

# Challenges Surrounding the Adjudication of Women's Rights in Relation to Customary Law and Practices in Tanzania



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## Abstract

Women's rights litigation has produced varied outcomes in many African countries. Although courts have looked at the legislation that discriminates against women with different degrees of success, matters such as tradition and culture continue to be unpredictable when subject to lawsuit. In Tanzania, the judiciary has gradually begun to recognise that discrimination on a prescribed ground cannot be justified. However, this principle has not blocked some judges from maintaining that gender discrimination based on customary rules can still be justified, despite the existence of internal, regional and national human rights law, which prohibits it. It is contended that the judiciary has a significant role to play in ensuring that customary law and harmful traditional practices are reformed and advanced to comply with human rights legislation and ensure equality between men and women in Tanzania.

## Keywords

Customary law and practice; women's rights; human rights; judicial enforcement; Tanzania.

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## 1 Introduction

This paper draws attention to selected cases in Tanzania, which reflect the enforcement of women's rights and demonstrate the steps that have been taken by the judiciary in relation to the application of women's rights and existing customary laws and practices. An overview of some of the complications associated with adjudication in this field of women's rights and the courts' reaction to tradition and cultural issues in the national context is provided. The application of customary law is the most problematic legal area in Tanzania as far as the equality of human beings is concerned.<sup>1</sup> Women have been seriously affected in both areas, particularly in relation to the ownership of property, inheritance, and the custody of children.<sup>2</sup> Most cases that went before the court related mainly to the controversial right to own land, the right of female members of the clan to inherit land, and the right to matrimonial property.<sup>3</sup>

### 1.1 Methodology

This study was approached from a purely legal perspective and hence involved legal research. Primary sources of law, such as case law, statutes, international instruments and regulations, were employed. The secondary sources of law consulted in this study include a vast array of books, textbooks, periodicals, research articles, law reviews, newspaper articles and dissertations. Scholarly works were studied on the implementation of women's rights and the contrasting views with regard to the efficaciousness of the law in realising social change to eliminate inimical customary law and practices.

### 1.2 International and regional instruments which protect women's rights

Women's rights are protected under international law through different United Nations international conventions. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) is a major international human rights instrument which deals exclusively with women's rights at international level. Women's human rights under CEDAW

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<sup>1</sup> Peter *Human Rights in Tanzania* 78; Kijokisimba and Chris *Justice and Rule of Law in Tanzania* 382.

<sup>2</sup> Kijokisimba and Chris *Justice and Rule of Law in Tanzania* 383.

<sup>3</sup> Ndulo 2011 *Ind J Global Legal Studies* 89.

are based on three principles, which are non-discrimination, equality, and a framework for state obligation. Discrimination against women is defined by Article 1 of this Convention as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Both direct and indirect forms of discrimination are prohibited under this provision. It also makes clear that there should be equality of opportunity and result, as formal pledges of equality may not in themselves be sufficient. It therefore primarily sets out a framework of equality, non-discrimination and state obligation and addresses dominant areas of discrimination in areas such as education, health, political participation, and marriage. Article 2, which focuses on state obligation, specifically addresses the issue of local values, and demands that state parties take all appropriate measures (including legislation) and that they modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. It also requires state parties to tackle gender stereotyping. Apart from CEDAW, other international instruments such as the *Universal Declaration of Human Rights*, 1948 (UDHR) proclaim the entitlement of everyone to equality before the law and to the enjoyment of human rights and fundamental freedoms without distinction of any kind.<sup>4</sup> The UDHR proceeds to include gender on the grounds of impermissible distinctions between the rights of people.<sup>5</sup> The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR), both of 1966, also translate the principles of the UDHR into a legally binding form as they clearly state that the rights set forth are applicable to all persons without distinction of any kind, with specific reference to gender as an impermissible distinction.<sup>6</sup> In addition, each Covenant specifically binds acceding or ratifying states to undertake to ensure that women and men have equal rights and enjoy all the rights they establish.<sup>7</sup>

At the regional level, women's rights in Africa are protected mainly by the *African Charter on Human and People's Rights*, 1981 (ACHPR). The Charter guarantees the basic rights and freedom of all people, including

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<sup>4</sup> UN *Women's Rights are Human Rights* 37.

<sup>5</sup> Hunter 2001 *J L & Pol'y*.

<sup>6</sup> Eide "Making Human Rights Universal" 247.

<sup>7</sup> Chinkin "Women, Rights of, International Protection" 891.

women.<sup>8</sup> Article 18(3) of the ACHPR specifically recognises and affirms women's rights and requires all African states to eliminate every discriminatory law against women and to ensure the protection of the rights of women and children. However, the provisions in ACHPR that guarantee women's rights have been viewed as inadequate and ineffective, which has shown the need for an optional protocol to specifically protect women's rights.<sup>9</sup> After years of activism by women's rights supporters, the draft of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, known as the *Maputo Protocol*, was originally adopted by the Assembly of the African Union (AU) in 2003.

The *Maputo Protocol* addresses women's rights and clarifies the obligations of African governments with respect to women's rights that are missing from the *African Charter*. The Protocol among other things requires African governments to eliminate all forms of discrimination and violence against women in Africa and to promote equality between men and women.<sup>10</sup> Member states are obliged to integrate a gender perspective in their policy decisions, legislation, development plans and activities, and to ensure the overall well-being of women.<sup>11</sup> The *Maputo Protocol* recognises that much of the controversy about the human rights of African women concerns the issue of cultural values and their interpretation, and so it acknowledges the importance of African culture, but makes a plea for the inclusion of African women in the formulation of cultural values, which it argues under Article 17(1) should not discriminate on the basis of gender. The Protocol also puts African cultural values into a filter under paragraph 2 of its Preamble, which states:

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

These words in the Preamble not only give meaning to the concept of African values that is missing from the *African Charter*, but they also state clearly that, in invoking these values, the issue of men and women having different entitlements because they have different roles and responsibilities in society is not permitted. The *Maputo Protocol* also requires African states to play a proactive role in eliminating harmful cultural, traditional and other

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<sup>8</sup> Articles 2 and 3 of the *African Charter on Human and People's Rights* (1981) (ACHPR).

<sup>9</sup> AWID *Maputo Protocol 10 Years* 37

<sup>10</sup> Article 2 of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2003) (*Maputo Protocol*).

<sup>11</sup> Articles 2 and 3 of the *Maputo Protocol*.

practices based on the idea of the inferiority or superiority of either sex, or on the stereotyped roles of men and women.<sup>12</sup> Article 17 of this Protocol obliges states to ensure the right of women to live in a positive cultural context. Family rights such as marriage, separation, divorce and the annulment of marriage are also addressed.<sup>13</sup> Article 7 of the Protocol provides for the rights to which wives are entitled in the case of separation, divorce or the annulment of marriage. The Protocol also requires that a widow automatically become the guardian and custodian of her children after the death of her husband unless this is contrary to the interests and welfare of the children.<sup>14</sup> A widow's right to have an equitable share in the inheritance of the property of her husband is also addressed by this Protocol.<sup>15</sup> Other women's rights guaranteed in the *Maputo Protocol* are the right to life and security, access to justice and equal protection before the law, the right to participate in political and decision-making processes, the right to peace, the right to protection in armed conflicts, the right to education and training, economic and social welfare rights, the right to adequate housing, the right to sustainable development, and the right to the special protection of women in distress.<sup>16</sup>

### **1.3 Tanzanian customary law of inheritance**

Tanzanian customary laws have been codified and included in the laws of the country under *Customary Law (Declaration) Order No 436 of 1963*. This law discriminates against women as widows and daughters regarding inheritance.<sup>17</sup> Women and girls are not allowed to inherit clan land, and they inherit a lesser amount of other kinds of assets than their male counterparts. Women are usually left with very few options and at times are homeless after being deprived of their property rights following divorce or the death of their spouses.<sup>18</sup> The law thus treats women as third-class citizens in matters relating to inheritance. Women cannot inherit the property of their sons, husbands, uncles or other males, as male relatives are given preference, except in the absence of male heirs.<sup>19</sup> This law allows women to simply use land under *usufructuary* rights that provide as follows:

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<sup>12</sup> Articles 4(b) and 5 of the *Maputo Protocol*.

<sup>13</sup> Article 6 of the *Maputo Protocol*.

<sup>14</sup> Article 20 of the *Maputo Protocol*.

<sup>15</sup> Chirwa and Chwenwi *Protection of Economic, Social and Cultural Rights* 18.

<sup>16</sup> Articles 11-19 of the *Maputo Protocol*.

<sup>17</sup> Msuya *Harmful Cultural and Traditional Practices* 103.

<sup>18</sup> Msuya *Harmful Cultural and Traditional Practices* 104.

<sup>19</sup> Ezer 2006 *Geo J Gender & L* 612.

The widow has no share of the inheritance if the deceased left relatives of his clan; her share is to be cared for by her children, just as she cared for them.<sup>20</sup>

The law considers widows as minors who need to depend on the care of others. It also treats females as property to be inherited by their deceased husbands' families. Rule 51 of this law confers the liability of taking care of the dowager to the deceased's beneficiary, who is usually her son, and if the widow's sons are young, the law provides that a male guardian must be selected to look after them, their mother and their inheritance.<sup>21</sup> The law also sets out an inheritance hierarchical scheme based on gender, under which daughters are granted the smallest share of the inheritance. Rule 30 of this law grants a larger portion of the inheritance to the older children than to the younger ones, and females receive less than males.

The law separates inheritors into three grades. The highest grade is the oldest son, the second grade is the other sons, and the last grade is the daughters.<sup>22</sup> Under this scheme, the first grade obtains the largest share, and the third grade the smallest.<sup>23</sup> Therefore, female children inherit less than their brothers. This law goes further and puts limitations on the property inherited by daughters in the sense that females cannot inherit clan land. Females may only use the land and are prohibited from selling it, despite the fact that they are the only offspring of the deceased's family.<sup>24</sup> Rule 66(a) of this law deals with the residential rights of a widow in respect of her matrimonial home. It states in part that the widow may claim her right to reside with her offspring in the house of her deceased husband.

## **2 Women's rights litigation in relation to customary law**

Since independence, Tanzania has joined the world's efforts to protect women's rights by signing and ratifying several treaties, including those discussed above.<sup>25</sup> Unlike civil law countries where ratified international treaties form a direct part of their municipal laws, Tanzania as a common law country follows the dualism principle, which necessitates further domestication of these international treaties in its municipal laws through legislation.<sup>26</sup> So far Tanzania has not enacted a specific law to incorporate the international instrument which protects women's rights. Human rights

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<sup>20</sup> Rule 17 of the *Local Customary Law Declaration Order 436 of 1963*.

<sup>21</sup> Rules 5, 7, 11 and 13 of the *Local Customary Law Declaration Order 436 of 1963*.

<sup>22</sup> Rule 25 of the *Local Customary Law Declaration Order 436 of 1963*.

<sup>23</sup> Rules 19 and 30 of the *Local Customary Law Declaration Order 436 of 1963*.

<sup>24</sup> Rules 20 and 31 of the *Local Customary Law Declaration Order 436 of 1963*.

<sup>25</sup> Kamanga "International Human Rights Law" 54.

<sup>26</sup> Kamanga "International Human Rights Law" 55.

instruments, predominantly those that have been ratified by Tanzania but not yet incorporated in domestic legislation, are applied as a guide to interpreting the *Constitution*.<sup>27</sup> The courts use international treaties as an interpretative tool to establish whether they are consistent with the *Constitution*.

Similarly, some of the content of CEDAW and the *Maputo Protocol* is reflected in Tanzania's domestic legislation. The highest law of the land, the *Constitution*, contains provisions that support the principles of gender equality and non-discrimination. Articles 9, 12, and 13 of Tanzania's *Constitution* maintain the equal treatment of men and women, covering a range of issues.<sup>28</sup> Article 12(1) of the Tanzanian *Constitution* asserts that "All human beings are born free, and are equal. Every person is entitled to recognition and respect for his dignity". Similarly, the principle of non-discrimination is laid down in article 13(5) of the *Constitution*, which stipulates that the basis on which each law is established may not discriminate against gender.

Article 9(g) of Tanzania's *Constitution* calls upon the organs of the state to treat men and women similarly. Interestingly, article 9(h) obliges the Tanzanian government and all its organs to eliminate "all forms of injustice, discrimination, oppression or favouritism". These provisions specify that "discrimination based on gender is a denial of equal opportunity and protection, which is prohibited under the Constitution." These clauses correspond with international and regional instruments, such as articles 2 and 7 of the UDHR, articles 2, 3 and 4 of CEDAW, and articles 2, 3 and 5 of the *Maputo Protocol*. Nevertheless, it has been argued that these articles of the Tanzania *Constitution* are not an absolute guarantee of adherence to basic human rights because of the provision of article 30(2), which states that:

... no provision contained in this Part of this Constitution which stipulates the basic human rights, freedom and duties shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law ...<sup>29</sup>

The derogatory nature of this article has been used to justify a virtual breach of fundamental rights, as some of Tanzania's legislation openly discriminates against women, in opposition to the above provisions of the

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<sup>27</sup> Killender *International Law* 60.

<sup>28</sup> Msuya *Tanzania's Obligation under International Human Rights Treaties* 22.

<sup>29</sup> Article 30(2) of the *Constitution of the United Republic of Tanzania of 1977* (the *Constitution*).

*Constitution* and international treaties. In this context, it should be noted that customary law is accepted as part of the Tanzanian legal system and thus receives constitutional recognition and protection.<sup>30</sup> The *Constitution* is silent on what is to happen in the case of a clash between customary laws and the provisions of the *Constitution* which guarantee equality. Most of the time difficulties arise in ascertaining what is to be done when the laws of a country are in disagreement, and precisely what should happen when personal laws infringe on the principle of equality. The derogatory clause, which limits the proper application of the rights guaranteed in the *Constitution*, paves the way for the infringement of those rights by other applicable legislation. In most cases, the judiciary has been making decisions based on discriminatory laws, because interpretations have been allowed to override the principle of equality guaranteed in the *Constitution* in favour of customary and discriminatory laws, as established below.

### **2.1 Adjudication on discriminatory customary rule**

The position of the customary law discussed above was cemented by the highest court in Tanzania, the Court of Appeal, in *Maagwi Kinito v Gibeno Warema*<sup>31</sup> in the following finding:

The customary laws of this country have the same status in our courts as any other law, subject to the Constitution and any other statutory law that may provide to the contrary.<sup>32</sup>

Despite the discriminatory provisions of customary law that are against many international human rights treaties, including CEDAW and the *Maputo Protocol*, the courts in Tanzania continue to use it.<sup>33</sup> For example, in the case of *Scholastica Benedict v Martine Benedict*,<sup>34</sup> the Court of Appeal denied a widow the right to inherit matrimonial property when she and her stepson claimed ownership of the matrimonial home, which was part of the deceased's estate. The widow sought the right to remain in the house as it was the matrimonial home and she claimed that she was thus entitled to inhabit in it after the death of her husband. The court ruled according to Haya customary law, which makes no provision for a widow to remain in the matrimonial home after her husband's death. The Court decided that a widow can inherit from her husband only if he is the last surviving member

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<sup>30</sup> Article 11 of the *Judicature and Application of Laws Act* Cap 358 of 1920.

<sup>31</sup> *Maagwi Kinito v Gibeno Warema* (Court of Appeal of Tanzania at Dar es Salaam unreported) Civil Appeal number 20/1984.

<sup>32</sup> *Maagwi Kinito v Gibeno Warema* (Court of Appeal of Tanzania at Dar es Salaam unreported) Civil Appeal number 20/1984 para 8.

<sup>33</sup> Msuya *Harmful Cultural and Traditional Practices* 63.

<sup>34</sup> *Scholastica Benedict v Martine Benedict* 1993 TLR 1.

of his clan and there were no other heirs when he died. The court advised the widow to leave the house and stay with her daughter, who was given a small, undeveloped rural house (as part of her inheritance), or to opt to be "inherited" by her husband's relative, who was eager to "inherit" her. The Court clearly showed gender bias by not taking into account the fact that Scholastica's daughter was the only married child and therefore had more right to inherit the deceased's property than the stepson, who had no relationship with that property except by virtue of his affiliation to the deceased. The stepson had had no role in increasing the wealth of that family, and his father had not possessed any wealth before or at the time he married Scholastica.

The High Court of Tanzania, unlike the Court of Appeal, has at times exhibited boldness in some of the issues relating to customary law, as was decided in the case of *Rubuka Nteme v Bi Jalia Hassan and Another*.<sup>35</sup> In this matter the Court of Appeal overturned the decision of the High Court, that had decided that a female member of the clan could not sell clan land to a stranger, which is prohibited under Haya customary law. Despite the existence of this previous binding decision of the Court of Appeal, the High Court did not stop fighting for equality. Instead, it cemented a new way in the case of *Ndewawiosia Ndeamtzo v Emmanuel Malasia*.<sup>36</sup> Here the late Judge Said declared that a customary law that bars daughters from inheriting has no place in the current Tanzania, as it is discriminatory.

The High Court continued in this spirit in the case of *Bernardo Ephrahim v Holaria Pastory*,<sup>37</sup> where Judge Mwalusanya declared that the Haya customary law that bars female clan members from disposing of land is prejudicial and conflicts with article 13(4) of the Tanzanian *Constitution*, which forbids discrimination. He went further and declared that customary law is null and void. This appeal case involved a daughter who inherited clan land from her father through a valid will. When she was older and decided to sell the inherited clan land to a person who was not a member of that clan, one of her nephews, the applicant, filed a case in the lower court requesting it to nullify the sale, claiming that it was void because according to Haya customary law females have no right to dispose of clan land. The lower court agreed with the appellant's arguments, nullified the

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<sup>35</sup> *Rubuka Nteme v Bi Jalia Hassan* (Court of Appeal of Tanzania at Mwanza) (unreported) Civil Case number 19/1986.

<sup>36</sup> *Ndewawiosia Ndeamtzo v Emmanuel Malasia* (High Court of Tanzania, Civil Appeal) (unreported) Civil Appeal number 80/1966.

<sup>37</sup> *Bernardo Ephrahim v Holaria Pastory* (High Court of Tanzania at Mwanza) (unreported) Civil Appeal number 70/1989.

sale, and ordered the respondent to reimburse the stranger who had bought the land. The respondent appealed to the District Court, where the learned Magistrate set aside the decision of the lower court and took a stand in favour of the appellant. Dissatisfied with this decision, her nephew appealed to the High Court, where the late Mwalusanya J. confirmed the decision of the District Court. The provisions of Haya customary law that are incorporated in paragraph 20 of the *Customary Law Order* of 1963 which deny women the right to dispose of inherited property state that:

Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.<sup>38</sup>

This customary law requires women to become heirs of clan land for *usufruct* use only, which means for their lifetime only, and it denies them the right to dispose of the land. The same law provides a different position for male members of the clan. The law allows them to dispose of clan land after consulting other family members.

It is the duty of the Court to establish the legality of any legislation that is disputed on the grounds that it is against the *Constitution*, since statutes that are inconsistent with the *Constitution* are null and void.<sup>39</sup> The Court is the organ vested with the power to determine whether the parliament has legislated according to the power conferred on it by the *Constitution*. Therefore, it is the main concern of any court in the case where an infringement of the *Constitution* is alleged to make sure that it is redressed as expediently as possible. The provisions of the *Constitution* should be clear in prohibiting any form of discrimination through recognising the equality of all human beings and "guaranteeing equality and protection of all before the law without any discrimination".<sup>40</sup>

It seems that some judges do not think it unjust to make decisions based on discriminatory legislation, even in current social and economic developments. This was portrayed in the case of *Elizabeth Steven and another v AG*,<sup>41</sup> where the court failed to reach a decision based on the articles of the *Constitution* and international instruments pleaded by the petitioner. The petitioner filed a petition under article 30(3) of the *Constitution of the United Republic of Tanzania, 1977*, for an order declaring

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<sup>38</sup> *Bernardo Ephrahim v Holaria Pastory* (High Court of Tanzania at Mwanza) (unreported) Civil Appeal number 70/1989.

<sup>39</sup> Article 30(5) of the *Constitution*.

<sup>40</sup> Articles 12, 13(1) and 13(4) of the *Constitution*.

<sup>41</sup> *Elizabeth Stephen v AG* (High Court of Tanzania at Dar es Salaam) (unreported) Miscellaneous Civil Case number 82/2005.

unconstitutional paragraphs 1 to 51 of the second schedule of the *Local Customary Law*,<sup>42</sup> which denied women the right to inherit land and gave males preference over females. Through the services of their Advocates the petitioners referred the court to a litany of international treaties that Tanzania had ratified, such as CEDAW, 1979, ACHPR, 1981, *Convention on the Rights of the Child*, 1989 and ICESCR, 1966, which provide, among other things, for the elimination of discrimination against women.

The High Court adjudicated that the customary law that restricted women from acquiring and selling clan land was against the *Constitution*, but it declined to nullify the law. The Court applied the principle of constitutional avoidance and confirmed the maxim set out in *Attorney General v WK Butambala*, where the court provided that:

We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and momentous occasions. Things which can easily be taken up by administration initiative are best pursued in that manner.<sup>43</sup>

The High Court went further and provided that customary law which contravened the *Constitution* could not be abolished because it was defending the "sacrosanct nature of the Constitution" in guaranteeing that "only matters of great importance" were filed in court. The Court also referred to the *Basic Rights and Duties Enforcement Act* Cap 3 RE 2002 under its section 8(2), which provides the following:

The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.<sup>44</sup>

To justify its decision, the High Court in Elizabeth's case maintained that traditions and cultures develop and change with time. It was argued that this process "does not end, nor can it be ended", and so the court should not interfere.<sup>45</sup>

It is very disappointing to note that the Court considered that the political process was an adequate means of remedy in this case. By taking this decision the Court nullified the enjoyment and enforcement of fundamental rights in the democratic process. The equal enjoyment of all rights is a

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<sup>42</sup> *Local Customary Law Declaration Order* 436 of 1963.

<sup>43</sup> *Attorney General v WK Butambala* 1993 TLR 46.

<sup>44</sup> Section 8(2) of the *Basic Rights and Duties Enforcement Act* Cap 3 RE 2002.

<sup>45</sup> *Msuya Harmful Cultural and Traditional Practices* 165.

matter of great significance, and constitutional avoidance and the availability of other legal paths to protect people's constitutional rights should not be an accepted principle.

The Court in this case provided a remedy by arguing that the regional council should lobby the Minister responsible to amend the law, consequently leaving the solution in the hands of the political process. However, it seems that the genuine rationale for this conclusion was that the Court was dragging its feet in relation to the need to interfere with customary law. The Court clearly indicated this by stipulating that:

It is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality.<sup>46</sup>

Here the decision of the High Court was to the effect that it would not make a judicial pronouncement on the constitutionality of the indubitably unconstitutional clause. The High Court in Elizabeth's case ignored even the available precedent of *Transport Equipment Ltd and Reginald John Noland v Devran P Valambhia* case,<sup>47</sup> where a Court of Appeal judge interpreted and applied international law in line with the Tanzanian *Constitution*. In this case, the former Chief Justice of Tanzania, Justice Agustino Ramadhani, affirmed the following:

Our Constitutional protection falls short of that which is provided by the International Covenant on Civil and Political Rights. But since we are party to that Covenant, then it is my conviction that we have at least to interpret and apply our derogation law extremely strictly.<sup>48</sup>

However, the judiciary needs to abide by the principle of precedence. Most judges and magistrates in Tanzania seem to have male-dominant mind-sets and are not gender sensitive, as they sometimes appear to make decisions based on customary rules without even considering the principle of human rights enshrined in the *Constitution* as discussed above. In many instances, their views on the interpretation of laws deviate, and their literal application of legislation has resulted in many women being left destitute. Nowadays,

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<sup>46</sup> *Elizabeth Stephen v AG* (High Court of Tanzania at Dar es Salaam) (unreported) Miscellaneous Civil Case number 82/2005 para 17.

<sup>47</sup> *Transport Equipment Ltd and Reginald John Noland v Devran P Valambhia* (Court of Appeal of Tanzania at Dar es Salaam) (unreported) Civil Application 19/1993.

<sup>48</sup> *Transport Equipment Ltd and Reginald John Noland v Devran P Valambhia* (Court of Appeal of Tanzania at Dar es Salaam) (unreported) Civil Application 19/1993 para 10.

society does not even reflect the values that customary law is based on.<sup>49</sup> A society where family members work together, respect time-honoured customs and maintain each other no longer exists in urban areas, and sometimes not even in rural areas either.<sup>50</sup>

Despite the fact that discriminatory customary laws have been quashed by the High Court in numerous cases, they still exist in the laws of the land and the judiciary is left with the discretionary power to decide whether or not to apply customary law and forget the principle of precedent and the *Constitution*. It has been proved that many women continue to suffer because of this loophole, which the government clearly needs to close.<sup>51</sup> This tug-of-war between the decision of the Court of Appeal and High Court on the application of customary law is also due to the dissimilar schools of thought followed by judges. Some of them believe that they are not bound to decide based on unincorporated international instruments.<sup>52</sup> More specifically, concerning the High Court's failure to follow the precedent available in the case of *Elizabeth Steven*, Rutakagwa J. was of the view that it was due to a lack of communication, as sometimes judges do not have the opportunity to come across all the decisions of other courts. He divulged that it was the first time he had come across the Court of Appeal decision in the case of *Transport Equipment Ltd and Reginald John Nolan v Devran P Valambhia*, although it had been a decision of the same court over which he was presiding.<sup>53</sup>

From the above cases, it seems that the application of legislation that is inconsistent with human rights depends on the decision maker. Most judges and magistrates are aware that those rights are guaranteed in the *Constitution* and international instruments, but they just have a stereotypical mind-set of the role of men and women in society, which makes them even decide against the *Constitution*.<sup>54</sup> The *Constitution* is very clear concerning discrimination between human beings, and it is the duty of the court of law to invalidate customs and traditions which are against the *Constitution*. The judiciary usually contributes to law making, as judges make laws through judicial review. The courts usually depend on the astuteness of judges to

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<sup>49</sup> Msuya *Harmful Cultural and Traditional Practices* 166.

<sup>50</sup> For instance, male heirs appointed in terms of applying customary law no longer adhere to their customary duty of maintaining those family members left by a deceased.

<sup>51</sup> Mwakyembe *Hansard*.

<sup>52</sup> Msuya *Harmful Cultural and Traditional Practices* 167.

<sup>53</sup> Msuya *Harmful Cultural and Traditional Practices* 107.

<sup>54</sup> *ES & SC v United Republic of Tanzania* UN Doc CEDAW/C/60/D/48/2013 Communication No 48/2013 para 16.

interpret enactments that advance rather than demolish the rights of the individual, and this is quite apart from declaring them bad or good laws, as acknowledged by Mwalusanya J. in the following words:

The shape in which the statute is imposed on the community as a guide for conduct is that the statute is interpreted by the courts. The court puts life into the dead words of the statutes. By the statutory interpretation, the courts make judge-made laws that affect the fundamental rights of the citizen.<sup>55</sup>

## **2.2 Application of the principle of equality enshrined in international instruments and the Constitution**

Some judges in the High Court and Court of Appeal have been at the forefront in making sure that women are not oppressed, but enjoy their rights guaranteed by the *Constitution* and other international instruments ratified by Tanzania.<sup>56</sup> The following cases are examples of the firm stance of the judiciary against oppression, where the court made sure that justice is seen to be done. For instance, the rights of the female child to inherit a parent's land was considered in the case of *Jason Tinkazaile Katalihwa v Halima Balthazar Ngaiza*,<sup>57</sup> where the respondent was appointed the administrator of the estate of her deceased son, who had died intestate, and distributed the property to the child of the deceased. The widow of the deceased, who survived the death of her husband, later died and then one Jonathan Ngaiza, who had been appointed administrator of the widow's estate, sold the house to the appellant. The house had already been given to the child of the deceased prior to the death of the widow. Madam Justice Kileo, considering the welfare and interests of the child, ordered the appellant to forthwith give vacant possession of the house to the respondent who, apart from being the administrator of the estate of the deceased, which included the house, had custody of the child also.

As regards *Ndossi v Ndossi*,<sup>58</sup> where a dispute involved the administration of an estate, the High Court approved the District Court's decision to substitute the "deceased's brother for the deceased's widow as the administrator of the deceased's estate". The High Court affirmed that the Tanzanian *Constitution* provided that "every person is entitled to own property and has a right to the protection of that property held in accordance

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<sup>55</sup> Mwalusanya J in *Bernardo Ephrahim v Holaria Pastory* (High Court of Tanzania at Mwanza) (unreported) Civil Appeal number 70/1989 para 10.

<sup>56</sup> Shivji 1991 *J Afr L* 121.

<sup>57</sup> *Tinkazaile Katalihwa v Halima Balthazar Ngaiza* (High Court of Tanzania, Land Division at Dar es Salaam) (unreported) Land Appeal number 8/2006.

<sup>58</sup> *Ndossi v Ndossi* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 13/2001.

with the law", and that article 9(a) and (f) of the *Constitution* generally domesticated human rights instruments ratified by Tanzania, including the anti-discrimination principles contained in article 2(b) and (f) of CEDAW.<sup>59</sup>

In the case of *Naftal Joseph Kalalu v Angela Mashirima*,<sup>60</sup> the respondent, Angela Mashirima, had petitioned the Primary Court to grant her letters of administration in respect of her deceased husband's estate. She was legally appointed administratrix after the consideration of some of the beneficiaries and the proper appraisal by the court of the appropriateness of her appointment. The father of the deceased objected to the appointment of his son's wife as administratrix of the will and claimed that there was no proof that his son contracted a customary marriage with 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 averred that the law that was supposed to be used in administration issues in the Primary Court was customary law or Islamic law. He insisted that since both the respondent and the deceased were of Chagga origin, the Law of Inheritance was applicable, as it stated that:

A Chagga widow cannot inherit the estate of a deceased husband unless clan members do not survive the deceased and the widow has only usufructuary rights over the deceased's properties.<sup>61</sup>

The High Court responded that even if there had not been a traditional marriage between the respondent and the deceased, the duration and nature of their relationship satisfied the requirements of a presumed marriage. Furthermore, the Court referred to articles 12 and 13 of the Tanzanian *Constitution* and article 1 of CEDAW to emphasise its commitment to ending gender-based discrimination, and held that the Chagga customary law referred to was discriminatory and that the deceased's wife would remain as administratrix of the will.

In addition, some members of the judiciary have stood firm to ensure that the disposition of matrimonial property is granted without any discrimination.

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<sup>59</sup> Article 2 of CEDAW states: "State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (...) (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women. (...) (f) To take all appropriate measures, including legislation, to modify or abolish existing laws regulations, customs and practices which constitute discrimination against women."

<sup>60</sup> *Naftal Joseph Kalalu v Angela Mashirima* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 145/2001.

<sup>61</sup> *Local Customary Law Declaration Order* 436 of 1963 para 20.

In the case of *Leila Jalaludin Haji Jamal v Sharif Jalaludin Haji Jamal*,<sup>62</sup> the respondent was sued in the High Court as the executor of the will of his deceased brother, who was the husband of the appellant. The appellant, who was not resident in Tanzania, asked the court to order the respondent to give her the Koranic share of 1/8 of the estate of her deceased husband immediately. The High Court ordered the appellant to pay Tshs. 2,216,250,000/= (\$ 972,274.) as security for the costs incurred and likely to be incurred by the respondent in the process of dealing with that suit, because the appellant was neither a resident of Tanzania nor had she any immovable properties in the country. The panel, comprising Justice Madam Kimaro, Justice Rutakangwa and Justice Kaji, held that the motive for paying such a large amount of money, which the Court knew the appellant could in no way afford, was bad, that it barred the appellant from accessing justice, and that it was against article 13(1) of the *Constitution*. The Court of Appeal found that the right to a hearing is fundamental, which was why the doors of the court should remain wide open for all who come to seek justice. Despite the existence of the above derogative piece of legislation, the Court of Appeal did not hesitate in safeguarding the human rights provisions of the Constitution as basic rights.

In the case of *Mwajuma Mohamed Njopeka v Juma Said Mkorogoro*,<sup>63</sup> the appellant was dissatisfied with the judgment of the trial court, which directed the respondent to reimburse the appellant Tsh 500,000/= US\$230 for the division of matrimonial property after issuing a decree of divorce to the appellant. The respondent, who was the husband of the appellant, was left with the two houses they had acquired during their marriage. On appeal, Madam Judge Kimaro held that the decision of the Lower Court did not take into consideration "the right to equal protection before the law". She granted the appellant one of the matrimonial houses and observed the following:

The decision of the Primary Court is discriminatory and offends Article 13(1) of the Constitution of the United Republic of Tanzania.... Article 7 of the Universal Declaration of Human Rights provides for equal protection before the law. This is what is provided for in Article 13(1) of the Constitution of the United Republic of Tanzania. UDHR is a source of subsequent International Conventions Dealing with Human Rights. The Convention on the Elimination of All Forms of Discrimination against Women in its Article 2 requires state

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<sup>62</sup> *Leila Jalaludin Haji Jamal v Sharif Jalaludin Haji* (Court of Appeal of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 55/2003.

<sup>63</sup> *Mwajuma Mohamed Njopeka v Juma Said Mkorogoro* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 6/2001.

parties to embody the principle of equality before the law in their national constitutions and to ensure through law the realization of this principle.<sup>64</sup>

The High Court of Tanzania also once barred the customary practice of denying the rights of women in respect of matrimonial property.<sup>65</sup> In this case the appellant, who was the husband of the respondent, challenged the decision of the trial court which had distributed the matrimonial property equally and ordered the appellant to pay the respondent an amount of money equivalent to US\$5 per month for maintenance. The grounds for the challenge were to the effect that, according to Chagga tradition, the respondent was wrongly granted a share of the two matrimonial houses constructed in Moshi because they were constructed on clan land. It was argued that it is not allowed to alienate such property and that section 114(2) of the *Tanzania Marriage Act* required the court to consider when determining matrimonial cases the tradition of the community to which the parties belonged. The Advocate of the appellant submitted that the respondent was a housewife and so she had contributed nothing in terms of money or assets to the building of the house. The only contribution she had made was "housekeeping, which amounted to purely conjugal obligations", which did not entitle the applicant to the distribution of the other matrimonial house, which was in Tandika, Dar es Salaam. Again, Madam Justice Kimaro ruled as follows:

The submission by Mr. Mbuya [Advocate for the applicant], to say the least, is a clear reflection of the violence and discrimination which a woman has lived with in the society for years. Services by women which require recognition and compensation are termed conjugal obligations on the part of the woman. This is so even where they are not reciprocated and the woman ends up being an exploited loser ...<sup>66</sup>

With regard to the above celebrated ruling, among other things, the High Court recognised the domestic services rendered by a homemaker as a contribution to the acquisition of matrimonial property.<sup>67</sup> The quorum of judges of the Court of Appeal in the case of *Bi Hawa Mohamed* made a landmark decision by recognising that household duties had sufficient monetary value for the division of matrimonial assets. However, the Court of Appeal in this case did not give clear guidance on assessing the contribution made by doing domestic work or efforts in this regard. In

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<sup>64</sup> *Mwajuma Mohamed Njopeka v Juma Said Mkorogoro* (High Court of Tanzania at Dar es Salaam) (unreported) Civil Appeal number 6/2001 para 17.

<sup>65</sup> *Laurence Mtefu v Germana Mtefu* (High Court of Tanzania, at Dar es Salaam) (unreported) Civil Appeal number 214/2000.

<sup>66</sup> *Laurence Mtefu v Germana Mtefu* (High Court of Tanzania, at Dar es Salaam) (unreported) Civil Appeal number 214/2000 para 26.

<sup>67</sup> *Bi Hawa Mohamed v Ally Sefu* 1983 TLR 32.

addition, section 114(2)(b) of the *Law of Marriage Act*, which requires partners in marriage to prove the extent to which they have contributed to the matrimonial property, creates the possibility that parties may become vulnerable upon divorce or separation.

Although the prerequisite to provide evidence of the extent of one's contribution to the matrimonial property is applicable to both parties in marriage, it has more negative consequences for women, who are in most instances in a weaker position. Lots of women have lost their right to property because of not being able to prove the amount of their contribution.<sup>68</sup> This is due to the fact that in a patriarchal system females are not expected to own property as they are limited by cultural norms, such as the one which requires them to obtain their husband's permission if they want to be involved in any activities. They are also subordinated by a culture that excludes women from participating in public life. Many are illiterate, as they are often denied access to education. The effect of this culture amounts to economic violence, as defined in article 1(j) of the *Maputo Protocol*. Many husbands forbid their wives to work and force them to stay at home. They withhold money for food and other necessities from their wives to "keep them in line" as a punishment or simply because they do not want to fulfil their obligation to support the family.

The Tanzanian police database shows that the number of sexual victims among female and males below the age of 15 doubled between 2004 and 2008 countrywide.<sup>69</sup> In the criminal case of *Leonard Jonadhan v R*<sup>70</sup> that was heard in the trial court, Leonard admitted that he had raped the complainant because he was in love with her and wanted to marry her but the complainant had insisted on a Christian wedding, which Leonard could not afford. He then decided to ambush, catch and rape her, and he now considered himself married to her, as that was the custom relating to Chagga traditional marriage. On appeal, he asserted that on that particular day he had married the complainant according to Chagga tradition, and so he had committed no offence. In judgment, Madam Justice Mnunuo stated that "the defence of contracting Chagga customary marriage through rape was improbable and fallacious in fact and in law". The complainant was protected by the *Law of Marriage Act*, which provides that there is no valid marriage without volition. The High Court also cited articles 2 and 16(b) of CEDAW and article 23 of ICCPR, 1966, and concluded that the appellant

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<sup>68</sup> TAWLA *Position Paper on Gender Mainstreaming* 18.

<sup>69</sup> TAWLA *Position Paper on Gender Mainstreaming* 19.

<sup>70</sup> *Leonard Jonadhan v R* (High Court of Tanzania at Dar es Salaam) (unreported) Criminal Appeal number 53/2001.

had seriously offended the complainant's fundamental rights of "choosing her spouse and had marred her without her volition".

In the ground-breaking case of *Rebeca Gyumi v Attorney General* the High Court of Tanzania finally declared that sections 13 and 17 of the *Tanzania Law of Marriage Act* are against the *Constitution*.<sup>71</sup> These sections authorised young girls to marry at the age of 15 if permitted by their parents. They also allowed girls aged 14 to marry once they obtained the court's permission. This case was a significant step forward in the efforts to end child marriage in the country. It was held that these provisions of law violate young girls' fundamental rights, including the right to dignity, equality and access to education. The provisions contradicted the *Law of the Child Act* of Tanzania, which regarded a person below the age of 18 as a child.<sup>72</sup> In arriving at the decision, the Court pointed out that while the Law might have been enacted with fine objectives in 1971, those objectives were no longer relevant because the current legislation was biased against girls, as it denied them opportunities that are very important for all human beings. The Attorney General was given a year from the date of the decision to prepare a modification of that law and make 18 the minimum age for everyone to enter into the contract of marriage.

On average, two out of five girls in Tanzania get married before the age of 18 and 39% fall pregnant by the age of 19, giving the country the highest rate of child marriage in the world.<sup>73</sup> Although human rights groups and civil society organisations applauded the ruling, there are mixed feelings in the country, as the ban of this law is said to primarily affect Muslim and traditional tribal communities.<sup>74</sup> So far the government has not amended the law although a year has elapsed. The Minister responsible has declared that the amendment process will take time as the *Law of Marriage Act* is one of the areas that needs to be handled very carefully to reach a justifiable consensus.<sup>75</sup> He stated that changing the age of marriage so promptly would create chaos in the context of Tanzanian traditions, culture and religion, which approve of child marriage.<sup>76</sup>

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<sup>71</sup> *Rebeca Gyumi v AG* (High Court of Tanzania at Dar es Salaam Main Registry) (unreported) Miscellaneous Civil Case number 5/2016.

<sup>72</sup> Section 4(1) of *Law of the Child Act* 21 of 2009.

<sup>73</sup> Parsons and McCleary-Sills 2014 <http://documents.worldbank.org/curated/en/224441468147543361/Preventing-child-marriage-lessons-from-World-Bank-Group-gender-impact-evaluations> 17.

<sup>74</sup> Mhagama *Tanzania Daily News* 2.

<sup>75</sup> Kapama and Msuya *Tanzania Daily News* 1.

<sup>76</sup> Kapama and Msuya *Tanzania Daily News* 1.

### 2.3 *Remarks on the cases discussed above*

In most of the above cases in which women's rights were strictly enforced, the adjudicating judges were women. In the Court of Appeal cases there was a woman judge on the panel of three judges. Women judges have been playing a major role in ensuring that the rights of their fellow women are granted in accordance with the *Constitution* and international human rights instruments. In addressing this issue, the Hon Madam EN Mnunuo of the Court of Appeal was of the view that the women themselves need to be bold in the first place and fight in order to force men to grant them their rights.<sup>77</sup> It is not easy for a man who is steeped in stereotyped thinking and who is enjoying the benefits of oppressing women to recognise women's rights.<sup>78</sup>

It is noted that women judges in Tanzania have realised the importance of the judiciary's having a broad mind in respect of human rights. They use their association, called the Tanzania Women Judges' Association, as a platform for addressing the issue of human rights for women, and they conduct human rights seminars for judges and magistrates once a year, where they specifically discuss national and international precedents and legislation which safeguard human rights and specifically protect women and children.<sup>79</sup>

A notable number of women are being appointed as magistrates, judges and justices of the Court of Appeal across the country.<sup>80</sup> This trend is of benefit to gender equality and, more specifically, to creating understanding and the compassionate handling of cases in the courts when women's issues are being considered or when their rights are at stake. Women judges promote gender equality and female rights in general. A court presided over by a woman judge produces judgements and rulings that have real-world implications and real impacts on the lives of female members of the community. The *Constitution of South Africa*, for example, under section 174(2), specifically declares the need for the "judiciary to broadly reflect the gender composition of South Africa" when judicial officers are appointed. It is argued that women judges approach the issue of law and case management from a different perspective and with a different way of thinking that can help correct the biases of culture and tradition.

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<sup>77</sup> Mnunuo "Legal Implications of Professional Associations" 4.

<sup>78</sup> Mnunuo "Legal Implications of Professional Associations" 6.

<sup>79</sup> TAWJA *Stopping the Abuse of Power* 8.

<sup>80</sup> United Republic of Tanzania Judiciary *Consolidated Annual Statistics Report*.

However, the challenge of accepting female judges still exists in society and among many male members of the legal profession. Prevailing gender stereotypes, norms and roles often play a significant role in preventing women's full and equal participation in the judiciary.<sup>81</sup> In some contexts, these manifest themselves in serious opposition to women's participation in the judiciary. The traditional interpretation of the role of women in society continues to exclude women from the judiciary or from particular courts in Africa.<sup>82</sup> Sometimes conservative religious beliefs regarding women's role in society provide authorities with the pretext to restrict women's participation.<sup>83</sup> Gendered assumptions based on the culture of women's submissive role in society result in female judicial members being mistreated by male colleagues and authority figures. It is also noted that women's promotion or appointment to the bench is often considered on the presumption that they are mainly children's attendants and will stop working or will not take on the required workload when they become mothers.<sup>84</sup> It is also widely assumed in many African communities that judges are, or should be, men.<sup>85</sup> Sometimes people who appeared in a court presided over by a female judge asked where the judge was.<sup>86</sup> The experience of some female judicial members has been that men and women have refused to appear before them or sought to have their cases transferred to another court. Some members of the judiciary in Africa still use the male form of address for female judges<sup>87</sup> as they address them as "My Lord" or "Your Lordship" instead of "My Lady" or "Your Ladyship".<sup>88</sup>

### 3 Recommendations

Judges and magistrates have to play a leading role so that women's rights are implemented at national level in Africa. The Judiciary can assist in protecting victims and their families by making sure that perpetrators are held responsible, which in turn will prevent and reduce further discrimination on the basis of gender. The Judiciary needs to be encouraged to interpret customary law in accordance with human rights norms by demonstrating that the traditional, social and economic relations on which the biased customary norms are founded and on which traditionalists count to oppose transformation, have in actuality been radically reformed. This will show that

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<sup>81</sup> Reid "Trouble with Tradition" 21.

<sup>82</sup> Msuya *Harmful Cultural and Traditional Practices* 182.

<sup>83</sup> OHCHR *Gender Stereotyping*.

<sup>84</sup> International Commission of Jurists *Women and the Judiciary* 23.

<sup>85</sup> Msuya *Harmful Cultural and Traditional Practices* 182.

<sup>86</sup> Msuya *Harmful Cultural and Traditional Practices* 182.

<sup>87</sup> Msuya *Harmful Cultural and Traditional Practices* 182.

<sup>88</sup> International Commission of Jurists *Women and the Judiciary* para 19.

communities no longer adhere to the values used by traditionalists to support customary legal norms that are biased against women in their existing form.

Strategic litigation must also be attempted to ensure that decisions prohibiting discrimination on the grounds of gender are well considered and not open to criticism.<sup>89</sup> Lawyers must make every effort to convince the courts to make decisions that establish principles on which to build bold jurisprudence. There is also a great need to continue to appeal against judgements that ignore gender bias, as it is not enough when they are merely ruled as discriminatory. More effort needs to be made by the judiciary to set out comprehensible jurisprudence that confirms that such dissimilarity represents unlawful discrimination and breaches the rule of equality. More importantly, the principle of equality is entrenched in the *Constitution*, although personal and customary law is often exempted from the scope of this principle. It is this tension between customary law and the constitutional principle of equality that has created problems for lawyers and judges alike, but from the standpoint of strategic litigation this is a significant opportunity for lobbying and litigation.

If the courts are to deliver substantive justice, legal representatives and the jury must ensure that the social framework, values and perspectives that support people's legal claims are properly heard and understood. To achieve this, all law enforcement officers, including attorneys, prosecutors, the police and medical practitioners, must be involved in campaigning against gender discrimination and harmful customary practices which discriminate against women. In this regard, the principal responsibility of judges and lawyers is not simply that of adjudicating or legal representation, but also of facilitating access to justice. Other barriers to the legal system that hinder the female victim's ability to access justice must be considered and addressed. These include attending to the hours of operation or location of the court, the legal technicalities of court procedures, delays in judicial proceedings, and the financial sanctions imposed on perpetrators.<sup>90</sup> Court and user fees also hinder access to justice. These difficulties in access affect everyone, but they place a particular burden on those women who have no formal employment, have limited access to finance, have extensive health care needs because of pregnancy and childbirth, and suffer under a huge domestic workload. Access to courts must be improved so that women

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<sup>89</sup> Msuya *Harmful Cultural and Traditional Practices* 252.

<sup>90</sup> Msuya *Harmful Cultural and Traditional Practices* 254.

can file claims on the infringement of their basic right to justice, which will in turn provide opportunities for the courts to reform the law.

Courts also need to play an active role in enforcing human rights by interpreting domestic law in line with international human rights standards. Having a discussion on international instruments would present an enhanced basis for courts' decisions despite the fact that the international treaties themselves do not often provide much aid in interpreting the provisions of a bill of rights embedded in related provisions. In interpreting constitutional and legislative provisions that protect women's rights, judges should also consider how related provisions have been interpreted in other jurisdictions, by foreign courts, international courts, or quasi-judicial bodies. Case law from other countries also needs to be considered. While access to courts continues to be a challenge, it is much harder for a female litigant than a male to bring a human rights case to court. Therefore the judiciary should take the opportunity to go the extra mile in developing women's rights, instead of confining itself to the application of domestic law only. This could be achieved by noticing how the same rights have been interpreted in other jurisdictions.

#### 4 Conclusion

Despite the fact that the principle of equality has been entrenched in the Tanzanian *Constitution*, personal and customary law is often outside the ambit of this principle.<sup>91</sup> The tension between the principle of equality enshrined in the *Constitution* and the position in customary law has created similar problems for members of the judiciary. Consequently, some judicial members have produced varied and random judgments that have led to misdirection, as well as an unclear and inconsistent legal system. Contradictory decisions taken are those in the case of *Elizabeth Steven v AG* and *Rubuka Nteme v Bi Jalia Hassan*. It is when courts seek to justify the unjustifiable that judicial precedents and recognised standards on non-discrimination fall foul of the law. Tanzania has signed and ratified various instruments that address equity and equality, but the procedures for and the pace of their implementation and enforcement in the country differ. Based on the above case analyses, it is concluded that the judicial development of customary law, according to the constitutional and international principle of gender equality, has not been easy and straightforward in Tanzania.

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<sup>91</sup> Msuya *Harmful Cultural and Traditional Practices* 253.

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### List of Abbreviations

ACHPR	African Charter on Human and People's Rights
AU	African Union
AWID	Association for Women's Rights in Development
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Geo J Gender & L	Georgetown Journal of Gender and Law
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
J L & Pol'y	Journal of Law and Policy
J Afr L	Journal of African Law
OHCHR	Office of the United Nations High Commissioner for Human Rights
TAWJA	Tanzania Women Judges Association
TAWLA	Tanzania Women Lawyers Association
UDHR	Universal Declaration of Human Rights
UN	United Nations