted by the counsel for defendants, the plaintiff failed to bring before this court any document or form duly signed by the spouse signifying that the 3<sup>rd</sup> defendant as a wife of the mortgagor assented to the mortgage of matrimonial property. It is trite law that for a mortgage of the matrimonial home to be valid, it must be assented to by the spouse by inserting a signature in any document or form used in applying and granting the said mortgage.” [Emphasis added].*

Under the LMA, subsection (1) of section 114 has conferred upon the court the power when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any matrimonial assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale. Subsection (2) of the same section provides that in exercising the power conferred by subsection (1), the court shall have regard (a) to the custom of the community to which the parties belong; (b) to the extent of the **contributions** made by each party in money, property or work towards the acquiring of the assets; (c) to any debts owing by either party which were contracted for their joint benefit; and (d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division. Unfortunately, the Act does not make clear what constitutes a ‘**contribution**’ towards the acquisition of matrimonial assets. Case law has attempted to fill the vacuum. For instance, in the case of **Bi. Hawa Mohamed vs. Ally Sefu**<sup>236</sup> the Court held, *inter alia*, that:

*“The “joint efforts” and work towards acquiring of the assets have to be construed as embracing the domestic “efforts” or “work” of husband and wife”.*

Also in the case of **Bibie Mauridi vs. Mohamed Ibrahim**<sup>237</sup> Maina, J. held that performance of domestic duties amounts to contribution towards such acquisition of matrimonial assets but not necessarily 50% and also there must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets.

<sup>235</sup> Commercial Case No. 84 of 2015 (unreported).

<sup>236</sup> *Supra*, Note 209.

<sup>237</sup> (1989) TLR 162.

Currently, case law has expanded to the level of equitable sharing of jointly acquired matrimonial assets. See also the case of **Christian John Msigwa vs. Nesian Justine Lukumay**,<sup>238</sup> where Sameji, J (as she then was) stated that, “...in case of separation, divorce, or annulment of marriage, women or man shall have right to an equitable sharing of joint property acquired during the subsistence of the marriage ...”.

## 6.6. Property Rights in Relation to Succession/Inheritance

### 6.6.1. Succession/Inheritance in General

As far as succession, inheritance and wills are concerned, there are four regimes in Tanzania. These are statutory, customary, Islamic and Hindu. Each regime applies a different set of laws. The Child Act has also added another dimension on the aspect of children in view of its prevalence over any rule of customary and Islamic Law to the contrary. The statutory regime applies the Indian Succession Act, 1865. The law is applicable to non- members of customary and Islamic faiths, i.e., Christians and those of European origin.

The customary regime applies the codified customary law contained in the customary law.<sup>239</sup> In Tanzania Mainland there are a number of customary laws which are based on tribal groupings, but the codified customary law is applicable only to patrilineal communities which constitute 80% of all communities in Tanzania.

Under the Islamic regime, a number of pieces of legislations apply, namely: the Succession (Non-Christian Asiatic) Act [Cap. 112 R.E.2002], the Judicature and Application of Laws Act [Cap. 453 R.E. 2002], the Magistrates Courts Act [Cap 11 R.E.2002], The LMA, the Mohamedan Estate (Benevolent Payments) Act [Cap. 25 R.E.2002], the Re-statement of Islamic Law, G.N. No. 22 of 1967 and the Wakf Commissioners Act [Cap. 109 R.E 2002].

The Hindu regime applies the Hindu Wills Act, 1870 which was imported from India to matters of inheritance and succession only for members of the Hindu community.

### 6.6.2. State of Inheritance/Succession and Wills in the Four Regimes

#### (i) The Indian Succession Act

Under the statutory regime, section 27 of the Indian Succession Act 1865 provides that:

*“Where the intestate has left a widow, if he has also left any lineal descendants, 1/3 of his property shall belong to his widow and the remaining 2/3 shall go to his lineal descendants ... if he has left no lineal descendants, but has left persons, who are of kindred to him, one half of his property shall belong to his widow, and the other shall belong to those who are of kindred to him ... and if he left none who are of kindred to him the whole of his property shall belong to his widow.”*

<sup>238</sup> Civil Appeal No. 178 of 2017 Dar es Salaam, District Registry (unreported) at page 12.

<sup>239</sup> Customary Law (Declaration) Order (No. 4) of 1963, (Government Notice No. 279/436 of 1963).

Also section 28 of the same Act provides that:

*“Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are kindred to him but not being lineal descendants, according to the rules herein contained’ and where he has left none who are of kindred to him, it shall go to the Crown (State).”*

At the same time, under Indian Succession Act, Wills are covered from section 50 of the Act and they are of two types (a) privileged and (b) unprivileged on which the testator must sign or signed by other person on his direction. Also, the Will shall be attested by two or more signatures. Under section 82, a testator may bequeath all of his estate to any person he wishes to, unless it appears from the Will that only a limited interest was intended to pass to such a person. However, this statutory regime has not addressed some issues in the inheritance, succession and Wills, in particular on the following key points:

- (a) *Though introduced into our legal system by the colonial masters, the provisions of the Indian Succession Act 1865 differ from those under the English law today;*
- (b) *The Act provides for freedom of testamentary disposition to the extent that the testator/testatrix may dispose of all his/her property by Will without providing anything to his/her dependents;*
- (c) *It does not give recognition to illegitimate children;*
- (d) *It makes no distinction between movable and immovable property; and*
- (e) *It does not apply to Muslims, but to Christians and those of European origin resident in Tanzania (Mainland).*

**(a) The Local Customary Law (Declaration) Order, 1963**

Under the Customary regime, most members of the African tribal communities apply customary rules of succession, inheritance and Wills irrespective of their places of origin and religious beliefs. Pursuant to Rules 25 and 26 of the Local Customary Order the heirs of the deceased's estate are children, brothers, sisters, father, paternal fathers and aunts, husband, or wife. However, the inheritance is divided into three degrees. The first-degree heirs refer to the first son (in the case of polygamous marriages this is the first son of the first house). This heir inherits first and usually receives the biggest share of the estate. The second-degree heirs include the other sons who also inherit bigger shares than the third-degree heirs. The last degree heirs' daughters, irrespective of their age, inherit a smaller share than that of male heirs. However, if a deceased person has no sons, then the daughter of the first house will become the heir in the first degree, but her right in the landed property is one of usufruct. Where the deceased has left no children or grandchildren, his full brothers and sisters will inherit. The eldest brother will inherit in the first degree, the second in the second degree and the sister(s) will inherit in the third degree. Male heirs inherit movable and immovable property absolutely, female heirs inherit movable property and if they happen to inherit immovable property this is only a usufruct right.

Rule 20 of the same law provides that daughters can inherit clan land to use for their lifetime only but have no disposal rights. No such restrictions apply to men. Notably, a widow is not mentioned in the degrees of inheritance. This is reinforced by rules 27 and 28<sup>240</sup> stating that, “...*the widow has no share in her husband's estate if there exist issues of the marital union her share is to be cared for by her children just as she cared for them.*”

In an attempt to deal with the discriminatory customary law of intestate succession, as early as 1968, Saudi, J. recognized that the system of discrimination against women did not reflect a modern life and he declared that “...*the time has now come when the rights of daughters in inheritance should be recognized.*”<sup>241</sup> Acknowledging that a daughter should inherit before the nephew of the deceased, the court reasoned that on “*grounds of natural justice and equity, daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality.*” Again, the High Court in ***Bernado Ephrahaim v. Holaria Pastory and Gervazi Kaizilege***<sup>242</sup> upheld a woman's right to sell clan land. The court holds 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. In the reasoned opinion, which one would recommend to be a guide, the honorable judge noted further that:

*“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.”*

A similar position is reflected in ***Naftal Joseph Kalalu vs. Angela Mashirima***.<sup>243</sup> This was a petition for the grant of letters of administration of estate by the respondent which was challenged in the High Court.<sup>244</sup> 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 administrator 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.

<sup>240</sup> The Local Customary Law (Declaration) Order, 1963.

<sup>241</sup> Ndewawosio d/o Ndeamtzo vs. Immanuel s/o Malasi, (1968) H.C.D. n. 127.

<sup>242</sup> High Court (PC) Civil Application No. 70 of 1989 (unreported).

<sup>243</sup> Naftal Joseph Kalalu vs. Angela Mashirima PC, Civil Appeal No. 145 of 2001 (unreported).

<sup>244</sup> *Ibid*

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 administration of the will. The court took into account the provisions of CEDAW stating that:

*“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.”*

The Local Customary Law (Declaration) Order, 1963 also governs Customary Wills. Under this, any person of sound mind and of the age of 18 years and above is free to make a Will. It may be a written or oral Will. Family members benefiting from the Will are disqualified from being witnesses to the Will, except the wife or wives of the testator. A written Will must be written by a permanent ink and preferably should be printed or typed. The date of the writing of the Will must be clearly shown on it. A written Will must be witnessed by persons who know how to read and write. If the testator knows how to read and write, the number of witnesses required is two (2) (one from the clan and another from his friends). If the testator is illiterate and prefers an oral Will, then the number of witnesses required is four (4) (two from the clan and two from his friends). Differences in religion are not an impediment to inheritance through a Will. Rule 40 of the Local Customary (Declaration) Order provides that, a husband can leave his crops or property to his wife by a Will until she remarries or for life.

The customary regime is discriminative and has its drawbacks. Just to note a few:

- (a) In some tribes it is only the senior-most son who would inherit the whole estate supposedly in trust for the other children;
- (b) Priority is generally given to male heirs and not female heirs;
- (c) The rights of female heirs to landed property under Customary Law are limited to use for life and not disposition. This position is contrary to the Constitution of the United Republic of Tanzania and also the provisions of the Land Act and the LMA highlighted above, which recognize equality of right to acquisition, ownership, mortgage and disposition of property irrespective of gender.

**(iii) The Islamic Law**

Under Islamic regime, statutory provisions have imposed conditions to be looked into before one is able to determine at what point Islamic Law should be applicable to a given deceased person's estate. At times, Islamic law is equated with customary law and gives rise to conflict of law. A non-Muslim cannot inherit from a deceased Muslim even if she was his wife, equally, a Muslim cannot inherit from a non-Muslim. Widow(s) inherit 1/8 of the estate if there are children. If there are no children, they inherit 1/4 of the estate. The remainder of the estate is divided into 3 parts; 2/3 is inherited by male heirs, 1/3 by female heirs. As regards to the Wills, under Islamic law, a Muslim can bequeath 1/3 of his property by Will. The remaining 2/3 must be distributed in accordance with Islamic Law of Inheritance. The Will can be oral or written but the same must be proved by witnesses. Also, the Will under Islamic law is an exception because the Quran has already made provisions for Inheritance.

**(iv) Hindu Law**

Under Hindu Regime, Hindu Law applies to Wills for the members of Hindu community.

However, at times it applies to descendants of such members who may not profess Hinduism.

### **6.6.3. The State of Children Born out of Wedlock**

Under the regimes discussed above, children born out of the wedlock are not entitled to inherit from their fathers. However, with the enactment of the Child Act, there have been some changes and courts have gone ahead to interpret the Act to the effect that the children born out of the wedlock can inherit. Section 5(2) of the Child Act prohibits any type of discrimination against a child. The said section provides that:

*“A person shall not discriminate against a child on the grounds of gender, race, age, religion, language, political opinion, disability, health status, customs ethnic origin....birth....”*

Section 10 of the Child Act which is in *pari- materia* with Article 3 of the United Nations Convention on the Rights of the Child provides: “A person shall not deprive a child of reasonable enjoyment out of the estate of a parent.” In the case of **Elizabeth Mohamed vs. Adolf John Magesa**,<sup>245</sup> where the appellant fought to have her children inherit from their deceased father, and on the other hand, the respondent submitted that three children born by the appellant with the deceased were born out of wedlock. Mruma J. held that:

“...in terms of Section 3 read together with section 10 of the Law of Child Act, 2009 they are entitled to inherit from their father's estate. Section 10 of the Law of Child Act, 2009 has prohibited any person from depriving them reasonable enjoyment of the estate of their father ...”

In the above case, the court confirmed that children born out of wedlock have a right to inherit from their deceased biological father's estate.

#### 6.6.4. Determination of Applicable Law

Due to the multiplicity of laws as indicated above, in some cases there is conflict as to which law should be applied. In the circumstances, courts have adopted two tests (i) the ‘mode of life’ test and (ii) the ‘intention of the deceased’ test.<sup>246</sup>

In the case of **George s/o Kumwenda vs. Fidelis Nyirenda**,<sup>247</sup> the deceased Martin Kumwenda was a Malawian national living in Dar es Salaam and at the time of his death he left a house. The deceased's wife wanted to inherit the house under statutory law, but the deceased's brother wanted customary law to apply so that the wife should not inherit the house, but that it should be sold and the proceeds be distributed among the children only. The Primary Court invoked the application of customary law and on appeal the District Court overruled the Primary Court and opted for the application of statutory law. In the High Court, Kisanga J. (as he then was) ordered a retrial because the two Courts below had arbitrarily made a choice of law without first investigating ‘the mode of life’ of the deceased.

In another case on the estate of the late **Salum Omari Mkeremi**,<sup>248</sup> the deceased was a Hehe and practicing Muslim. He was an army Officer. He married a member of his own tribe and contracted a civil marriage. Justice Mfalila held that applying the mode of life test (that he was a practicing Muslim), the deceased has intended his estate to be administered according to Islamic Law and not Hehe Customary Law, as the ‘deceased's manner and way of life’ was far removed from his tribal customs.

All decisions highlighted above reflect the willingness of the Judiciary to recognize women's fundamental rights to equality and equal protection of the law in the sphere of inheritance and property rights. It is sad to note, however, that in some cases such as **Elizabeth Steven vs Attorney General**,<sup>249</sup> though the court admitted that customary law of intestate succession was flawed and actually discriminates against widows and female children, it declined to declare it unconstitutional because it would open a floodgate of similar cases with people challenging their customary laws and practices. The court stated that:

<sup>245</sup> Administration Appeal No. 14 of 2011, HC Mwanza.

<sup>246</sup> See the case of Re Innocent Mbilinyi, [1969] HCD No. 283.

<sup>247</sup> [1981] TLR No. 211.

<sup>248</sup> [1973] TLR No. 80.

<sup>249</sup> *Elizabeth Stephen and another v. the Attorney General*, Tanzania High Court, Miscellaneous Civil Cause, No. 82, of 2005.

*“It is impossible to effect customary change by judicial pronouncements; it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality. This will be opening the ‘Pandora’s Box’ with all seemingly discriminatory customs from our 120 tribes plus following the same path.”*

This case demonstrates that matters such as traditions, customs and culture continue to be unpredictable when brought before the courts. However, that notwithstanding, the courts have a significant role to play in ensuring that customary law and harmful traditional practices are reformed and advanced to comply with human rights standards and legislation and ensure equality between men and women in Tanzania.

### 6.6.5. Decision by CEDAW Committee under its Optional Protocol on Customary Laws

Following extensive legal proceedings in Tanzania, a communication on the predicament of two widows in Tanzania, **Elizabeth Stephen and Another** (*supra*) who were denied the right of inheriting or administering the estates of their late husbands under our customary inheritance law, was submitted before the Committee on Elimination of Discrimination against Women (the CEDAW Committee) in 2012 under its Optional Protocol mechanism. In its decision, the Committee criticized the patrilineal inheritance law (inheritance by persons related through male kin) that left E.S. and S.C and established “a denial of access to justice” and thereby amounted to a failure to provide an effective remedy. The CEDAW Committee held that Tanzania, by condoning legal restraints on inheritance and property rights that discriminate against women, had violated several articles under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including, among others, provisions pertaining to equality before the law [15 (1), 15 (2)].<sup>250</sup> This CEDAW Committee decision is a key victory for women’s rights, particularly as it pertains to breaking the cycle of poverty through equal inheritance rights. Enforcing the CEDAW Committee recommendations will require concrete steps by Tanzania towards meeting its obligations under CEDAW.

By denying wives the same rights as husbands to inherit the property of a deceased spouse, customary law goes contrary to in marriage guaranteed by articles 13(1) and 13(2) of the Constitution. In addition, the UDHR, CEDAW and the ICCPR all confirm that equality in marriage “*during marriage and at its dissolution*” is a fundamental right.<sup>251</sup> Pursuant to CEDAW “*any law or custom that grants men a right to a greater share of property at the end of a marriage is discriminatory and will have a serious impact on the widow.*”<sup>252</sup> The fundamental right to equality in marriage is therefore violated when inheritance shares are determined solely on the grounds of the surviving spouse’s gender. Not granting widows the same rights afforded to divorced women creates inconsistencies within the law that unfairly punish women who remain in a marriage.

<sup>250</sup> <https://www.escr-net.org/caselaw/2015/es-sc-v-united-republic-tanzania-cedawc60d482013-communication-no-48/2013>.

<sup>251</sup> UDHR, Article 16. See also ICCPR Article 23(4) and CEDAW Article 16 (1) (c).

<sup>252</sup> (Thirteenth session, 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, U.N. Doc. HRI/GEN/1/Rev.6 at 250 (2003); para. 28, available at <http://www1.umn.edu/humanrts/gencomm/gener121.htm>.

## 6.7. Examples of Cases from Other Jurisdictions

In the case of **Abdulaziz, Cabales and Balkandali vs. U.K.**,<sup>253</sup> where the European Court of Human Rights set a standard in determining whether legislation that treats men and women differently violates the European Convention for the Protection of Human Rights and Freedom.<sup>254</sup> The Convention provides that “*the enjoyment of the rights and freedom set forth in the Convention shall be secured without discrimination on any ground such as sex.*”<sup>255</sup> Therefore, based on this provision, the European Court of Human Rights determined that the British Immigration Rules do not meet the human rights standard because it made it easier for foreign male permanent residents to bring their spouses to Great Britain than foreign female permanent residents. Despite the fact that the above two examples are based on immigration laws, they all deny benefits to female citizens solely based on gender. Likewise, women in Tanzania are discriminated against solely on the basis of gender, despite strong constitutional and international protections. Under the customary inheritance law, daughters inherit less property than their brothers irrespective of their age; they cannot act as administrators of their deceased parents' estate if there are any male relatives alive; and widows are left with nothing when the spouse dies. This constitutes discrimination based on gender.

The United States Supreme court, for example, ruled on the appointment of an administrator of the estate of the deceased in the case of **Reed vs. Reed**.<sup>256</sup> Here it declared an Idaho statute unlawful because it discriminates against women for preferring men over women as administrators.

In Africa as well, a number of countries<sup>257</sup> have declared their customary inheritance laws unconstitutional for the same reasons of discrimination against women contradicting the principle of equal protection before the law. Recently for example, the South African Constitutional Court held its customary law of inheritance unconstitutional insofar as it forbade two daughters the right to inherit.<sup>258</sup> Similarly, three daughters in Ghana<sup>259</sup> successfully sued a brother who had taken their joint property from their deceased father as his own. Like many clansmen in Tanzania, the brother stated that his status as eldest son entitled him to the property. The court, however, disagreed with this patrilineal scheme and declared that the daughters and sons jointly owned the property.

## 6.8. Protection and Promotion of Property Rights under Regional and International Instruments

As discussed in preceding chapters, Tanzania is a signatory to several international and regional human rights instruments. It has as well ratified those treaties and instruments without reservation. Tanzania's ratification of international treaties without reservation is not a mere formality. By becoming a signatory to these treaties, Tanzania is morally bound and obliged to adhere to principles of equality.

<sup>253</sup> European Court of Human Rights, (1985).

<sup>254</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

<sup>255</sup> *Ibid*, Article 14.

<sup>256</sup> *Reed v. Reed*, 404 U.S. 71 (1971) where the court held that “*The means used to achieve gender classification was the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause*”.

<sup>257</sup> Some of these countries include Zambia, Ethiopia, Zimbabwe and Ghana.

<sup>258</sup> In the case of *In Bhe and Others vs. The Magistrate, Khayelitsha and Others*, CCT 49, South African Constitutional Court, (2003).

<sup>259</sup> *ZI vs. Da*, (2002) BA: PC: 2000, 159.

It must, therefore, condemn discrimination in all forms. Significantly, ratifying all the cited treaties without reservation, suggest a strong commitment on the part of the government to recognize these fundamental rights and guarantee that they are provided to all citizens. The right to property has been given attention and prominence in several international and regional human rights instruments as it will be demonstrated herein below.

- (i) **Article 17 of the Universal Declaration of Human Rights (UDHR)** declares that, *“Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property,”*
- (ii) **Article 16 (h) of the Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW)<sup>260</sup>** provides for rights of both spouses in relation with the ownership of the property, *“the same rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration”*.

**Article 14 of CEDAW** is especially important, reinforced by the **CEDAW Committee's General Recommendation No. 34** on the rights of rural women. General Recommendation No. 34 stipulates that States Parties ensure that legal frameworks are non-discriminatory, and guarantee access to justice to rural women, in line with general recommendation No. 33 (on access to justice). Such a guarantee would include:

*“Providing training to the judiciary, lawyers, law enforcement officials, paralegals, traditional leaders and other relevant authorities and officials in rural areas on the rights of rural women and the negative impact of discrimination against them”*.

- (iii) **The African [Banjul] Charter on Human and Peoples' Rights<sup>261</sup>** recognizes different aspects of the right of a woman, including the right to participate freely in the government of his/her country, the right to equal access to public services, and *“the right of access to public property and services in strict equality of all persons before the law”*.
- (iv) **More comprehensively, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>262</sup> (the Maputo Protocol)** has several provisions on the property rights of women, including **Articles: 6(j)** for married women; **7(d)**. Specifically, **Article 7** of the Maputo Protocol provides that *“in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage”*. In addition, **Article 20(c)** covers the state's obligation to promote women's access to and control over productive resources such as land, and to guarantee their right to property; and **Article 21** is on inheritance matters.

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<sup>260</sup> G.A. Res,34/180, 34 U.N.G.A. OR Supp. (No. 46) at 193, U.N Doc.A/34/46. Entered into force on 3<sup>rd</sup> September, 1981, available at <http://www.unhcr.ch/htm/menu3/b/e/icedaw.htm>.

<sup>261</sup> Adopted by the Organization of African Unity on 17<sup>th</sup> June 1981 and entered into force on 21<sup>st</sup> October 1986.

<sup>262</sup> This was adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the African Union, in Maputo July 11, 2003 and entered into force on 25 November, 2005. Tanzania ratified the same on March 8, 2007. See information available at <http://www1.umn.edu/humanrts/africa/protocol-women2003.html>.

