



## African Human Rights and Access to Justice Programme

### Legal Opinion Case No. 105

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National Lawyer: National Organisation for Legal Aid- Tanzania

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#### **Summary of opinion**

**Tanzania is bound by the Convention on the Elimination of Violence Against Women (CEDAW), as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Women's Protocol). Tanzania is also a signatory to most other major international human rights instruments, including International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention in the Rights of the Child (CRC). Under its international obligations, Tanzania is required to guarantee the rights of women in effect as well as to interpret legislation so as to meaningfully apply these rights.**

#### **Question in which Opinion is sought**

In this case there are a number of questions to be answered. Firstly, whether the applicant is entitled to an equal division of property following a decree of divorce. Secondly, whether she is entitled to custody of the children. Thirdly, whether the husband is obliged to pay maintenance for the children; and finally if domestic violence is relevant to the proceedings.

The questions will be answered as follows; Firstly, it will be shown that Tanzania is under international obligations to eliminate discrimination against women and that this obligation must be met legislatively as well as practically. In order to give effect to these international obligations, the court is required to interpret laws to enable the applicant to a) recover a division of properties jointly owned; b) custody of, and maintenance for, the children of the marriage; and c) that there should be remedies for the domestic violence experienced by the applicant.

Secondly, it will be seen that Tanzania has domestic obligations to the same effect. However, in the case of any ambiguity the courts may face in interpreting relevant national legislation, that ambiguity must be resolved in a way so as to give effect to the abovementioned international laws.

## **Women's Rights and Children's Rights in Africa**

Women's rights have increased in significance on the international human rights agenda in recent decades. In recent years some countries in the developing world have passed laws explicitly recognizing women's land rights, and there is now a growing acceptance of such rights among the world's more traditional societies. Worldwide, there is a high correlation between women's lack of control over resources, their poverty, and lack of full citizenship. Lack of rights to tenure or ownership renders many women unable to protect themselves, and prevents access to credit through lack of collateral, thus reinforcing the control that men traditionally have over the household and its dependents. Tanzania is a multicultural and multireligious society, and although predominantly rural, having some modern sectors. Poverty is widespread and the bulk of society remains traditionalist when it comes to gender issues. However, a public debate is in its beginning. Women's protection by the law remains limited. In this context it is important for courts to keep in tune with international consensus on the rights of women, and for the rights and freedoms which Tanzania has formally agreed to uphold to be given their full effect.

## **International Legal Obligations for Tanzania**

### *Women's Rights Generally*

Tanzania is under international obligations to afford women equality in all areas of public and private life. These international obligations are voluntarily undertaken by parliament and it must be presumed that Tanzania wishes to refrain from violating such obligations. In order to give effect to these laws courts must ensure women find themselves in an equal position to men (save extraordinary circumstances) following the dissolution of a marriage. By allowing any law, which, in words or effect allows for the husband, in circumstances such as these, to gain access to all property and the children is clearly discriminatory against women.

The Universal Declaration of Human Rights confirms the international community's acceptance of the right to equal treatment for women: Article 2 provides: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as...sex. Specifically for our purposes; Article 16(1) provides: Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution.

Tanzania is also a party to the International Covenant on Civil and Political Rights, of which Article 3 provides: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant. Article 23(4) provides: States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage during marriage and at its dissolution. In the case of dissolution, protection shall be made for the necessary protection of any children.

ICCPR General Comment 28<sup>1</sup> stated that States must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children. The need to maintain contact between children and the non-custodial parent, should be based on equal considerations.

Regional instruments further support the applicant's claim. The African Charter on Human and People's Rights:

Article 2 provides: Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction as to ...sex.

Article 18(3) provides 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 international declarations and conventions

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>2</sup> to which Tanzania was one of the first signatories provides:

Article 2 Elimination of Discrimination Against Women

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

a) Include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

c) Integrate a gender perspective in their policy decisions, legislation, development plans, programs and activities and in all other spheres of life;

d) Take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practice and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

The Women's protocol is therefore emphasizing that the obligation is in regards to both legislative as well as administrative action. Policy decision and court decisions must strive to give effect to the rights of women.

The most significant international instrument for the present case is the Convention on the Elimination of All Forms of Discrimination Against Women:

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<sup>1</sup> (sixty-eighth session, 2000); article 3: Equality of Rights Between men and Women. A/55/40 vol. 1 (2000) 133 at para 26

<sup>2</sup> Adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (sept 13, 2000) reprinted in 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005

Article 1: For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing, 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 other field.

The CEDAW anti-discrimination bar has three components: first, it impugns law or conduct that is discriminatory both in terms of its effect and its purposes. Second, “discrimination against women” can be perpetrated both by the state and by private actors. Violation of CEDAW rights is therefore actionable against individuals and private actors. Thirdly, the categories of impermissible discrimination are not closed and have been implicitly expanded by the phrase, “any other field” in article 1. This means that CEDAW’s definition of discrimination is flexible enough to accommodate changing conceptions and new forms of discrimination. It also follows that the violation of the right can be by the husband as a private actor.

Article 2 require States 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, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on a equal basis with men and to ensure, through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measure, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women

Any laws which would not enable the applicant, in the present case access to her children, and to an equal share in matrimonial properties would clearly discriminate against women in violation of article 2. Courts, as a public institution, need to effectively protect against any such discrimination in conformity with Article 2 (c) where domestic legislation allows.

Article 3 provides: States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

The Committee on the Elimination of Discrimination against Women<sup>3</sup> has emphasized the need to reflect the above international laws on non-discrimination in the field of marriage and divorce. The committee acknowledges that historically, human activity in public and private life has been viewed differently and regulated accordingly. In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior.

The Committee continued; As such activities are invaluable for the survival of society, there can be no justification for applying different and discriminatory laws or customs to them. Reports of States parties disclose that there are still countries where de jure equality does not exist. Women are thereby prevented from having equal access to resources and enjoying equality of status in the family and society.

International jurisprudence has confirmed this sentiment. For example, the case of *Prior v Battle & Ors*<sup>4</sup> in South Africa, it was held that there is no logical or rational basis to conclude that the male partner in a civil marriage must have more rights than the female partner simply because he is male.

If the facts of the case indicate that the respondent worked either in paid employment, or in domestic duties, she will be entitled to a share of the matrimonial properties.

#### *Right to equality Before the Law*

It is important to note that women must be equal before the law, interlinked with this is the right to own property and women's right to an equal share in the property of a marriage following its dissolution.

Tanzania has obligations under the ICCPR Article 16 provides that everyone shall have to right to recognition everywhere as a person before the law.

The UDHR article 6 provides that everyone has the right to recognition everywhere as a person before the law.

Article 7 provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The African Charter on Human and People's rights provides:

Article 3(1) Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.

Article 15 of CEDAW provides:

States Parties shall accord to women equality with men before the law.

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give

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<sup>3</sup> General Recommendation No. 21 (13<sup>th</sup> Session, 1994) Equality in marriage and family relations

<sup>4</sup> 1998 (8) BCLR 1013

women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

On this application, whatever the contractual marriage agreements which enable the husband to have property will be seen as not equal before the law and therefore null and void.

Article 8 of the Women's Protocol on Access to Justice and Equal protection before the law provides: Women and men are equal before the law and shall have to right to equal protection and benefit of the law. States parties shall take all appropriate measures to ensure; (d) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

The applicant therefore should have access to the law to ensure that no law or agreement is upheld that enables her to receive unequal treatment to her husband.

#### *Right to Property*

Under Tanzania's international obligations, the applicant is entitled to equal access to the property of the marriage. It is unclear from the facts the details of the purchase of the properties of the marriage, or of what form of documentation in regards to such property exists. However, it can be seen that, irrespective of the source of income, the property must be divided between the parties, and the court must take many factors into account in order to fulfill the right to non-discrimination.

Article 17 UDHR provides:

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

Article 14 African Charter on Human and People's Rights provides: The right to property shall be guaranteed. It may be encroached upon in interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The Committee has noted<sup>5</sup> that when a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman's ability to provide for herself and her dependents.

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<sup>5</sup> CEDAW General Recommendation 21 (Thirteenth session, 1994): Equality in Marriage and Family Relations, A/49/38 (1994) 1para 7 -8

The Committee went on to note that Article 15(1) guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of a property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and provide adequate housing and nutrition for herself and her family.<sup>6</sup>

Article 16 of CEDAW provides:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) the same right to enter into marriage;
  - (b) the same right freely to choose a spouse and enter into marriage only with their free and full consent;
  - (c) the same rights and responsibilities during marriage and at its dissolution;
  - (d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of their children shall be paramount;
  - (e) ...
  - (f) ...
  - (g) The same personal rights as husband and wife...
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for valuable consideration;

The Committee on the Elimination of Discrimination Against women<sup>7</sup> discussed Article 16(1)(c) stated that an examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status and responsibility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision maker and therefore contravene the provisions of the convention.

The Committee also said of article 16(1)(h) that in countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms should be carefully observed.

The Committee went on to say<sup>8</sup> that there are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize

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<sup>6</sup> *ibid* Para 26

<sup>7</sup> in General Recommendation No. 21 (13<sup>th</sup> Session, 1994)

<sup>8</sup> paragraph 30 - 32

that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.

Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or divorce may be managed by a man. In many states, including those where there is a community property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it<sup>9</sup>.

In some countries, on division of matrimonial property, greater emphasis is placed on financial contributions to property acquired during marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight<sup>10</sup>.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>11</sup> Article 7 on Separation, Divorce and Annulment of Marriage:

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- a) Separation, divorce or annulment of a marriage shall be effected by judicial order;
- b) Women and men shall enjoy the same rights to seek separation, divorce or annulment of a marriage
- c) ...
- d) In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from the marriage

The CEDAW Committee has stated<sup>12</sup> that in most countries, a significant proportion of the women are single are divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the woman and children of his family and that he can and will honorably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and live in dignity as an independent person.

It is clear that there is universal consensus that following the dissolution of marriage, the woman should be entitled to an equal division of shared property. Irrespective of the

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<sup>9</sup> *ibid* para 31

<sup>10</sup> *ibid* para 32

<sup>11</sup> adopted by the 2<sup>nd</sup> ordinary session of the assembly of the union, Maputo, CAB/LEG/66.6 (sept 13 2000; reprinted in 1 Afr. Hum. L.J., 40 *entered into force* Nov. 25, 2005

<sup>12</sup> CEDAW General Recommendation 21 (Thirteenth session, 1994): Equality in Marriage and Family Relations, A/49/38 (1994) 1para 7 -8Para 28

formalities undertaken in acquiring the property, it is important that the courts are aware that the outcome is important to ensure non-discrimination against women. The court must interpret Tanzania's legislation and constitution to give effect to Tanzania's international obligations in this regard, and ensure they are given effect in a practical way.

### *Custody of Children*

The applicant in the present case also has a right to custody of her children, or at a minimum, she has a right not to be denied access to them in the absence of further reasons why it would be in the best interests of the children to deny such access.

CEDAW Article 16(1) 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 (d) The same rights and responsibilities as parents, irrespective of their marital status; and (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation, in all cases the interests of the children shall be paramount.

The Committee has noted<sup>13</sup> the shared rights and responsibilities enunciated in the Convention should be enforced at law and as appropriate thought legal concepts of guardianship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children.

The Convention on the Rights of the Child states:

Article 3:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures

Article 5: States Parties shall respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention.

Article 9:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the

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<sup>13</sup> General Recommendation No. 21 (13<sup>th</sup> session, 1994)

- child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in proceedings and make their views known
  3. states parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests

Article 18:

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents... have the primary responsibility for the upbringing and development of the child. The best interests of the child shall be their basic concern

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>14</sup> states, in article 7(c), in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance.

It can be seen that there is no evidence to suggest, if appropriate financial requirements are met, that in the present case it would be in the best interests of the children to remain with their mother. The children's father has a history of violence within the household and it would be contrary to the children's best interests to remain in such an environment. To give effect to Tanzania's obligations as to the rights of the child, as well as its duty not to discriminate against women in this regard, the court should grant custody to the applicant.

*Maintenance*

We are requesting that the husband be required to pay maintenance to the respondent in the present case. If he fails to do so, it can be said to be an indirect violation of the right to life. Furthermore, as we believe the custody of the children should rest with the applicant, the husband should be required to pay maintenance thereof.

Article 6 of the ICCPR states that Every Human Being has the inherent right to life. No one shall be arbitrarily deprived of his life. An argument could be made that by depriving the applicant of maintenance given her circumstances is depriving her of her right to life and her right to livelihood<sup>15</sup>.

The Universal Declaration of Human Rights, article 25 states:

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<sup>14</sup> op cit

<sup>15</sup> see *OLGA TELLIS & ORS v. BOMBAY MUNICIPAL CORPORATION & ORS. ETC* [1985] INSC 155; [1985] 3 SCC 545; AIR 1986 SC 180 (10 July 1985) where it was held that by depriving a person of the right to earn a living was a violation of the right to life.

1. Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control
2. Motherhood and childhood are entitled to special care and assistance...

The African Charter on Human and Peoples' Rights, article 3 provides that Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person...

The Women's Protocol<sup>16</sup>, article 16 provides that women shall have the right to equal access to housing and acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant women, whatever their marital status, access to adequate housing.

If the applicant is granted custody of the children (in accordance with international law) then it will be required that the father pay maintenance thereof. The Convention on the Rights of the Child supports this view, it would clearly be in the best interests of the children, as well as the obligation for both parents to have responsibility for the upbringing of children<sup>17</sup>.

#### *Issue of the Domestic Violence*

The respondent was a victim of domestic violence during the marriage. Tanzania is under and obligation to punish the perpetrator of such violence and support the victim. This has not been followed through. The court must take this into account as relevant to all of the remedies sought in the present case, including custody and maintenance.

The Declaration on the Elimination of Violence Against Women<sup>18</sup> provides:

Article 1 For the purposes of this Declaration, the term "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 private life.

Article 2 provides that Violence against women shall be understood to encompass, but not be limited to, the following:

a) Physical, sexual and psychological violence occurring in the family...

Article 4 provides that States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: (c)

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<sup>16</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the 2<sup>nd</sup> ordinary session of the assembly of the union, Maputo, CAB/LEG/66.6 (sept 13 2000; reprinted in 1 Afr. Hum. L.J., 40 entered into force Nov. 25, 2005

<sup>17</sup> CEDAW, article 5

<sup>18</sup> resolution adopted by the General Assembly on the Report of the Third committee (A/48/629) Resolution 48/104)

exercise due diligence to prevent, investigate and, in accordance with national legislation to punish and redress the wrongs caused to women who are subjected to violence...

The UDHR, Article 5, states that no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.

The CEDAW Committee has noted that Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedom on a basis of equality with men<sup>19</sup>. The convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts... They went on to say that gender-based violence, which impairs the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the convention.

The committee also stated that Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds...Lack of economic independence forces many women to stay in violent relationships. In light of this, the committee recommended that state parties should take appropriate and effective measures to overcome all forms of gender based violence, whether by public or private act; and states parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Furthermore, the committee recommended that there be criminal penalties where necessary and civil remedies in case of domestic violence.

The Women's Protocol<sup>20</sup>, Article 4(2) provides that States parties shall take appropriate and effective measures to

- a) Enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in public or private
- b) Adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women

In the present case the husband was not punished for his domestic violence, he has been rewarded with the property division as well as the custody of the children. The respondent was neither protected by the state as is required by international human rights

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<sup>19</sup> CEDAW General Recommendation 19 (eleventh session, 1992): Violence Against Women, A/47/38 (1992) 5 Para 1

<sup>20</sup>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the 2<sup>nd</sup> ordinary session of the assembly of the union, Maputo, CAB/LEG/66.6 (sept 13 2000; reprinted in 1 Afr. Hum. L.J., 40 *entered into force* Nov. 25, 2005

law to which Tanzania has obligations. It must be a factor in the decision of property, custody and maintenance.

### **Domestic obligations**

Tanzania's international obligations are reflected in its constitution. Part III specifies basic rights and duties.

#### Section 12

- (1) All human beings are born free and are all equal
- (2) Every person is entitled to recognition and respect for his dignity.

#### Section 13:

- (1) All persons are equal before the law and entitled, without any discrimination, to protection and equality before the law
- (2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory that is discriminatory either of itself or in its effect

While the constitution does not specifically mention women, it can be seen that the wording of this section is based in international law and thus the international human rights laws are directly relevant. This is supported by the fact that Tanzania has ratified CEDAW, the African women's Protocol and other treaties which do specifically deal with women's right to equality.

The right to equality in the Tanzanian constitution includes the right of women to be treated equally. If there is any ambiguity as to whether this includes women, the courts must look to Tanzania's international obligations to resolve the ambiguity and immediately it becomes apparent that this section is wide enough to include women. ICESCR and ICCPR were ratified in 1976 without reservations. CEDAW was ratified in 1985 without reservations, and CRC was ratified in 1991 without reservations. Therefore nothing can be said to suggest that Tanzania has every intention to give full effect to these international obligations, legislatively and practically

### *Property Division and maintenance*

Post-Divorce Maintenance/Financial Arrangements in Tanzania are such that in dividing marital property and passing decision on maintenance, courts must consider: customs of the parties' community; contribution made by each party towards acquisition of the property in money, property or work; debts owed by either party for acquiring property for their joint benefit; and needs of infant children; Courts may order maintenance for former wife for limited number of reasons.

*Mahenga Zengo vs. Holo Zadaso* 1982 TLR 94 held: Basing its law on s108 of the Law of Marriage Act, 1971, the court hearing of a divorce or separation has the duty to enquire into the issues of matrimonial property and determine its distribution among the parties thereof.

*James Gilbert Uriyo vs Gilbert Uriya*: 1982 TLR 355, the court held that a contribution to acquisition of matrimonial property should entitle a party to property rights

It should be noted that it is well accepted that the woman's role in household duties is considered a meaningful contribution to property acquisition, entitling the woman to a fair division on this basis.

*Bi Hawa Mohamed vs Ally Seif* 1983 TLR 32 (a landmark case in division of matrimonial property in Tanzania), the Court of Appeal held as follows:

- (a) 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
- (b) The joint efforts and work towards the acquisition of the assets have to be construed as embracing the domestic efforts or work of the husband and wife

### *Custody of children*

The ages of the children will be relevant under Tanzania's laws, however, the presumption domestically is that children remain with the mother. There is nothing in the current situation to suggest the court should go against this presumption.

*Ramesh Rajput vs. Mrs Sunanda Rajput* (1988) TLR 96 the court of appeal discussed the issue of custody and children and held as follows:

- (a) that the most important factor in custody of children proceedings is the welfare of the child
- (b) that an infant of two should be with the mother unless there are very strong reasons to the contrary

Child Custody and Guardianship in Tanzania is such that: first consideration of court in ruling over custody matters is welfare of the ward; rebuttable presumption that children should remain with mother until age of 7; courts also directed to consider: customs of community to which parents belong; economic circumstances of both parents; housing that both parents can provide; and behavior of mother and whether she contributed to marital breakdown. In this case it was the behavior of the father that substantially contributed to the breakdown, therefore supporting the view that the children should remain with the mother.

### *Domestic Violence*

Violence against women remains widespread in Tanzania. The Marriage Act of 1971 makes a declaration against spousal battery, but does not prohibit it or provide for any punishment. Traditional customs that subordinate women remain strong in both urban and rural areas and local magistrates often upheld such practices. Tanzania is therefore in violation of its international requirements and this legislation must be interpreted liberally so as to allow for domestic violence to be a factor in cases such as the present.

### **Recommendations for on-going litigation in Martha Mlata Runyoro case**

This case brings into judicial and public scrutiny the extent to which, in effect, Tanzania is conforming to its international human right obligations in relation to women and children. It is not enough to simply have legislation, which, on its face, does not discriminate, the effect must be seen in day to day life.

**First**, the court must dissolve the marriage and issue a decree of divorce. This is not contested by either party and should pose no problem.

**Second**, the court should make an order for the equal division of matrimonial properties jointly acquired. Domestically case law and legislation allow for such a division. The constitution requires that all people be treated equally. In this regard, the court must read such legislation in accordance with international law requiring that women be granted a share of properties following the dissolution of a marriage. It should be argued on the basis that domestic labor is regarded as an important contribution to the acquisition of such property.

**Thirdly**, the court should grant custody of the children to the applicant. Domestic law in Tanzania presumes that it is in the best interests of the child to remain with the mother, there is nothing to rebut this presumption. In fact, there is ample evidence that remaining with the father would not be in the best interests of the children, given his history of domestic violence. International law requires that both parents be granted access to the children and the children have a right to respective access to their parents. However, in this case, due to the history of violence, it would seem to be in the best interest of the children that the children do not reside at any time with the father.

**Fourthly**, the court should ensure that the father pay maintenance of the wife and the children. Tanzania's legal obligations require the court to interpret any laws in a way in which this is accomplished. Both parents have a responsibility to raise children, it cannot fall solely on the mother.

End.

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