



TANZANIA WOMEN
LAWYERS ASSOCIATION
(TAWLA)

POSITION PAPER
ON GENDER
MAINSTREAMING OF
THE CONSTITUTION
REVIEW PROCESS OF
TANZANIA

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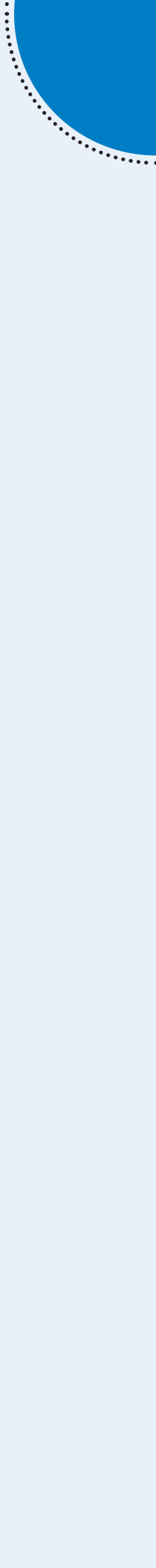




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Foreword

This Position Paper on Mainstreaming Gender in Constitution review process of Tanzania is a result of the cooperation of many people committed to gender equality.

On 31 December, 2010 His Excellency Jakaya Mrisho Kikwete announced that Tanzania would embark on writing a new constitution. Soon after that the idea of the formation of Gender Forum started and the small interest group started discussing gender and the constitution review process. In 2011, it started organizing activities with a vision of a new constitution that effectively addresses gender equity and equality issues well articulated and incorporated in its various chapters and articles. In due course, the Women Movement in Tanzania consolidated itself to have a “one voice” in the ongoing constitution review processes.

Consequently, our mission became to facilitate the Tanzanian community to engage in an informed dialogue about the country’s constitutional review process from a researched gender analysis with clear action points to be proposed to the CRC. This mission motivated the members of the GFC under the coordination of the Tanzania Women Lawyers Association (TAWLA) to agree on one main objective of contributing to the efforts for ensuring that women understand the relevance of the constitution to their daily lives and have opportunities to effectively participate in the national dialogue for constitutional review. The Tanzanian community took it as an occasion for solving their long standing grievances for instance insubordination of women in the Tanzania society due patriarchy and cultural norms. Gender rights activists on their part saw it as an opportunity to address long standing violations of women rights. Given that Tanzania has had no previous experience of involving the people in writing a new constitution, GFC decided to do a Comparative Study to see how other selected African countries have handled similar issues.

The Position Paper is informed by the comparative study and analysis of the existing literature in Tanzania on women’s’ rights. The process was inclusive and other stakeholders were also consulted during the preparation of the paper.

We are grateful to many individuals, organizations and development partners who encouraged and supported the GFC throughout the process.

ABBREVIATIONS AND ACCRONYMS

AIDS	Acquired Immune Deficiency Syndrome
ANC	Antenatal Clinic
CDD	Centre for Democratic Development
CEDAW	Convention and Elimination of All Forms of Discrimination Against Women.
CGE	Commission for Gender Equality
CREAW	Centre for Rights Education and Awareness
CSOs	Civil Society Organizations
DAS	District Administrative Secretary
DEDs	District Executive Directors
FEMACT	Feminist Activist Coalition
FIDA	Federation of Women Lawyers
GBV	Gender Based Violence
GFC	Gender Forum on the Constitution
GMO	Gender Monitoring Office
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LHRC	Legal and Human Rights Centre
MCDGC	Ministry of Community Development Gender and Children
NGO	Non Governmental Organization
NWC	National Women Council
PS	Permanent Secretary
RAS	Regional Administrative Secretary
RAW	Right Action Watch
RoR	Republic of Rwanda
SADC	Southern African Development Cooperation
SAHRC	Human Rights Commission for South Africa
SAHRiNGON	Southern African Human Rights Non Governmental Organizations Network
TAGA	Tanzania Gender and Accountability
TAWLA	Tanzania Women Lawyers Association
TDHS	Tanzania Demographic and Health Survey
TGNP	Tanzania Gender Networking Programme
UDHR	Universal Declaration on Human Rights
WHO	World Health Organization
WiLDAF	Women in Law and Development in Africa
WLAC	Women's Legal Aid Centre
WLEA-T	Women and Law in East Africa (Tanzania)

EXECUTIVE SUMMARY

Constitutional Making Process in Tanzania has been welcomed by women rights activists and civil society organizations working in the area of gender and women rights. The Gender Forum Coalition on the Constitution (GFC) on its part has seen it as a rare opportunity for which the long standing grievances related to gender equality should formally be discussed, analysed and adequately addressed. The members of the GFC namely Tanzania Gender Accountability (TAGA), Tanzania Women Lawyers Association (TAWLA), Women and Law in East Africa (WLEA-T) and Rights Action Watch (RAW) under the coordination of TAWLA are committed to seeing to it that the community, the Constitutional Review Commission and others appreciate that there is a clear need to have the constitutional review process takes into issues of women's rights.

The GFC has identified ten thematic areas as areas of focus in this process. They have strived to. Given that Tanzania has had no experience of involving the public in constitution making, the GFC members addressed itself on the kind of constitution that would address issues of gender disparities. . The GFC updated their data base and conducted research in other African countries in order to see how other countries have addressed similar issues. Thus the GFC addressed itself to ten thematic areas which are as follows:

(i) Women Property Rights

In Tanzania the Customary Law (Declaration) Order of 1963 discriminates women on property ownership especially inheritance of land. Widows have no right of inheritance nor right of residence in the matrimonial home after death of husband. As daughters women only inherit if there are no male heirs and even in these circumstances their share is negligible. have been overtaken by events. Some societies have questioned the validity of the codified customary law, others also complain that the social norms on which the customary law was anchored been eroded. In this regard gender discriminatory aspects of the customs should not be allowed to exist in the absence of mutually supporting protective provisions. The current constitution provides for property ownership generally however in practice this protects the rights of traditional property owners (read men).. For example the practice of widow inheritance or the assumption that a widow can be taken care by the heir is dismantled by the prevalence of HIV/AIDS and the rise of cash economy and liberalisation policies of the mid 1980s. Women as widows and daughters need an independent right to inherit the share of their deceased husband or fathers property so that they can be able to freely lead peaceful lives and look after their children.

(ii) Supremacy of the Constitution, Equality and non discrimination

The current Constitution does not categorically state that it supercedes all other laws. Even though the Constitution of the United Republic of Tanzania, 1977 prohibits in discrimination on the ground of sex its article 13(5), this protection is not sufficient. Despite the existence of this provision there are still provisions which are in conflict with each other while other laws conflict with the Constitution which is the basic law of the land. Such laws include the Customary Law (Declaration) Order Cap. 358 R.E 2002 which discriminates women on inheritance rights; the Citizenship Act Cap. 357 which

does not adequately provide for the right of naturalization of Tanzanian women's foreign spouses as it does to Tanzania men's foreign spouses men. The Law of Marriage Act, Cap.29 R.E 2002 allows other people to make decision for a girl child to get married at early age despite the existence of the Law of the Child No. 21 of 2009 which provides that a child is a person below eighteen years and prohibits discrimination on the basis of gender and age. This is coupled with failure to provide protection from GBV by virtue of being married at an early age.

Moreover the Land Act Cap. 113 R.E 2002 contain provisions that provides for gender equality to land ownership, management, access and control as well as representation in land dispute settlement committees but the same conflicts with the customary law (Declaration) Order, GN Number 436 of 1963 . The customary law restricts inheritance of land held under customary law to clan lineage where kinship membership follows the male line. In Tanzania over 80 % of communities are based on patrilineal lineage. In addition, the Education Act 1978 does not explicitly provide for the right to return to school for a girl child who has been a victim of Gender Based Violence (GBV) such as rape, incest. These gender insensitive education policies subject female children to circumstances that render them to become pregnant and drop out of school.

(iii) Comprehensive protection of rights women and children to ensure with dignity

The protection of the dignity of women and children in a multifaceted manner by proposing the protection of all types of rights without differentiating between . The proposed protection include the traditionally called first generation rights that is civil and political rights ; second generation rights i. e economic, social and cultural rights as well as third generation rights that encompass group rights such as the right to development, clean and healthy environment, right to natural wealth and resources as well as right to peace and security. By taking this comprehensive approach women's contribution in discharging assigned social roles such as child bearing, caring for the sick, the elderly and taking care of the society on specific gender needs becomes indispensable.

It is our conviction that Tanzania will never see real progress until we pay attention to this indispensable reality. This should be complimented by the provision of comprehensive social protection system including social assistance (i. e non contributory social security schemes) for those who need it. Such individuals include those in informal sectors, victims of natural disasters, mothers, elderly, vulnerable women and children. Due to the patriarchal system which reinforces other forms of violence and deprivation against women, women are the most vulnerable victims of the paradigm of poverty. Consequently, women and children's right to the full enjoyment of basic rights otherwise some of which are guaranteed by the constitution of the United Republic of Tanzania are curtailed. Such curtailment has negative implications for their chances to live dignified lives. Thus this paper proposes inclusion of some rights under the justiciable Bill of Rights that are currently either non existent under the constitution or in existence but in a limited manner. This paper does not attempt to exhaustively argue for all of the mentioned rights above especially in respect of group rights but rather attempts to shed light on what should be the focus of any meaningful comprehensive protection policy agenda in constitutional reform debates.

(iv) Women Representation in decision making Bodies

The presence of women elected in the parliament has had a long history. Since 1961 when Tanzania became independent, there was a recognition of the need to have women representatives in decision making bodies. Therefore the president appointed six women to be members of the parliament. It is notable that up to 1985, there was only one elected woman member of parliament (MP). Ten years thereafter, Tanzania only had 8 elected MPs. During the 2010 election, the highest number of elected women MPs was achieved i.e 26, elected women members of Parliament. The special seats were 102 women. The total number of women MPs is 128. This simply exemplifies the need to have an affirmative action in bringing in the number to what is currently a point of reference for which others have taken precedence. Likewise this needs to be replicated in other areas of decision making public bodies such as in boards and appointment of commissioners.

It is our conviction therefore that affirmative action should be maintained to help correct the participation of women in decision making. We also propose that the representation of women should be on the 50/50 basis taking into account the reality in numbers. Women are as many as men or may be more and thus it is logical that there is equality and equitability in representation. The same principle is in line with the International convention on gender equality. We also propose that this be reflected in high offices.

(v) Good Governance and Accountability

The National Constitution is the basis of a functional rule of law without which the provisions of a good constitution would be rendered useless. Thus the New Constitution must address both basic and Tanzania's specific critical governance issues as a matter of priority. These issues include reviewing the union pillars between Tanganyika and Zanzibar, providing for a clear separation of powers between the Executive, Judiciary and Parliament. There ought to be effective measures to curb the growing tendency of institutionalisation of corruption, embezzlement of public funds with impunity and public scrutiny of public appointments which in our view has a bearing on the judiciary's power to function, for example declaring discriminative laws unconstitutional. Currently the constitution contains claw back provisions which infringe on the independence of the judiciary and consequently the separation of powers is compromised. The constitution does not clearly provide for separation of powers and independence of the judiciary which are imperative for a functional judiciary and enjoyment of basic human rights.

Commitment to international conventions is currently initiated by the executive which takes it to parliament for ratification. However, the convention does not become operational at domestic level unless the executive takes another step of taking it again to parliament for domestication. The requirement for domestication of International Conventions is not clear under the Constitution of the United Republic of Tanzania 1977. The provision which is always relied on to justify this position is article 63(3) (d) and (e) of the Constitution which provides that for the purposes of discharging its functions the National Assembly may, enact legislation where implementation requires legislation. The National Assembly may deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratifications. Evidence shows that Tanzania follows a dualistic system for instance it has domesticated the Treaty establishing the East African Community through Act No. 4 of 2001.

In practice this system renders most of the rights negotiated and secured at international level of limited value to the lives of women in Tanzania. The executive sign the international instruments at national level is the same that is expected to initiate the procedure for ratification by the national Assembly and is also expected to initiate the Bill for their domestication. For unclear reasons the last two steps (ratification and domestication) do not happen regularly. It is our conviction that this is so because the system does not create a room for checks and balances for such an important area of accountability and governance of the affairs and lives of people.

(vi) Intergration of equity and equality principles throughout the Constitution

The Constitution is a living document which is a reference point for public and private actors as to what the citizens are entitled to, their responsibilities to each other and the state. This guiding document ought to be clear to ordinary men and women that the rights enshrined in it belong to men and women in fact and in practice. Thus it is submitted that gender equality should be intergrated into the entire constitution which will also enjoin all actors to incorporate principles of gender equity in their various working and policy documents.

(vii) Marriage, Family and Social Welfare

The Family is the fundamental unit of any functional society. Thus the constitution should protect it by guaranteeing that the family shall be the natural unit and basis of society and that the state shall take care of its physical health and moral. . In doing so the state shall put a mechanism in place to ensure that the vulnerable such women who are mentally disabled and mother who are still children are not subjected to gross forms of GBV. Failure to protect the family as defined under the Law of the Child leads to street children and mothers with no shelter, food, clothing among others.

In this regard, the state shall;1) have the duty to assist the family which is the custodian of morals and traditional values recognized by the community, 2) 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 and 3)ensure the aged and the disabled have the right to special measures of protection for their physical or moral needs.

(viii) The need for a strong institutional framework for monitoring the protection of rights

A strong institutional framework is advocated for so that the contents of the constitution that have been advocated for should have adequate mechanisms for their protection and monitoring the implementation is needed. Experience has shown that many gender sensitive laws are not implemented effectively and yet there are no accountability because of weak monitoring mechanisms. For example the policy that elderly people should get free medical services not known to majority of Tanzanians and those who are aware of it find the system not supportive of the policy.

(ix) Consumer Rights

Legislation and principles on consumer rights are scattered in so different statutes and principles of common law which makes it difficult to access and utilise them for the benefit of the people. These principles include those relevant for the unfair increase of consumer product prices, accessibility of goods and services without discrimination and more importantly safety of consumer goods and services. At the same time since the emergence of trade liberalisation and market economy policies in the mid 1980's there has been increasing concerns over the quality of goods and services and the safety of these products vis a vis the interest of consumers. This has resulted into deaths and loss of money amidst dire poverty that many Tanzanians experience. Of more critical concern is the quality of medicines and food like infants milk which have been reported to be fake on a number of occasions. Thus this paper proposes specific constitutional provisions to protect consumers against such violations from a gender and women rights perspective.

(x) Constitution Making Process Enhancement

The process for making a constitution that Tanzania has embarked on needs to be dealt with diligently. This is not only to ensure that the issues raised will be addressed and by necessary implication led to the initiation of the very process but also to save the scarce resources that have already been put in to it so far. This is because the process has the potential of determining whether in the end result Tanzania shall have a new constitution or not. One of the important concerns on the process is about the nature of the referendum. It appears that as the procedure is planned currently the people will be expected to vote either YES or NO for the new constitution. Depending on its contents, this means that if people will vote YES Tanzania will have a new constitution as it will be, good or bad.

On the other hand if for example one controversial issue is included against the interest of a potential segment of the society the people will vote NO to the new constitution and that will mean that we will go back to the current constitution. It is therefore recommended that the referendum vote should allow three options of votes that is YES, NO or YES SUBJECT TO CORRECTIONS. In the event the second option is accepted there should be a mechanism in place that will allow ample time to work on such controversial issues without demeaning the whole process of constitutional making.

In relation to the above it is therefore recommended that putting a mechanism in place that will address controversial issues such as a committee of experts or any such body is imperative. This is imperative in order to avoid making the whole process futile and also taking into account contemporary issues going on in the Tanzanian society.

Finally the Constitutional Review Commission should continue to enhance the environment for provision of civic education and specifically on the procedure to be followed after people have given their views on the content of the expected constitution, the referendum and adoption of or not adopting a new constitution. People should be aware of what it will take to get to the end of the process that has been initiated.

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The Gender Forum on the Constitution (GFC) under the coordination of the Tanzania Women Lawyers Association (TAWLA) would like to extend its special gratitude to many institutions and individuals whose support has made production of this Position Paper possible. In particular, we acknowledge the support of the member organizations of the Gender Forum on the Constitution (GFC) in both their individual and official capacities for sparing their time and availing themselves to facilitate the process at different levels in order for the issues to be identified.

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BACKGROUND AND RATIONALE OF THE POSITION PAPER

1.1 General Introduction

All over the world, women have similar problems and in no society do women enjoy the same opportunities as men. It is not the case even in the Nordic countries which top the list of countries that try to eradicate gender disparities.¹ According to the Human Development Report of 1995 problems relating to the access of women to education, health services, economic opportunities and political participation were found to be universal. Fifteen years down the road the Human Development Report 2010 identifies deprivations in areas of health, education and labour participation resulting from gender disparities to exist. Even though there are variations across regions the highest rate is in sub-Saharan Africa. This is not a justification for reinforcing women's inferior position in societies but rather a catalyst and a wake up call to vindicate women's equality and equity.

It is equally true that women are not homogeneous. The impact of failure to provide for certain rights for example guarantee of equality of opportunities between men and women or other substantive rights may be different depending on a number of factors. These factors may include the level of economic development of a certain country; the political climate prevailing in a certain locality; level of civilization including respect for human rights and literacy or education. It is these factors that make it necessary for the Gender Forum on the Constitution (GFC) under the coordination of Tanzania Women Lawyers Association (TAWLA) to submit this Position Paper. It is because the women of Tanzania and gender issues in our country are unique. This Position Paper is based on the existing research for instance the review of gender discriminative laws, Pilot Study;² Consolidated Comparative Study Report³ on Mainstreaming gender in Constitution Making in Africa: the Case Study of Ghana, Kenya, Rwanda and South Africa and independent research conducted by our in-house researchers over the years.

This Position Paper will deal with ten thematic areas that ought to be addressed by the new constitutional framework in Tanzania. These thematic areas are as follows:

- Women's Access to Property including to Land
- Supremacy of the Constitution, Equality and non Discrimination
- Comprehensive protection of Rights for the Protection of Lives of Women and Children with Dignity.
- Women Representation in Decision Making Bodies
- Good Governance and Accountability/Intergation of equity and equality principles throughout the Constitution
- Marriage, Family and Social Welfare
- The need for a strong institutional framework for monitoring the protection and guarantee of gender related rights

¹ Akermark S S, (2000) **Human Rights of Minority Women**, A Manual of International Law, The Aland Islands Peace Institute in Collaboration with Abo Akademi University Institute for Human Rights, Finland.

² The Pilot Study was conducted in December 2011 in Kenya, Uganda and South Africa.

³ See TAWLA (2012) "Consolidated Comparative Study Report on Mainstreaming Gender in Constitutional Making in Africa: the Case Study of Ghana, Kenya, Rwanda and South Africa", Dar es Salaam, Tanzania.

- Consumer Rights
- Constitution Making Process Enhancement

This Paper will also make a recap of the constitutional making processes in Tanzania-past to present; contextualize the problems that women of this country face and briefly analyse them; discuss best practices and finally make general as well as specific recommendations on how these issues will be included in the review of the constitution.

1.2 Who We Are

The Gender Forum on the Constitution (GFC) is a network of civil society organizations coordinated by TAWLA and working in the area of advocating for inclusion of gender and women rights in the Constitution review process.

The GFC member organizations are; Tanzania Gender Accountability (TAGA), Tanzania Women Lawyers Association (TAWLA), Women and Law in East Africa (WLEA-T) and Rights Action Watch RAW)

1.3 Constitutional Making Processes in Tanzania-Past to Present

The history of Constitution-making processes in Tanzania can be traced from 1961 when Tanzania (then Tanganyika became) independent. From 1961, there has been a chain of events leading to enactment of about five different Constitutions. The current constitution was enacted in 1977 and it has been amended fourteen (14) times. The five major amendments were: the fifth amendment of 1984 through Act no. 15 of 1984 which introduced the Bill of Rights into the constitution; the eighth amendment of 1992 through Act no. 4 of 1992 which introduced the multiparty system; the eleventh amendment of 1994 through Act no. 34 of 1994 introducing the system of a running mate of the presidential candidate to become the vice president; the 13th amendment of 2000 through Act no. 3 of 2000 which introduced four major changes relevant to women. These changes with implications on women rights were as follows: introduced the criteria of sex as a ground of prohibited form of discrimination; thirty percent (30%) of the parliamentary seats to be reserved for women; independency of the judiciary and exclusive judicial powers of the judiciary were expressly provided for and the establishment of the Commission for Human Rights and Good Governance (CHRAGG).

Following initiatives by the civil society organizations and political parties in Tanzania to have a new constitution, the President of the United Republic of Tanzania His Excellency Dr. Jakaya Mrisho Kikwete announced that the Government was embarking on a constitutional review process on the 31st December, 2010. The Constitutional Review Act, 2011 Cap. 83 R.E 2012 was enacted and it provides for the establishment of the Constitutional Review Commission for the purpose of coordination and collection of public opinions on the constitution. The Commission has a mandate to examine and analyze public opinions and make recommendations to the government. Furthermore, the Act provides for constitutional review, preparation and submission of report on public opinion, procedure for constituting the constituent assembly and establishes the manner for conducting the referendum and other related matters⁴.

⁴ The Constitutional Review Act 2011 as amended in 2012.

2. CONTEXTUAL ANALYSIS OF GENDER DIMENSIONS IN TANZANIA

2.1.0. Introduction

This part analyses the problems that Tanzania's women face by virtue of being women. The analysis is based on facts as evidenced by various study reports, decided cases as well as legal and policy frameworks or practices. The rationale for this part is to show that advocating for gender mainstreaming in the constitution-making process is necessary in order to protect the dignity of women as human beings and allow the country to effectively tap the potential of women for its economic development. The analysis will be based on the ten thematic areas itemized above. The references to various countries' constitutions especially those visited by the Gender Forum in the course of the preparation of this Position Paper are meant to provide evidence based recommendation and enrich the position that Gender Forum has taken. In any case the lessons and practices are studied and analysed in the context of local/Tanzanian circumstances so as to find out whether they fit the local circumstances and yes how and to what extent.

2.1 Women's Access to Property including to Land

2.1.1 Facts

Tanzania is made up of patrilineal and matrilineal societies, with the patrilineal society constituting more than eighty percent (80%) of the population. According to the legal framework for intestate succession/ inheritance in Tanzania, there are three legal regimes out of which the court can choose from for the distribution of the estate of the deceased person. These regimes are statutory law; customary law and religious law the latter that comprise Islamic and Hindu law. According to Customary Law (Declaration) Order No. 4 of 1963 (customary law)⁵ governing the patrilineal society, women have no right of inheriting the estate of their deceased husbands as a general rule. Female issues (children) can only inherit in the third degree regardless of their seniority of birth. The first degree –right of inheritance belongs to the first son of the main house and the second degree –right of inheritance belongs to other sons who are not the first son.⁶

The concept of clan lineage is predominantly that of the male gender family descent. As aforesaid, in Tanzania more than eighty percent (80%) of ethnic groups are patriarchal. Ownership of land and other family property is transferred through the male line. Informal or customary land and property rights are still predominant and recognized by national laws. However, a traditional customary and cultural norm does not recognize ownership of land by a woman.⁷ Gender based discrimination is so much rooted in both men and women and sometimes taken as natural and biological differences. As a result it is again reinforced in the religious belief, customs and traditions, legal and education systems which are most of the time interpreted in favor of men while not necessarily intended to disadvantage women originally. Because men have relatively more access and control to the economic resources

⁵ which is likely to affect more than eighty percent (80%) of Tanzanians as who are bound by patrilineal codified Customary Law

⁶ Rule 27 of the Customary Law (Declaration) Order, 1963.

⁷ Gita Sen and Caren Crown, development Crises and the alternative vision, third world perspective, London 1988 pg.28.

they control women's access to land. At the same time, such control is critical factor in social status, economic well being and empowerment of women. In rural areas land is a basic source of employment. It is also a crucial social asset for cultural identity and political power which also enables one to participate in decision-making.

2.1.2 The Impact on Women

Due to the above described state of affairs and discriminatory laws women suffer a lot of injustice from the male relatives of deceased persons. These include sexual harassment, property grabbing, prevention from remarrying and founding new families if they so wish and loss of conducive environment to take care of their children, lack of food and economic power. This injustice also includes suppression to leave the matrimonial homes when they choose to marry a man of their choice but different from the relatives of the deceased husband. Widows' rights to privacy and dignity are also infringed when circumstances necessitate the remarrying affair to be subjected to a discussion amongst clan members of the deceased person. The rule allowing widows to stay in the matrimonial homes under the care of the heirs has turned them into destitute in practice.

A study conducted in four regions around Lake Victoria in Tanzania⁸ found that forty five percent (45%) of the orphans interviewed were living alone without a parent or guardian, on the property left by the deceased parents.⁹ The study concluded that:

orphans may be living alone because of unfair inheritance practices dominant in patrilineal societies around the Lake Zone where women do not inherit property left by their husbands, and in such cases women would go back to their natal families. Sometimes orphans find themselves either abused by inheriting families or abandoned – the situation that contribute to the increasing number of street children and young girls involved in prostitution in Tanzania.¹⁰

The above situation is contrary to Tanzania's obligation under various international conventions that have been ratified. Article 21 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women's (Maputo Protocol) provides for a widow's right to inherit her husband's property, a right to continue living in the matrimonial house and to retain that right in the case of remarriage, whether the property belonged to her or she has inherited it. Article 20(b) of the Maputo Protocol also provides that a widow shall automatically become a guardian and custodian of her children after the death of her husband. This right in respect of parental right is reiterated under article 5 of the Convention on the Rights of the Child (CRC) which provides that state parties shall respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance in the exercise of the child's rights. With respect to a child's right the CRC reiterates that 'state Parties shall ensure that a child shall not be separated from his or her parents against their will.'

⁸ Mwanza, Shinyanga, Mara and Kagera.

⁹ UNICEF-MICS, Measures DHS, 1997-2002 (in C. M. Blackden and M. K. Rwebangira "'Tanzania Strategic Country Gender Assessment' Report of World Bank, African Region 2004, at page 16, paragraph 36). <http://siteresources.worldbank.org/EXTAFRRREGTOPGENDER/Resources/TanzaniaSCGA.pdf>. (accessed 22 June 2007).

¹⁰ Ibid.

2.1.3 International Standards, Best practices and States Obligations

Tanzania has ratified the African Charter on Human and Peoples' Rights (African Charter) which provides for the right to non discrimination and equal protection of the law, right to dignity, freedom of movement, right to property and right to family. Article 60 of the African Charter empowers the African Commission on Human and Peoples' Rights (Commission) to draw inspirations from other international Conventions. Tanzania has not adequately fulfilled obligations in Conventions ratified in respect of the problem of women in access to land in the context of inheritance regime. These Conventions include the Maputo Protocol, International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

The Local Customary Law (Declaration) Order Cap. 358 under Rules 20,27,47,48 and 49 violates the African Charter; articles 2 (non-discrimination), 3 (equality before the law), 5 (dignity), 12 (freedom of movement), 14 (property), 18 (protection of family) of. Articles 20 (right of a widow to remarry a person of her choice) and 21 (right to inheritance) of the Maputo Protocol; and articles 12 (right to privacy), and 25 (right to an adequate standard of living including food, housing, clothing and medical care) of the Universal Declaration of Human Rights (UDHR). The above impugned provisions violate articles of ICESCR.¹¹

Under the said Customary Law (Declaration) Order (Rules 20, 27 and 31), widows are given the option to either stay and depend on one of their children who inherits property, marry one of the relatives of the deceased's husband, or go back to their natal families. Should a widow remarry another person who is not the deceased's clan member, she is in practice forced to leave the property. One such example is what happened to the widows who eventually brought up a case as *Elizabeth and Another V. Attorney General*¹² emanating from Shinyanga. There are no such restrictions on men who are widowed.

According to a research conducted by the Legal and Human Rights Centre (LHRC) the most dominant form of violence against women in Tanzania is physical violence. Physical violence accounts for 33.72 percent, followed by the property dispossession which accounts for 32.56 percent. Property dispossession especially for widows and other beneficiaries has become the major challenge to the country.¹³ Despite these incidences of GBV the constitution and the laws of Tanzania do not adequately prohibit Gender Based Violence (GBV).The Constitution should provide for protection of women from violence and the review process ought to declare unconstitutional all laws that contribute to gender based violence.

¹¹ The above impugned provisions violate articles 11(1) and (2) (adequate standard of living including freedom from hunger) of ICESCR, articles 17 (right to non interference of one's family and home, 24 (right to protective measures required for a minor), and 26 of ICCPR and articles 2 (right to non discrimination), 3 (consideration of the best interest of the child), 5 (rights of parents to bring up children), 9 (right of a child not to be separated from parents against his or her will), 19 (protection of a child against violence and abuse, including sexual abuse) and 27 (1) of CRC (right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development).

¹² Elizabeth Stephen and Another V A. G Misc. Civil Cause No. 82 of 2005.

¹³ Tanzania Human Rights Report 2011 by the LHRC at pg. 141.

This is in clear violation of a principle of non-discrimination, and it does not have any objective justification. The assumption that the clan member who remarries the widow will take care of her is against the spirit of article 6(c) of the Maputo Protocol which provides that monogamous form of marriages are to be encouraged¹⁴ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee General recommendation 21. This recommendation called for the abolition of polygamy and bigamy.¹⁵ The United Nations Human Rights Committee (UNHRC) in its General Comment No. 28 on article 3 of ICCPR relating to the equality between men and women stated that polygamy is incompatible with the principle of equality, it is an inadmissible discrimination against women, and that it violates their right to dignity. The UNHRC also calls for the abolition of polygamy wherever it continues to exist.¹⁶ Some of the obvious adverse effects of the practice of widow inheritance is a violation of women's dignity and contributes to the spread of HIV/AIDS. The UNHRC also states in paragraph 5 of General Comment 28 that states should ensure that traditions and cultural practices should not be used to justify violation of women's right to equality. In particular, article 20(c) of the Maputo Protocol provides that states shall ensure that widows have the right to remarry a person of one's choice.

The practice of widow inheritance is not unique to Tanzania as women in other African countries also face similar problems.¹⁷ The difference in the impact of this practice depends on the way the Bill of Rights section of the constitution of a particular country is crafted to be able to protect women against the negative impact of such cultural practices. For example Banda draws up three constitutional models for convenience purposes as follows:

In summary one can identify three basic constitutional models, which are labeled for convenience: (i) strong cultural relativism, which allows customary law to exist unfettered by considerations of non discrimination or equality before the law provisions; (ii) weak cultural relativism, which recognizes customary law and also provides for equality before the law without making explicit between the formal recognition of equality provisions and the continued existence of customary law; and (iii) the 'universalist' position, which, whilst recognizing customary law and a right to culture, makes both subject to the test of non discrimination and equality before the law.¹⁸

Countries with progressive and gender responsive constitutions such as Kenya, Rwanda, Ghana and South Africa have been able to address the problem of violence against women that is rooted in the negative interpretation of customs, traditions and religion and perpetuated by the patriarchal system on

¹⁴ Since the relative who is expected to marry the widow is in most cases married to another woman before the demise of his relative.

¹⁵ CEDAW Committee General Recommendation 21 paragraph 39. This is not to decide for Tanzanians on whether polygamy should be abolished but rather to say that the state should not promote family environment that has no adequate controls and which instead forces women into risky environment without their true choices.

¹⁶ Human Rights Committee, General Comment 28, equality between men and women (article 3) U.N Doc. CCPR/C/21. REV.1/ADD.10 (2000) paragraph 24.

¹⁷ Hansungule M (2003), "Administering The African Society Through the Living Law": (in Lindholt and Muller) eds, Human Rights and Development, Human Rights and Local/Living Law, Year Book 2003, Martinus Nijhoff Publishers; Banda F (2005), Women, Law and Human Rights: An African Perspective, Oxford-Portland Oregon, 396.

¹⁸ Banda F, above.

the basis of justice. For example in Rwanda, Uganda and partly Kenya the law on inheritance is unified which makes it easier for people to know it in addition to the fact that equality is taken into account.¹⁹

The constitutions of South Africa and Kenya²⁰ create a hierarchy between the recognition of customary law and a right to culture and the principles of equality and non-discrimination are embedded in the Constitution. The Constitution of Kenya eliminates gender discrimination in relation to land and property and gives everyone including women the right to inheritance and unbiased access to land.²¹ In Ghana the constitution that has just been reviewed provided that customary law is only applicable if it has been so pronounced by the court and in practice the court adopts only positive customs.²²

In the case of *Bhe and Others v The Magistrate, Khayelitsha and others*²³ the High Court of South Africa was approached by a woman representing her two minor daughters²⁴ who had been denied a right to inherit their intestate father's estate by virtue of the rule of primogeniture embedded in the Black Administration Act 1927 and the Intestate Succession Act 1987. According to the rule of primogeniture a closest surviving male relative was given preference to inherit the intestate deceased's estate over the female child and the grandfather of the daughters asserted that this patriarchal construction of customary law be applied against the daughters.²⁵ The High Court judgment was held in favor of the daughter on the basis of the principles of equality and non-discrimination in the Constitution the court held that:

We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents' intestate estate like any male person.²⁶

In compliance with the procedure in South Africa the High Court decision was confirmed by the Constitutional Court through a judgment on 15 October 2004.²⁷

¹⁹ Kazoba G and Mongella L, (2011) Interaction of Laws and the Regulation of Inheritance in Tanzania. A Paper presented at the Commission on Legal Pluralism Conference 8-10 September 2011, University of Cape Town, South Africa.

²⁰ See article 2(4) of the constitution of Kenya.

²¹ Article 60(1)(f).

²² Interview with Dorcas Coocker Appiah, Executive Director, Institute for Gender and Documentation Centre, Ghana on 13 June, 2012 in Accra Ghana.

²³ High Court of South Africa, Cape Provincial division Case No. 9489/02 (unreported).

²⁴ In her capacity as a guardian.

²⁵ Kazoba G and Mongella L above.

²⁶ *Bhe and Others v The Magistrate, Khayelitsha and others* High Court of South Africa, Cape Provincial division Case No. 9489/02 unreported.

²⁷ Kazoba G and Mongella L above. Section 172 (2) (a) of the Constitution of South Africa no.108 of 1996 provides in effect that an order for constitutional invalidity by any other court has no force unless it is confirmed by the Constitutional Court.

The High Court of Botswana has also just joined the trail as Tanzania did many years ago in *Bernado Ephrahim versus Holaria Pastory and Gervasi Kaizilege*²⁸ by allowing females to inherit the property. In the case of *Edith Mmusi v Ramantele* the High Court of Botswana held that:

The court held that the customary law is biased against women, with the result that women have limited inheritance rights as compared to men, and that daughters living in their parents' homes are liable to eviction by the heir when the parents die. Judge Dingake argued that 'this gross and unjustifiable discrimination cannot be justified on the basis of culture.' Section 3 requires that all laws must treat all people equally save as may legitimately be accepted by the Constitution. Thus, to the extent that the customary law denies the right of women to inherit intestate solely on the basis of their sex, it violates their constitutional right to equality under section 3, notwithstanding the savings clause under section 15.²⁹

The Court further held that:

the Government of Botswana's ratification of a number of international legal instruments implied that it was committed to modifying social and cultural patterns of conduct that adversely affected women through appropriate legislative, institutional and other measures. In particular, these ought to aim at achieving the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. Therefore, the court also declared that there was an urgent need for Parliament to abolish all laws inconsistent with section 3(a).³⁰

2.1.4 Recommendations

Therefore it is recommended that women access to land including by way of inheritance should be secured by the constitution. The right to customs and culture should be subject to satisfying the constitutional principle of equality and non-discrimination including on the ground of gender or sex. Thus it is recommended that

1. Land issues should be governed under the Constitution.
2. The Constitution should clearly state the right of women and men to own land.
3. Parents/guardians should be recognized as part of legal heirs of their children's estate. However their share should be considered after the apportionment of the fifty percent share of a widow/widows.
4. There should be a uniform law on probate and inheritance issues to be enacted as is the case with the Law of Marriage Act, 1971. This law can take into consideration the peculiar needs of people based on their customs and religion among others (as is the case in Rwanda) provided that such consideration should be made subject to the supremacy of the constitutional principles of equality and non discrimination. This will reduce confusion among people in the society on which law is applicable to a particular inheritance problem/estate caused by the current system whereby for every intestate succession case a special enquiry has to be carried out. Evidence show that even that enquiry and its expected principles are not followed and applied consistently.

²⁸ (Civil Appeal No. 70; 1989).

²⁹ Karth V, "Equal Inheritance Rights for Women in Botswana", <http://ohrh.law.ox.ac.uk/?p=437> accessed on 13 November, 2012.

³⁰ Ibid.

2.2 Supremacy of the Constitution, Equality and non Discrimination

2.2.1 Facts

Tanzania has some laws that exacerbate discrimination against women in all spheres of rights especially civil and political rights despite the fact that the constitution and other legislation such as the Land Act prohibit discrimination on basis of sex and gender. The public awareness on discrimination is however most prominent in the areas of customary law followed by civil and political rights. Very little is ever discussed concerning the economic, social and cultural rights.³¹ Some of the rights where women are discriminated against are discussed below:

(i) The Law of Marriage Act³²

The Law of Marriage Act was enacted in 1971 to govern marriages in Tanzania. It provides for the process towards the marriage and rights and duties in marriage. This law attempts to take into regard interests based on religion, customs and modernity or western views for example on concluding the contract of marriage, divorce and division of matrimonial assets. This law provides for different marriage ages between men and women as a general rule. The minimum age of a man is eighteen years while that of a woman is fifteen years. In reality this position of the law subjects' female children to vulnerability to GBV, disempowerment in family matters and access to resources, deprives them opportunities for studying and also their health status is endangered. However, the law allows a child under eighteen years³³ to marry despite the existence of the Child Act which prohibits discrimination and the Sexual Offences (Special Provisions), 1998 (SOSPA) which provides for an offence of technical rape that is committed when a man has sexual intercourse with a person below eighteen years.

Also S. 114 (2) (b) of the Law of Marriage Act, 1971 provides that when a Court is granting a decree of divorce or separation and consequently considering the division of matrimonial properties, it shall have regard to, among others the extent of the contributions made by each party by way of money, property or work towards the acquiring of the assets. In practice it becomes difficult for ordinary wives to prove the extent of their contributions so as to justify their entitlement of share in the property. The Court of Appeal partly addressed this problem especially in relation to house wives in the case of **Bi Hawa Mohamed v Ally Seif** (1983) T.L.R 32. In this case the Court of Appeal made a ground breaking decision by recognizing domestic duties as having monetary value for purposes of acquisition and subsequent possible division of matrimonial assets. The court held that "words "their joint efforts" and "work towards the acquiring of the assets" have to be construed as embracing the domestic "efforts" or "work" of husband and wife." However, in this case the court did not provide clear guidelines on the value of contribution made by virtue of doing domestic efforts or work.

The requirement to prove extent of contribution creates a possibility for the parties to the marriage to become vulnerable in cases of separation or divorce during division of matrimonial assets determination. This is because the law obliges the parties to prove the extent of contribution to facilitate determination of a share to the matrimonial assets acquired during the subsistence of marriage.

³¹ The underpinning reasons for this omission will be discussed when addressing thematic area no. 3 below particularly on access to economic, social and cultural rights.

³² Act No 5 of 1971, Cap. 29 R. E. (2002).

³³ Cap. 29 - Section 13.

The above discussed rule causes some problems and many women have ended up losing their property for failure to prove the extent of their contribution. Even though the requirement to prove the extent of contribution operates to both women and men it has more negative impact on women who are in most of the cases in a weaker position. For example women are barred by traditional customs from socialization and free exchange of views with peers who would empower them in terms of contemporary issues such as knowledge of human rights and rights and responsibilities upon dissolution of marriage. In addition women are economically disempowered and hence lack the economic capacity to hire lawyers amid a limited system of legal aid scheme. The women are limited by cultural norms in that they usually require permissions from their husbands while being required to state reasons for their requested permission to go out. Within the patriarchal system women are not expected to own any property, money with which they can buy property leave alone keeping receipt as evidence of purchase.

(ii) The Citizenship Act³⁴

This Act governs the determination of citizenship in Tanzania. This is one of gender discriminative laws in Tanzania.³⁵ Under this law, women of Tanzania are not recognized as being equal to men. For instance, section 11(1) allows the acquisition of citizenship by naturalization for foreign women married to men who are citizens of the United Republic of Tanzania (URT). This is not the case for foreign men who have married women who are citizens of Tanzania. As a result women are potentially unable to exercise the right to choose a partner of one's choice due to fear on complexities of running family life after marriage as their potential spouses cannot expect to acquire citizenship by naturalization as would be the case if they women married to a Tanzanian citizen. In practice this has led to break up of many marriages between Tanzanian women and foreigners and also subjecting Tanzanian women and children of mixed nationalities to experience hardships. Also foreign men lose their right to property or else fail to invest in Tanzania jointly with their wives for uncertainties on the security of their property and resources. In the end result Tanzanian women lose the benefit of the union.

(iii) Gender Policy in Tanzania 2000³⁶

The gender policy³⁷ in Tanzania acknowledges that the status of women participation in economic and social issues is still low. For this reason the government has provided policy guidelines to address the gaps. The policy document states factors that contribute to this situation including customs and traditions that discriminate against women. The Government revised the Women Development Policy of 1992 to a Gender Policy in 2000 and mandated the Ministry of Community Development Gender and Children (MCDGC) to be the overall national coordinator of gender issues. The MCDGC developed a Strategic plan on gender in 2006 to guide the implementation of the Gender Policy. Despite these efforts, there are little gains to show in terms of gender equality and enhanced realization of human rights for women in Tanzania. For example notwithstanding the above described strides, women in Tanzania continue to hold low positions in public and private institutions as indicated in different parts of this paper.

³⁴ Act No.6 of 1995, Cap. 357.

³⁵ TAWLA (2004), Review of Gender Discriminative Laws. Dar es Salaam Tanzania.

³⁶ Before the enactment of 2000 Policy there was Women Development Policy Issued by the Ministry of Community Development Women Affairs and Children in March 1992.

³⁷ Gender Policy in 2000

2.2.2 Impact on Women

(a) Low/Discriminatory Age of Marriage

This practice has overwhelming negative impact on the girl child. The negative effects include diseases such as fistula due to biological and physical immaturity; experiencing physical and mental violence partly due to mental immaturity to handle family roles related to marriage; unequal relations in marriage due to age differences between marriage partners and potential broken marriages resulting from the fact that these children enter into binding contracts before the legal contracting age which would allow them to appreciate the value of such contracts. In addition to that, children who enter in such marriages in accordance to law, lack real consent of their own as in such circumstances they are assumed to have no capacity to give consent as this position is also cemented under the criminal legal framework. As discussed above SOSPA provides in effect that any adult person who has sexual intercourse with a person under eighteen (18) years commits the offence of rape. In addition, according to the law of contract, a child below the age of 18 years does not have capacity to contract.

(b) Requirement to Prove Extent of Contribution

The requirement to prove extent of contribution creates a possibility for the parties to the marriage to become vulnerable in cases of separation or divorce during division of matrimonial assets. This is because the law obliges the parties to prove the extent of contribution to facilitate determination of a share to the matrimonial assets acquired during the subsistence of marriage. As a result many women have ended up losing their properties for failure to prove the extent of their contribution as discussed above.

Even though the requirement to prove the extent of contribution applies to both women and men it has a more negative impact on women who are in most cases in a weaker position due to cultural practices that exclude with from participation to public life, illiteracy and in access to human rights/gender rights education. This is in addition to lack of capacity to hire lawyers while there is no sufficient coverage of legal aid scheme in Tanzania.

(c) Limitation of Women's Right to Found a Family

The main issue is that a woman's marriage to a non citizen affects a woman's nationality rights because in section 11 of the Citizenship Act only foreign women who are married to Tanzanian husbands are entitled to apply for naturalization shortly after the marriage while women who are married to foreigners do not enjoy a similar advantage for their spouses. Moreover, if they have to acquire the citizenship of their husbands on account of marriage, they lose Tanzanian citizenship and have no advantage in regaining it, unlike foreign women married to Tanzanian male nationals. As the result of the provisions under the citizenship Act described above, this leads to break of families and it is a challenge for children to know when they are supposed to change citizenship. Foreign men married to Tanzania women lose their right to property. This provision contravenes article 9 of CEDAW.

(d) Women's Participation to Public Affairs

In relation to women participation to public affairs including in the constitution making process, it is argued that the current contents of the constitution are a product of women' exclusion from previous constitutional making processes. This is mainly reinforced by traditional and cultural norms as argued earlier which exclude women from participation in public life. This includes participation in public

debates, education, and resource disempowerment among others. Thus the national dialogue on constitutional making and processes thereof should specifically target mechanisms that will increase women involvement in public affairs and decision making.

2.2.3 International Standards, best practices and state obligations

(a) Age of Marriage

This is in violation of the international instruments that Tanzania has ratified.³⁸ For instance, CEDAW article 16 (2) provides:

The betrothal and the marriage of a child shall **have no legal effect**, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Article 6(b) of Maputo Protocol provides that the minimum age of marriage for women shall be 18'. The Law of Marriage further contradicts the Education Act, which requires a child to attend school as well as the Law of the Child which defines a child as a person under the age of eighteen.

(b) The requirement to prove extent of contribution for family assets

The requirement to prove extent of contribution towards acquisition of matrimonial property and subsequent distribution thereof in practice violates various international instruments including CEDAW. International practices either enshrine clear safe guards in the constitution or have interpretations which consider practical effect of such provisions.

According to the rules of equality and non discrimination, equality is not uniformity but rather the decision or policy makers should take into consideration the burden, obligation, disadvantage; or withheld benefits, opportunities or advantage from a person on one or more of the prohibited grounds of discrimination. This was the view of the South African Constitutional Court interpreting the Equality Act and the constitutional principles on equality and non discrimination in the case of *MEC for Education: KwaZulu-Natal and Others v Pillay*.³⁹ In this case the court held that the rule prohibiting the wearing of a nose stud in favor of school uniform regulations was discriminatory. This was so despite the fact that the rule applied to all students because it had a more negative impact on students who needed to wear a nose stud as per the Southern India's culture and religion.

The Constitution of Kenya provides that parties to a marriage will be entitled to equal rights at the time of marriage, during the marriage and at its dissolution.⁴⁰ The Constitution assures that parental responsibility shall be shared between parents regardless of marital status.⁴¹ This constitution further provides for the enactment of legislation to protect matrimonial property with special interest on the matrimonial home during, and upon the termination of the marriage.⁴²

³⁸ CEDAW Article 16 and Maputo protocol Article 6.

³⁹ Case CCT 51/06.

⁴⁰ Article 45 (3).

⁴¹ Article 53 (1) (e).

⁴² Article 68 (c) (iii).

(c) Violation of CEDAW on equality of spouses to acquire, change or retain nationality

The Citizenship Act contravenes article 9 of CEDAW which provides among other things that state parties shall grant women equal rights with men to acquire change or retain their nationality. In particular that neither marriage to an alien (non citizen) automatically change the nationality of the wife, render her stateless or force on her the nationality of the husband.

Similar provisions possibly useful or compatible with reciprocal rules in many African countries. However practice shows that other states find them to be no more useful, valid and just as Tanzanians who complain on the same rules regularly do. The difference is that in other countries while reviewing their constitutions changed them and it is hoped and recommended that women of Tanzania deserve the same standard of measure of dignity of a human being. For example in the Kenyan Constitution women will be able to pass on citizenship to their children regardless of their marital status and whether or not they are married to Kenyans.⁴³ The constitution also allows dual citizenship and hence both men and women can pass citizenship to their spouses without losing their original citizenship.

(d) Women participation to public affairs including constitution making processes.

Practices of other countries offer some lessons that Tanzania can learn from. For example during the constitutional review exercise in Ghana women galvanized to ensure that gender was fully mainstreamed into the entire constitution. Before that article 27 of the Constitution of Ghana provided for women's rights, albeit limited to their reproductive rights in relation to the "traditional role" as caregiver. As a result of this, women's groups in Ghana jointly initiated efforts to ensure that women's rights find a more broad expression in the amended constitution in accordance to the CEDAW definition of discrimination which cuts across all spheres of rights such as economic, social, cultural, civil and political rights.

In the White Paper of Ghana, the Government accepted to include in the Constitution equal treatment of all citizens (Art.35); maternity and paternity protection; at least thirty percent (30%) of each gender to be involved in decision making in all public institutions (Art. 35(6)(b)). In Kenya, women and men have the right to equal treatment, including the rights to equal opportunities in political, economic, cultural and social spheres.⁴⁴

The Constitutional Commission encouraged individuals and groups to make submissions through diverse channels including letters, phone calls, phone messages, memoranda, face book, twitter, whatsapp, and meetings. This served to overcome the traditional barriers that prevent women from coming out to express their opinions and priorities by creating a safe space for them.

A broad range of civil society organizations which included mainstream women's organizations such as Network for women's Rights (NETRIGHT) and Women in Law and Development in Africa (WiLDAF Ghana) and governance NGOs such as Institute of Economic Affairs, Institute For Democratic Governance (IDEG) and the Centre for Democratic Development (CDD)-Ghana) were involved in the process and made proposals that sought to amend and expand the constitution to address discrimination against women.

⁴³ Article 14(1).

⁴⁴ Article 27" (3) .

Women issues were advanced through unification of all networks in a coalition which was used as channels to collect opinions/ views from various women's, presentations. These were aired on all popular TV Stations and radio stations. The Commission further opened up the forum for all people to engage and give views by making visits to all regions and villages. The Commission visited all 10 regions of Ghana and covered 170 districts, receiving over 50,000 submissions through the various channels of communication they had opened for the public between April and October 2010.

Women rights groups presented their submission under the umbrella organization for all women rights groups known as NETRIGHTS.⁴⁵ It is not surprising therefore by the inclusive nature of views collection strategy that the Ghanaian CRC adopted to find that the Ghanaian White Paper include some of the most progressive provisions such as providing that "Facilities shall be provided at the work place for the care of children below school going age to facilitate care by parents."

In Kenya as well the process for constitutional making was very user friendly for women at all levels and locations. Women were fully engaged in the debates to such an extent that all contentious issues were exhaustively discussed and those that they wanted as Kenyans were taken on board or out as was found necessary. The Constitution maintains a one third requirement for either gender in elective bodies in effect giving women of Kenya, at least 1/3 minimum in elective public bodies.⁴⁶ Gender equality is maintained in political parties providing a basic requirement for political parties as amongst other stakeholders to respect and promote gender equality.⁴⁷ The Parliament is tasked to formulate law to promote the representation of women, persons with disabilities, ethnic and other minorities and marginalized communities in Parliament.⁴⁸ The Constitution ensures that women and men will have the right to equal treatment and opportunities in political, economic, cultural and social spheres without discrimination.⁴⁹ Finally, the Constitution affords adequate and equal opportunities for appointment, training and advancement for women and men at all levels within the Public Service Commission.⁵⁰

2.2.4 Recommendations

- (a) Since the Law in Tanzania does not protect a girl child in respect of marriage, as it does to male children there is a need for the constitution to prohibit this form of discrimination. The Constitution should raise the marriage of age for girls and boys from the current age to 20 years.
- (b) The constitution of Tanzania should have a specific provision protecting rights relating to marriage including equality and non discrimination during and upon the termination of marriage. It is specifically recommended that upon the dissolution of marriage spouses should be entitled to fifty percent share of the property acquired during marriage.
- (c) It is recommended that the constitution should create a room for a woman who takes the citizenship of another country on account of marriage not to lose her Tanzanian citizenship. Dual citizenship should be allowed for the certainty of women welfare. Further a spouse of any person who is not a

⁴⁵ TAWLA (2012) above.

⁴⁶ Article 81(b).

⁴⁷ Article 91(f).

⁴⁸ Article 100.

⁴⁹ Article 27 (3).

⁵⁰ Article 232 (i).

Tanzanian national should be accorded citizenship rights on account of marriage. The constitution should provide for women to pass citizenship to their children. Children of Tanzanians born in other countries should be allowed to choose citizenship after 24 years instead of 18 years.

- (d) The constitutional review commission in Tanzania should devise and adopt measures that will make the women in Tanzania to participate effectively in the constitutional making process at all levels/stages. These measures should be culturally sensitive and accessible by women. Women views should be considered when making final recommendations to be adapted to form a new constitution.
- (e) The Constitution should have provisions that make customary law applicable only in so far as it serves to promote the equal rights and dignity of all people in Tanzania. The Constitution should declare un-constitutional all laws that discriminate and dehumanise women.
- f) The Constitution should ensure parental responsibility of both men and women regardless of the status of the relationship of parents. This is also already a practice in Kenya based on the new Kenyan constitution. In addition this is provided for in the Maputo Protocol Article 6 and CEDAW Article 16 both of which Tanzania has signed and ratified in respect of the former.
- (g) Property acquired during the marriage should be shared equally that is 50/50 by the spouses as per CEDAW Article 16.
- (h) The 50% share of a surviving spouse should not be subject to distribution upon the demise of another spouse but the surviving spouse should be entitled to a share in the estate of the deceased spouse.
- (i) The constitution should have a clause which provides that before any international instrument is signed by the state (executive) it should be tabled to the Parliament for its authorisation to sign it. Thus once the executive sign the International and Regional Instruments they should be automatically applicable in local courts subject to matters which are against the national values and for which the state should enter reservation while signing. In case there will be emergencies where certain agreements are to be either signed or rejected immediately and the executive considers that it is in the best interest of Tanzania to sign them, the same should be tabled to the national Assembly and their ratification subject to “reserving” those against national interest be applicable automatically in local courts for the interest of Tanzanians.
- (m) In respect of all basic rights, there should be enabling Acts with a clear complaint procedure/ mechanism, starting with the complaint desk at a lower level which if necessary can go up to the court of appeal. This system is available in other consumer and business related laws such as under the Tanzania Communication Regulatory Authority Act, 2003 and the Public Procurement Act. The importance of such a procedure is to enable people who may be dissatisfied with the service to know where to lodge their complaints without fear of being harassed. As such procedures should design mechanisms that will make people speak out their dissatisfaction without fear.
- (n) Such mechanisms should include having an internal organ with a function to oversee, monitor and to take necessary action where possible including people with necessary expertise and non state actors in order to avoid biasness of decisions and actions.

2.3. Comprehensive Protection of Rights for the dignity of women and children

2.3.1 Facts

There is a growing body of knowledge that human rights are indivisible, interdependent and interrelated.⁵¹ It is also correct that the old division of human rights into first (civil and political rights), second (economic, social and cultural rights) and third (community rights such as right to development, clean and healthy environment, right to natural wealth and resources) generations of rights no longer holds water. The arguments for such division of rights included the contention that the economic, social and cultural rights are more expensive to enforce or realize compared to the civil and political rights. It was also argued that the civil and political rights are more important. The common example given in favor of the latter argument was the right to life. However these arguments have increasingly been refuted.

It is argued firstly that the effective realization of civil and political rights also require adequate resources. For example the right to vote and be voted requires a well serviced electoral commission; a comprehensive voters' education among others. The presumption of innocence requires decent prison facilities. Secondly, it is undisputable that human rights are interrelated and interdependent. For instance the protection the very right to life is interdependent on the right to education. Life expectancy tends to go higher as the education level or literacy also increases. Thus in order to protect the right to life a state must also protect the right to education and health.

From the foregoing the paper argues that the new constitution of the United Republic of Tanzania should provide comprehensive protection of individual rights which cover economic, social, cultural, civil and political rights and group rights such as the right to development. It suffices to say that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.⁵² They are said to be intertwined like Siamese twins.⁵³ Such rights should be under the justiciable part of the constitution. Considering the fact that the current constitution rarely protects the second and third generation rights the paper attempts to make a concise discussion on these rights.

2.3.2 Justiciability of the Rights in Tanzania⁵⁴

The term "justiciable" stemming from the word "justice" means "capable of being settled by law or by the action of a court." It is the possibility of a potential litigant to claim the enforcement of a particular right through a court of law. Usually it is the constitution in modern states that will lay down the basic legal framework that will determine rights that are justiciable and others that are not.

The Constitution of the United Republic of Tanzania contains a section that is referred to as the Bill of Rights. In Part Three of Chapter One, the Bill of rights, which is also referred to in Tanzania as the

⁵¹ Roch E (2009), Indivisibility of Human Right concept of the European Court of Human Rights, Leiden, the Netherlands.

⁵² Vienna Declaration and Programme of Action, 1993.

⁵³ Rosas, Allan (1990), "Democracy and Human Rights" in Allan Rosas and Jan Helgesen (eds), Human Rights in a Changing East-West Perspective, London: Pinter Publishers, 17.

⁵⁴ The section on the justiciability of rights in Tanzania has been lifted with permission from Kazoba G, (2012) Legal and Institutional Framework for Combating the Prevalence of Counterfeit and Substandard Pharmaceuticals in Tanzania, Ph. D Thesis of the University of Dar es Salaam. TAWLA extends gratitude to the author of this section of the text extracted from her thesis .

basic rights and duties section, runs from article 12 through to article 32 but with the basic rights ending at Article 24. By virtue of the Basic Rights and Duties Enforcement Act, citizens of Tanzania are guaranteed access to justice to litigate in cases of violation of any part of the Bill of rights. The Bill of Rights though contains some social and economic rights such as the right to work (article 22) and the debatable right to property, (article 24) does not contain the right to health, housing, shelter, education or social assistance. These above mentioned are pertinent for women's enjoyment of the rights which are justiciable under the Bill of Rights i.e. civil and political rights.

The strides encountered in the drafting of the UDHR are reflected in its subsequent two Covenants; the ICCPR and the ICESCR, where the civil and political rights were separated from the economic, social and cultural rights. While the nature of state obligations in respect of civil and political rights is immediate, to the contrary the nature of obligations for economic, social and cultural rights under the international Covenant of economic, social and cultural Rights is progressive and capable of being realized upon availability of resources. The resource aspect also influenced the inclusion in article 2 of the ICESCR of the need for international cooperation and assistance. Among the factors for these differences in the rights contents and nature of the state's obligations established by the two Covenants, was the fact that social and economic rights were more expensive to realize than civil and political rights. Thus traditionally when adopting the Bill of Rights which includes the three discussed documents⁵⁵ many states, Tanzania inclusive, used to leave out most of the social and economic rights outside the ambit of the Bill of Rights which is otherwise usually the justiciable part of the Constitutions.⁵⁶

However, the exclusion of social economic and cultural rights is arguably based on the state's inability to provide them on account of its cost. However, on the other hand making these rights justiciable makes them fully constitutional and gives them the prominence they deserve. When all basic rights are prominently placed in the national constitution, awareness is enhanced. Further, the citizens, the pillars of governance as well as the civil society are able to take up interest litigation for courts to interpret and clarify the application of these rights. Otherwise they will remain closed to the majority of Tanzanians for a very long time since constitutions are not rewritten every often. The constitution review process is an opportune time to remedy the anomaly.

The above point can be illustrated with the right to health. The right to health in Tanzania for example can arguably be anchored on two provisions of the Constitution. The first provision is article 8 which is situated under the part referred to as the Fundamental Objectives and Directive of State Policy (FODSP)⁵⁷ and the right to life, which is part of the basic rights under article 14 of the Constitution. Reliance on article 8 is arguably possible because this article underscores the duty of the state to uphold the welfare of the state. If welfare is interpreted in the light of article 25 of the UDHR at the minimum, it should be found to include healthy people who have access to goods and services that can continue to sustain their health as far as externalities can do.⁵⁸ The welfare of the people being the overall objective of the Constitution, this argument can easily be sustained on this ground.

⁵⁵ the UDHR, the ICCPR and the ICESCR.

⁵⁶ An exception to this trend in Africa is the Constitution of the Republic of South Africa, and more recently Kenya as well as Rwanda on some rights of this nature.

⁵⁷ This is not under the justiciable part of the Constitution but can provide guidance to Courts when interpreting the Constitution.

⁵⁸ Other factors that make people not healthy are inherent in their biological composition. See paragraph 9 of General Comment no 14, paragraph 9, Committee on ESCR.

However courts easily anchor the justiciability of the right to health on the rights to life. This trend of the Courts is found in Indian Courts⁵⁹ and Tanzania has developed a similar jurisprudence in environmental law cases.

In respect to Tanzania, some authors⁶⁰ note that, “Tanzania appears to be the first African nation whose courts have addressed the scope of the constitutional right to life in provisions in the context of environmental protection”. This was in the case of *Joseph D Kessy v Dar Es Salaam City Council*,⁶¹ whereby the Dar es Salaam City Council was dumping and burning wastes in the Tabata area-a Dar es Salaam suburb. The residents applied for a court injunction to stop the City Council from doing so and the latter sought a corresponding Court’s order to validate its actions. Denying the City Council’s application, the Court of Appeal essentially recognised the residents’ right to health as integral to the right to life and held as follows:

I have never heard it before for a public authority, or even an individual to go to court and confidently seek for permission to pollute the environment and endanger peoples’ lives, regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article 14 of our Constitution provides that every person has a right to live and to protection of his life by the society. It therefore, is a contradiction in terms and a denial of this basic right deliberately to expose anybody’s life to danger or, what is eminently monstrous, to enlist the assistance of the Court in this infringement.

On another occasion a Kenyan Court in the case of *Waweru v Republic*⁶² harnessed the opportunity *suo motto* where a case based on the Public Health Act came before it to hold and interpret that the constitutional right to life enshrined under section 71 of the (former) Kenyan Constitution includes the right to a healthy environment.

2.3.3 Impact on Women

The constitution of the United Republic of Tanzania hardly protects the so called economic, social and cultural rights in a form that can be enforced in a court of law (otherwise referred to as justiciable rights).⁶³ Women are the ones who suffer most by lacking the protection of such rights. For example as it will be demonstrated below women are the ones who bear heavier burdens of illiteracy due to the burden of diseases as the primary care givers of sick persons and the elderly in our societies. Lack of full realization of the right to education leads to girls giving birth out of wedlock, or at a very young age. Consequently older mothers become again responsible for looking after child mothers as well

⁵⁹ See for example *Parmanand Katara v. Union of India*, (1989) 4 SCC 286. See also article 47 of the Constitution of India ((whose Constitution also contains Directive principles of State Policy) which is contained in part IV while the basic rights are contained in part III. See also *Paschim Banga Khet Majoor Samity v. State of West Bengal* (1996) 4 SCC 37; *Consumer Education and Research Centre v. Union of India* 1995 AIR 922 1995 SCC (3) 42 JT 1995 (1) 636 1995 SCALE (1)354.

⁶⁰ Kameri-Mbote, P. (2009), “Courts as Champions of Sustainable Development: Lessons From East Africa”, *Sustainable Development Law & Policy*, Vol. 10, Issue1, 34.

⁶¹ High of Tanzania, Civil case number 29 of 1998 (unreported) at page 15.

⁶² (2007) AHRLR 149 (KeHC 2006).

⁶³ Some of the economic, social and cultural rights argued for in this paper include the right of access to safe and clean water, healthcare including reproductive health rights, housing, shelter, social security and assistance and employment rights.

as grandchildren. In such cases women become the major victims of the entire paradigm of poverty whereby they have to be engaged in travelling long distances in search of water, firewood among others without any specific support such as provisions for social assistance to the needy. The fact that women travel such long distances exposes them to other risks such as rape, beatings from their husbands as a result of delaying to come back home and hence failure to prepare meals on time for the family .

(a) Education

Education plays a very significant role in everyone's life. For women and girls it is also an essential key to freeing them from their subordinate positions. Enshrining in the constitution the right to free and compulsory primary and secondary education would be a major step to address some of the gendered inequalities in this field. This right may be strategically crafted to create for example the obligation to promote the right to education and eradicate gender disparities. Correspondingly this duty may include revision of school curriculum materials so as to deal with stereotypes, and nurture a society that respects human dignity for both men and women.

Section 35 of the Education Act 1978 as amended from time to time already provides for compulsory school enrollment from seven years. Therefore there is no reason as to why it should not be directly enshrined under the constitution as a justiciable right.

Tanzania has ratified ICESCR and education is provided for under Article 13 and 14 of the Covenant. It is necessary to protect women and the girl child in order to deal with the problems of school drop-out in Tanzania. The new Constitution should provide for an article that protects education rights up to the secondary level as protected under CEDAW Article 10 and Banjul Charter Article 17.

(b) Employment

In Tanzania the majority of women continue to work in the sectors where work is unpaid mostly in rural areas. Moreover, even those women who do work tend to work in the informal sector either as self employed or as employees with little or no employment benefits. For those who are employed either in formal or informal sector, issues related to pregnancies and motherhood often lead to women losing jobs due to lack of specific constitutional protections of ante natal and post natal period.

The Government of the United Republic of Tanzania has ratified ILO Declaration on the Fundamental Principles and Human Rights at work and other international instruments. Therefore, the instrument binds the government to comply with the set standards. This will give room for appointments at different levels on the basis of gender equality including in executive positions. In order to achieve the intended objective, the new constitution should have a provision to protect employment in broader terms.

According to the views of the officers of the Commission for Mediation and Arbitration (CMA) established under the Labour Institutions Act, 2004 women are increasingly discriminated against on ground of pregnancy irrespective of section 7 of the Employment and Labour Relation Act, 2004. Examples of CMA offices that have received such reports include Tabora, Singida and Dar es Salaam.⁶⁴ This occurs especially in complex situations when employees are forced to be on bed rest with doctor's advice and when pregnant women are seeking employment among others. Other sporadic reports reveal that there are private sector institutions which prefer to employ men and others such as some schools

⁶⁴ Interview with an Officer of the Commission for Mediation and Arbitration on 13 November, 2012.

do not employ women at all. The Employment and Labour Relations Act, 2004 starts by saying that it is enacted to give effect to the Constitution but the constitution itself has no sufficient protection especially for women. Therefore the constitution should provide for this right in more specific terms.

(c) A Comprehensive Social Protection System

The mechanism in place is inadequate to support vulnerable individuals to access social protection including social security and social assistance services. The argument for provision of non contributory social assistance is based on the fact that in respect to people without source of income, such as the elderly. In other cases the elderly who have for a long period of time worked and contributed to national development end up in destitute due to old age and lack of ability to work and earn income. The policy that the elderly for example should get free medical services has not been implemented partly because it is not promoted. This results into suffering as the elderly become needy or destitute. Further, rural women suffer more, for lack of social services and basic utilities like water and power. It is very important for the constitution to recognize and provide for such rights. The Tanzania State is obligated to realize these rights for its people under article 13 of the Maputo Protocol that provides for economic and social welfare rights as well as article 8 of the ICESCR.

(d) Right to Protection Against Gender Based Violence (GBV)

- The legal framework providing protection against unlawful violence is contained in the Penal Code Revised edition which has incorporated the Sexual Offences (Special Provisions) Act, 1998. Other law include the Law of Marriage Act, 1971 which provides that no spouse has a right to inflict corporal punishment on the other spouse. However, there are a number of important gaps that needs to be addressed. These gaps include the following:-There is no definition for Gender Based Violence
- Performing FGM on children is criminal offence but it is not an offence for adult women. As a result FGM is forcefully performed on adult women forcefully for instance during child birth.
- There is no law on domestic violence although studies demonstrate that most GBV occurs in the home, marital rape is not criminalized but marital rape incidences are reported often by women in the legal aid clinic centres.
- The new constitution should have provisions that effectively protect the human rights of women in marriage by addressing all forms of Gender Based Violence (GBV) including marital rape.
- The Penal Code revised edition which has incorporated sexual offences through SOSPA protects mainly girls from sexual violence but not boys.

(e) Rights in Marriage

Women in Tanzania suffer a lot due to gaps in the law that governs marriage and other related laws such as the LMA and the Land Act.⁶⁵ Sometimes the matrimonial homes have been subject to auction due to mortgage obligations without the knowledge of the wife. Under such a circumstance, women and children become homeless. The obligation that Tanzania has under the international instruments gives room for the new constitution to protect rights of women rights in marriage. The Constitution of Kenya

⁶⁵ Act No. 4 of 1999, Cap. 113.

provides for the enactment of legislation for the protection of matrimonial property with special interest on the matrimonial home during, and upon the termination of the marriage.⁶⁶

Rwanda has gone extra mile to recognise monogamous marriages only.⁶⁷ Article 27 provides for protection of the family by the state as “a natural foundation of Rwandan society.” Article 29 states that “every person has a right to private property, whether personal or owned in association with others.”

(f) Right to Own Land

The constitution of the United Republic of Tanzania of 1977 provides for the right to property including land. In 1999 the Parliament enacted two Land Acts which are generally regarded as among the best land laws in terms of gender protection.⁶⁸ However, the implementation and full realization of these Acts has been affected by a number of factors including negative interpretations of customs, cultural beliefs, and religious affiliations. More importantly, lack of gender based disaggregated data in various government institutions and policies make it difficult to measure the real benefits of these Acts and others. It is therefore recommended that the constitution should effectively address the aspect of gender mainstreaming in its all institutions and policies including the requirement to have gender based disaggregated data.

(g) Parental Responsibility

There have been incidences where children get inadequate parental care due to factors like matrimonial conflicts and children born out of wedlock, despite the enactment of the Law of the Child Act No. 20 of 2009. The Constitution should provide for an article for parental responsibility as the case in Kenya under Article 53 (1) (e) that provides for shared parental responsibility between parents regardless of marital status.

2.3.4 International Standards, Best Practices and State Obligations

(a) Justiciability of Social and Economic Rights

Experience of the countries that were visited by the researchers of the GFC mentioned in this Position Paper demonstrates that states now protect social and economic rights as described and they also do so as independent rights. For example articles 41 and 49 of the constitution of Rwanda provides for protection and promotion of health of all citizens. Article 43(1) (a) of the constitution of Kenya accords the right to health including reproductive health to all.

⁶⁶ Article 68 (c) (iii).

⁶⁷ Article 26 of the Constitution of Rwanda recognizes “only civil monogamous marriage between a man and a woman” equal rights and duties of marriage partners upon, during the subsistence of marriage, and at the time of divorce

⁶⁸ Kazoba G, (2012), the History and Success of the Gender Land Task Force, TAWLA Publication, Dar es Salaam, Tanzania.

The constitution of South Africa on its part provides in article 27 as follows:

27. Health care, food, water and social security.

(1) Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

It should be noted that while the provision takes into account the resource aspect it also sets specific obligations that the state must fulfil including legislative measures. It should be further noted that on the basis of the cases discussed above, Tanzania already protects the right to health albeit through the right to life which is a justiciable right under the current Bill of rights. However enshrining the right under the constitution as a justiciable right is likely to enable women access their rights for instance the right to health.

The Committee established under the ICESCR made a general comment concerning the implementation of the economic, social and cultural rights and states minimum core obligations. The committee stated that obligation to take steps towards a goal of realisation of a particular right must be taken within a reasonably short time. It stated further that in fields such as health, steps must include legislative and provisions of judicial remedies with respect to rights. On the meaning of progressive realisation the committee stated that the implementation must be expeditious and effective. States must take deliberate, concrete and targeted steps. Finally states are discouraged from taking backward steps.

Thus some of these obligations as interpreted by the committee are cost effective or rather do not impose any overwhelming resource burden compared to civil and political rights. Obligation not to take backward steps do not generally imply any additional cost.

2.3. 5 Recommendations

- (a) The constitution should direct the state to improve health care and structures on mental health.
- (b) The right to free and compulsory education should be up to secondary level i.e. form four level, accessible, availability and of required quality. In order to encourage patriotism and alleviate inequalities in the education sector there should be compulsory courses such as civics and the history of Tanzania as subjects that every school registered and operating in Tanzania must teach.
- (c) Right to education should be under the bill of rights. The government has obligation to protect and promote education through including the duty that civic education is mandatory, citizenship, patriotism, respect for one's dignity. Importance of unity should be part of school curriculums and should be reviewed on regular basis in order to address challenges of keeping our national values

- (d) To improve health rights especially for women and, reduce mobility, maternity leave should take into consideration the welfare of the mother. For instance, when one experiences premature birth- they should be entitled to six weeks leave.
- (e) In respect of all basic rights, there should be enabling legislation with a clear complaint procedure/ mechanism, starting with the complaint desk at a lower level which if necessary can go up to the court of appeal.
- (f) A system to be established for people to contribute towards the elderly who serve societies and die helpless .The government to have a system for contributory and non- contributory schemes.
- (g) Constitution should have a specific provision that protects women from GBV in compliance with the Maputo Protocol and CEDAW.

2.4 Representation in Decision Making Bodies

2.4.1 Facts

The current Constitution of the United Republic of Tanzania has general provisions in relation to equal representation in certain decision making bodies (both elective and appointive). There are clear strategies for ensuring that women are made part of various decision making bodies while customs and traditions continue to exacerbate the exclusion of women from public space.

2.4.2 Impact on Women

Women continue to be left behind while designing and discussing national policies despite the fact that women constitute a larger percentage and that in reality women are the ones who are most likely to be affected by the gender blind policies.

2.4.3 International Practices and States' Obligation

The Maputo Protocol under article 9 in respect of gender mainstreaming provides for equal right to participate in the political and decision making processes. It provides for equal representation in all levels, equal partnership with men at all levels of development and effective representation and participation at all levels of decision making.

One of the fundamental principles encompassing the constitution of Rwanda of 2003 was the gender equality that was violated in the past texts. Article 9 (5) of the constitution prohibits discrimination and sets not less than thirty percent (30%) quota for women in decision making positions. Gender integration in the constitution is found in many articles of the constitution thus enhancing the enjoyment of the rights of women and children.

With similar ambience the Constitution of Kenya maintains a one third requirement for either gender in elective bodies giving women of Kenya at least 1/3 minimum in elective public bodies.⁶⁹ Gender equality is maintained in political parties providing a basic requirement for political parties as amongst others to respect and promote gender equality.⁷⁰ In this regard the Parliament is tasked to formulate law to promote the representation of women, the disabled, ethnic and other minorities and marginalized communities in Parliament.⁷¹ The constitution ensures that women and men

⁶⁹ Article 81(b).

⁷⁰ Article 91(f).

⁷¹ Article 100.

will have the right to equal treatment and opportunities in political, economic, cultural and social spheres without discrimination.⁷² Finally, the constitution affords adequate and equal opportunities for appointment, training and advancement for women and men at all levels within the Public Service Commission.⁷³

2.4.5 Recommendations

Therefore in all appointive public positions of decision making one gender should not exceed two thirds. However, in elective positions it should be fifty fifty and where necessary affirmative action modalities should be used.

2.5 Good Governance and Accountability

The National Constitution is the basis of a functional rule of law. Thus the New Constitution must address both basic and Tanzania's specific critical governance issues as a matter of priority. These issues include reviewing the pillars of the Union between Tanganyika and Zanzibar, providing for a clear separation of powers between the Executive, Judiciary and Parliament, effective measures to curb a growing tendency to institutionalise corruption, embezzlement of public funds with impunity and public scrutiny of public appointments.

2.5.1 Facts

In Tanzania there has been increasing concerns over public fund embezzlements with impunity of offenders. One way of increasing accountability is by having effective and powerful scrutiny bodies such as ward councils and parliament. However many people are currently complain about the qualifications of those who are elected to occupy such positions, and question their legitimacy and whether they represent the people. We are mindful of the views to do away with even special seats including for women because of lack of tangible benefits for such practice. The issue is that special seats representatives are recruited through political parties and are only accountable to them.

2.5.2 Impact on Women

The voices and needs of women continue to lack effective representation in major decision making organs and the patriarchal system keeps reigning since the political parties are headed and dominated by men.

2.5.3 International Standards, Best Practices and State Obligations

Quotas are used to respond to the slow speed at which the number of women in political leadership is rising. Quotas are temporary, compensatory and fast track measures to address historical injustices and the exclusionary practices of political institutions and societies that discriminate against women in electing and appointing political bodies. Worldwide quotas have significantly increased women's participation and representation in both elective and appointive political decision making positions. Quotas can be established in a country's constitution or its electoral law or can be voluntary on the part of political parties or governments.

⁷² Article 27(3).

⁷³ Article 232(i).

Gender balance in Parliament and politics in general can be a reality if some form of quota system is implemented. Rwanda has achieved a remarkable 56% representation of women in Parliament due to the use of constitutional quota system that is stipulated by the government. This ensures that 30% of seats in all leadership levels are occupied by women. In South Africa, similar provisions have resulted in women occupying 45 % of the seats in Parliament.

In Uganda, a parliamentary seat from each of the 39 districts is reserved for women, resulting in an increase in women's political representation. Some other women are elected to parliament on the non-gender specific reserved seats.⁷⁴

In Argentina, the electoral law establishes a compulsory 30 % quota for women candidates for elective positions. This rule has increased women's representation in the Argentinean Chamber of Deputies considerably.

2.5.4 Recommendations

- a) Special seats for women in constituencies like the practice in Uganda could be adopted in Tanzania.
- b) Commitment to enforcing affirmative action.
- c) A uniform transparent system for selecting special seat representatives in Parliament and Municipal Councils is what is needed in all political parties.
- d) A Criteria and procedures for choosing representatives should be set by the Constitution and more details dealt with in election laws.
- e) The present electoral constituencies should be done away with. Instead the districts should be used as electoral units where each political party which fields a candidate shall be required to field one man and one woman. This would automatically bring about the equitable 50/50 representation, transparency and enhance accountability to the people and restore respect for Members of Parliament under Special Seats.
- f) In any case neither appointive nor elective positions category shall be occupied by more than 2/3 of any gender. Where it becomes impossible to fulfil this recommendation through general election of competitive interviews due to prevailing patriarchal systems which jeopardize women participation, affirmative action should be undertaken.
- g) Article 78 on modality of appointing women through affirmative action tickets should continue but there should be a modality that allows special seats MP to be accountable to the interest groups/ constituencies they represent such as women, youth, people with disability and not only seen to be concerned with the political parties' agenda, an example of such modality can be direct participation by the population in the election as women MP or council.
- h) Scrutiny and vetting for public office positions should be done ethically and transparently to enhance meritocracy.

⁷⁴ See Article 78 (1) (b) of the Constitution of Uganda

- i) Access to natural resources and equal distribution:–1)The Government should have the last say on the natural resources,2) centralized resources irrespective of locality and effective planning for distribution,3)centralized basket of resources and 4)a system or mechanism where public participates in contracts related to natural resources before the government finalizes the contracts
- j) Non Governmental organizations work with the people and in many cases supplement government efforts in development work;1)the government should subsidize activities done by the non -governmental organizations for example the legal aid services, 2)the government to recognize NGO’s and what they do and 3)Recognition of the work undertaken by non state actors

2.6 Intergration of equity and equality principles throughout the Constitution

2.6.1 Facts

Gender equality gaps exist in the constitution and the laws made under it because they are often not gender mainstreamed. The Interpretation of Laws Act, Cap. 1 provides that words importing the masculine gender include the masculine gender. However, in practice gender roles are cast in stone in our society. Consequently, unless women are specifically mentioned, it is generally assumed that those rights where men or “person” are mentioned belong to men and me alone.

As a general rule the strategy of gender mainstreaming is aimed at ensuring that the constitution will bring about equality of effect. It acknowledges the fact that laws and policies affect men and women differently on account of their gender/sex.

The UN Economic and Social Council Agreed Conclusions 1997/2 defined the mainstreaming as follows:

The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal is to achieve gender equality.⁷⁵

Thus if gender mainstreaming is undertaken as described above, it will not be just the duty of the Ministry of Gender Community Development and Children to assess the implication of a particular policy, legislation, programme or planned action for women and men but this will happen in all ministries, departments and government Agencies.

Mainstreaming was clearly established as the global strategy for promoting gender equality, through the Platform for Action at the UN Fourth World Conference in Beijing in 1995. The Beijing document clearly states:

⁷⁵ Ibid.

In addressing the inequality between men and women in the sharing of power and decision making at all levels, government and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programs so that before decisions are taken, an analysis is made of the effects on women and men respectively.⁷⁶

The Beijing document described above focus on the importance of gender mainstreaming in relation to decision making and sharing of power. This approach is imperative because the constitution can not explicitly provide for every specific scenario but it should provide an adequate and sufficient mechanism to cater for needs as they arise. It is one thing to have the substantive rights of men and women in the constitution but another to ensure that women and men benefit from those rights. Gender mainstreamed policies and programmes will ensure that in all decisions made and power obtained or conferred men and women benefit equally.

From the above statement it is clear that it is not enough to just have a clause or chapter in a constitution that addresses issues of gender. Instead the right approach is to ensure that there is an adequate mechanism in place to properly cure every mischief likely to arise as a result of perceptions that are gender related in every institution and policy dealing with men and women. This should also include the language used in the preamble, objectives and principles of the constitution to the contents of the constitution. Each article should consider the implications and categorically use in the text of the constitution the language of “men and women” instead of using “men/he” to mean women/she respectively as well. In addition the way each provision of the constitution is drafted should take into consideration the implication of that article to both men and women.

Tomasevsk (1993) argued that what are often portrayed as ‘women rights’ are allowances that societies have made for motherhood, not for womanhood. The author observes that this is just one component of the recognition and protection of equal rights for women. In this regard the need is to pay attention to gender gap between the recognition and enjoyment of human rights.

2.6.2 Impact on Women

From the foregoing, it is clear that non discrimination clause including on the ground of sex and gender has been found to be insufficient tool for women rights protection. This is because there are other violations such as sexual harassment; non recognition and non remuneration of work done within the family, family business and in public. Such injustices can only be cured or addressed by engendering every aspect of life. Bunch⁷⁷ elaborates women’s rights violations succinctly as follows:

First some violations of human rights are more or less the same as those experienced by men. Women active in politics or in trade unions are persecuted as are their male colleagues. Minority and indigenous women active in the struggle for the preservation of the identity of their group are often persecuted as the male members and activists.

⁷⁶ Paragraph 189.

⁷⁷ Bunch S (1993), *Feminist Visions of Human Rights in the Twenty First Century*, in Kathleen M and Paul M, *Human Rights Twenty-First Century* 967-969.

In such cases the problem is one of visibility since men are more often seen as the political actors and made the focus of human rights advocacy.

Thus different actors including policy makers, policy implementers, employers, men and women need to be assisted to be able to see gender violation through gender mainstreamed constitution. For example gender mainstreaming should be prominently visible from the preamble of the constitution.

2.6.3 International standards, best Practices and State Obligations

Rwanda and Kenya offer best practices as particularly in Rwandan constitution gender is integrated in so many articles of the constitution of 2003. The South African constitution also continuously highlights gender issues in the country like poverty, education, employment, refugees, economic rights issues, sex workers, just to mention a few.

Buch elaborated further that:

A second type of human rights abuses that women experience are where gender exacerbates other forms of human rights violations such as sexual torture, or rape in jails and refugee camps. The third type of human rights violations that women suffer is that directed against them just because they are female. Domestic violence is one example of such violations and yet has attracted least attention from states.⁷⁸

2.6.4 Recommendations

From the foregoing discussion it is clear that women's rights violations require a special attention. The Constitutional review process can address the identified gender gaps to be dealt with in the new Constitution. This can be achieved by mainstreaming gender throughout the constitution.

2.7 Marriage, Family and Social Welfare

2.7.1 Facts

In Tanzania family is not protected under the constitution directly. However it is a fundamental and natural unit of the society. Through family children are nurtured, elderly cared for and provided with room to pass on their virtues and values to the young generation, a practice which plays a significant role in binding people who share common culture together. It is through family where the young generation learn the do's and don't's thereby preserving the morals of a particular society. Thus neglecting the family in constitutional set up and resultant national laws means neglecting and despising the values of the same communities. No wonder the values of the country and its communities are disintegrating day by day. It is important to devise mechanism to protect the family in respect of its physical and mental well being. Women being at the centre stage of the family unit continually face the negative effect of this neglect.

⁷⁸ Ibid in Akermark above at page 17.

2.7.2 Impact on Women

Neglecting a family as natural and fundamental unit of our society negatively affects women's well being. This exposes women to GBV in a number of ways. For example it is common practice in Tanzania to find helpless women in streets with children without any shed under which they can care for their children leave alone clothing, food, medications and access to formal education. Some of such mothers are mentally disabled but are impregnated by irresponsible men without regard to the outcome of their violence on these women. As the result some of such children born in such circumstances become again child- mothers reproducing more children who may end up living in the streets and the vicious cycle goes on and on.

Moreover, the lack of support necessary for binding together the family leads to the regularly complain about situation of decline of morals, positive culture and national values.

2.7.3 Best practices, and States Obligations

Both the African Charter and the Universal Declaration of Human Rights underscores the importance of a family. Particularly the Banjul Charter provides as follows:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community.
3. 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.
4. The elderly and the disabled should also have the right to special measures of protection in keeping with their physical or moral needs.

The Univesal Declaration of Human Rights (UDHR) on its part enjoins the state and society to protect a family as a natural and fundamental group unit of a society.

2.7.4 Recommendations

A family should be protected as provided for under international human rights conventions discussed herein.

2.8. Institutional Framework for Promotion, Protection and Monitoring of Gender Based Rights

2.8.1 Facts

Ministry of Community Development, Gender and Children is the key institution dealing with gender issues in Tanzania. The Ministry was established in 1990 to lead gender development in the country. The Ministry, among other things, facilitated the formulation of the Women and Gender Development Policy (2000). The aim of this policy is to ensure that the gender perspective is mainstreamed into all policies, programmes and strategies. In order to meet this objective, the ministry initiated the establishment of gender focal points in ministries, independent government departments, regional and local authorities. These focal points are to be responsible for gender mainstreaming in their respective

plans and programmes, while working with the national machinery, which has a coordinating role in gender development.⁷⁹ The Government also amended the 1977 Constitution in 2000 and 2004 among other things, to increase women's participation in the National Parliament and Local Authorities as its pertinent public institution for decision making.

2.8.2 Impact on Women

The National Strategy for Gender Development identifies strengthening institutional mechanisms for gender development as one of the Ministry's challenge in particular in relation to the patriarchal system prevailing in Tanzania.⁸⁰ The institutional framework of the Ministry responsible for gender identifies two major challenges in relation to the institutional framework supportive of gender equity and equality. The challenges are (i) inadequate capacity for gender mainstreaming into policies, strategies, programmes and plans; and (ii) inadequate reporting and monitoring mechanism among different actors to facilitate proper recording and reporting.

As a result of this phenomenon, gender issues are not adequately addressed. For example one can hardly find gender disaggregated data on issues like women's , access and or ownership of land, number of women employees in both public and private sector, judgments that violate written laws and the constitution, number of females in different levels of education fora or the number of women in various decision making bodies among others.

2.8.3 International Experiences and Best Practices

The comparative study that the GFC conducted in selected African countries reveal that the visited countries have separate bodies responsible for gender apart from the respective ministries.

In South Africa the constitution has established the Commission for Gender Equality (CGE) that makes submissions in Parliament, local government and other institutions dealing with public policy on issues of gender equality significance. The CGE has an officer stationed at the Parliament office in Cape Town who analyses every Bill and scrutinizes those sent to provinces through gender lens. For example, in the current ongoing debate on the Traditional Leaders Bill, the CGE made a submission against the Bill because it was derogating from the Constitutional Principles on Gender Equality. The CGE is spearheading the campaign to remove the Bill from Parliament by mobilizing other institutions, which have also included it in their submissions as far as it relates to their mandate.

The Constitution continuously highlights gender issues in the country like poverty, education, employment, refugees, economic rights issues, sex workers, just to mention a few.

The Commission has been integrating gender equality in development processes such as through the Employment Equity Commission, which submits a report on what they have done so far on equality in the workplace policies where the Commission audits it for gender equality status and raises issues, if any, or offers advice as required.

⁷⁹ United Republic of Tanzania, National Strategy for Gender Development, 2000. http://www.mcdgc.go.tz/data/Tanzania_-_National_Strategy_for_Gender_Development.pdf. (accessed on 23 October, 2012).

⁸⁰ United Republic of Tanzania, National Strategy for Gender Development, 2000 above.

In election monitoring the CGE also analyses the voting trends as to who is voting in terms of gender, age and service delivery. The latter is part of the Bill of Rights in Chapter 2 of the 1996 Constitution.

Furthermore, the Commission monitors the implementation of the Empowerment Equity Act by government, public and private institutions for gender sensitivity and representation in leadership, corporate positions and employment by demanding detailed gender disaggregated data and calling for hearings after which the best performing as well as the worst performing government, public and private companies are named. The report of findings is submitted to Parliament.

All the findings of the Gender Commission are reported to Parliament which is politically accountable to the actions taken in regard to the issues raised.

With regard to the prohibition of discrimination section 9(4) of the constitution of South Africa no. 108 of 1996 required the state to enact a legislation to prevent or prohibit unfair discrimination. Correspondingly the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 was enacted creating equality courts. Section 16 of the Equality Act. provides that:

every magistrate's court and every High Court is an equality court for the area of its jurisdiction; and any magistrate, additional magistrate and judge may be designated by the Minister, after consultation with the Judge President or the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), concerned, as the case may be, as a presiding officer of the equality court of the area in respect of which he or she is magistrate, additional magistrate or judge, as the case may be.
(2) A presiding officer must perform the functions and exercise the powers assigned to or conferred on him or her under this Act or any other law.

This has the effect of integrating equality related litigation into the entire judicial system rather than limiting it to the High Court as is the case in Tanzania.⁸¹ As a result access to justice on issues of equality increases and makes the justiciability of the constitutional principles accessible to the general public.

On the other hand, the National Women's Council (NWC), an advocacy forum for women is one of the gender monitoring institutions established by the Rwandan Constitution⁸² and the law was enacted to establish and operationalize the NWC. It is supervised by the Ministry of Gender and Family Promotion.

Further, Gender Monitoring Office has been established by the Constitution⁸³ as "an independent public institution responsible for monitoring and supervision of compliance with gender indicators and to serve as a reference point on matters relating to gender equality and non discrimination for equal opportunity and fairness." The GMO is under the Prime Minister's Office charged with the role of monitoring progress toward gender equality.

⁸¹ Except in a few areas such as employment that can be litigated under the mechanism created under the Employment and Labour Relations Act, no. 6 of 2004.

⁸² Article 187.

⁸³ Article 183.

Recommendations

- (a) It is therefore recommended that the constitution design an appropriate institutional framework to specifically deal with gender issues. This should have a constitutional mandate and report to the National Assembly. It should be responsible for monitoring, promoting and analysing gender issues and principles among others. This should be in addition to other existing mechanisms such as the Ministry for , Community Development, Gender and Children and the Commission for Human Rights and Good Governance.
- (b) Establish a national Gender Council as an independent public office with a mandate to promote, monitor and analyse and report on gender issues to the National Assembly
- (c) Establishment of a family court or registries
- (d) Establishment of national children and youth alliance council
- (e) Establishments of Equality court. This can either be established as a separate court or establish equality registries within the existing courts which enhances access to litigating on equality related cases and promotes the protection of human rights

2.9. Consumer Rights

2.9.1 Facts

Tanzania does not have any specific legislation on consumer rights and protection. The principles of consumers are scattered in various legislation such as the Food Drugs and Cosmetics Act, 2003, Fair Competition Act, 2003 and other common law principles. As the result people including lawyers hardly know their entitlements in respect of the infringement of consumer rights against defective goods, misleading advertisements and other violations.

2.9.2 Impact on Women

The impact of lack of clear protection of consumer rights in relation to goods and service is overwhelming even though there is no systemic research that has been conducted to establish the magnitude of the impact in all sectors. For example the Tanzania Association of Industries have reported on the estimated magnitude of counterfeit products and the associated loss. On a number of occasions people have lost lives, sustained injuries and spent money for no value. In relation to medicines, women are likely to be more affected than any other groups for a number of reasons. For one, women use medications such as contraceptives on daily basis just because they are women. Secondly, it is an established fact that women are vulnerable to contracting malaria during pregnancy due to low immunity and hence potentially in need of anti malarial medicine. Thirdly, women as caregivers buy medicines for those under their care such as children, the sick, people affected by HIV AIDS and the elderly.

2.9.3 International Best Practices and State Obligations

The unregulated market which renders people vulnerable to defective goods is a violation of many international obligations under human rights instruments that Tanzania has ratified. This includes the violation of the right to life, property, community development, health and the right to information.

Other countries including South Africa and India have specific legislation on consumer protection. The government of Ghana accepted to include specific provision of consumer rights into the constitution in its White Paper.

2.9.4 Recommendations

The new constitution should include specific constitutional provisions to protect consumers against such violations, Further, there should be provisions for consumer rights as part of fundamental human rights in the Constitution and, that such rights should include but not limited to:

- (a) Information on competing goods and services;
- (b) protection from misleading, false advertising and labeling of goods and services;
- (c) protection from dangerous and hazardous goods;
- (d) unfair competition and anti-trust;
- (e) safety of goods; and
- (f) the right to reject defective goods.

2.10 Constitution Making Process Enhancement

2.10.1 Facts

At a referendum Tanzanians will be required to vote YES or NO. The draft constitution will obviously be a result of the views that have been aired out by Tanzanians and collected by the Constitutional Review Commission. Hence the expectation is that the draft constitution will to a great extent reflect the will of the people. The above notwithstanding however, going by the same logic the controversy that have been expressed during the opinion collection are likely to also be reflected in the draft constitution. Thus there is a possibility that Tanzanians may agree and be comfortable with a major content of the draft constitution and yet be uncomfortable with some of the content. According to section 36 (5) Where the majority of the votes cast in the referendum is “No”, the Constitution of the United Republic of Tanzania, 1977 shall remain in force.

2.10.2 Impact on Women

This will have an overwhelming negative impact on women because all of the rights that have been advocated for above and the framework as well as the institutions that have been proposed will remain a dream. This is because if for example the majority of Tanzanians will vote YES it means the entire draft will be taken as a valid constitution. To the contrary if the majority of Tanzanians will decide to reject the whole draft just because there are some contents which they are dissatisfied with all of the good content will be lost at the detriment of women to whom the respect for human rights is imperative for their survival and dignity.

2. 10.3 International Best Practices

Other countries have considered the issues raised above and devised mechanisms to address them. For example in South African constitutional review process, first a set of 34 principles was set. The Constitutional Court was given mandate to certify whether the draft constitution conformed to the set

34 principles. When it observed that the draft constitution had not conformed to the set 34 principles in respect of formation of provinces it returned it back back so that the errors could be corrected. Also in Egypt the Constitution Declaration of 2011 contained a clause which provided that if people through a referendum reject (vote No to) the draft constitution they will go back to the process whereas Yes meant accepting the draft constitution as it is.

2.10.4 Recommendations

(a) If people will accept most of the content of the draft constitution but be against just a few issues there should be three options of voting. That is YES, NO and YES with modifications

(b) Controversial issues should be identified and be dealt with by a team of experts so that in the end result a consensus should be reached before such issues are included in the list of issues to be subjected to the referendum.

GENDER FORUM THEMATIC AREAS: KEY ISSUES AND RECOMMENDATIONS FOR CONSTITUTIONAL REVIEW PROCESS

Thematic Area 1	Women's access to land and property rights in the context of inheritance
Current Situation in Tanzania	<p>Presently land is not a constitutional category in Tanzania. In 1992 the Presidential Commission of Inquiry on Land Matters recommended land to be a constitutional category.¹ In the National Land Policy (NLP) 1995 the Government of the URT accepted this recommendation.²</p> <p>According to the legal framework for intestate succession/inheritance in Tanzania, there are three legal regimes out of which the court can choose from for the distribution of the estate of the deceased person. These regimes are statutory law; customary law and religious law the latter that comprise Islamic and Hindu law. According to Customary Law (Declaration) Order No. 4 of 1963 (customary law) governing the patrilineal society, women have no right of inheriting the estate of their deceased husbands as a general rule.</p>
Recommendation 1.1	<i>Land issues to be governed under the Constitution.</i>
Recommendation 1.2	<i>The Constitution to clearly state the right of women and men to own land.</i>
Recommendation 1.3	<i>Indigenous people should have a say on the who, where and what to invest on their land</i>
Recommendation 1.4	<i>Parents/guardians should be recognized as part of legal heirs of their children's estate. However their share should be considered after the apportionment of the fifty percent share of a widow/widows.</i>
Recommendation 1.5	<i>There should be a uniform law on probate and inheritance issues to be enacted as is the case with the Law of Marriage Act, 1971. This law can take into consideration the peculiar needs of people based on their customs and religion among others (as is the case in Rwanda) provided that such consideration should be made subject to the supremacy of the constitutional principles of equality and non discrimination.</i>
Best Practice	<p>Land is regulated by the Constitutions of Kenya, Uganda, and Ghana.</p> <p>Kenya Art.60 (1) prohibits gender discrimination in relation to land and property in land and gives everyone including women the right to inheritance. Article 61(1) states that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities, and as individuals. Article 61(2) classifies land in Kenya as public, community or private, and Article 62(3) states that "Public land classified. . .shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission". Public land is vested in the national government in trust for the people of Kenya or vested in the county government in trust for the people resident in the county. ³ Community land is vested in communities identified on the basis of ethnicity, culture or similar community interest.⁴ In terms of Article 64 private land consists of registered land held by any person under freehold tenure or leasehold.</p> <p>Uganda CHAPTER FIFTEEN of the 1995 Constitution on Land and Environment declares that land belongs to the citizens of Uganda. Land ownership is based on the following tenure systems: customary, freehold, <i>mailo</i> and leasehold. In summary, land is vested in the citizens of Uganda; not all land in Uganda is vested in the Government, the Uganda Land Commission merely holds and manages the land vested in or acquired by the Government.</p>

Thematic area 2	Supremacy of the Constitution, Equality and non discrimination
Current Situation in Tanzania	<p>Discrimination is dealt with in Article 13 of the Constitution. The definition of discrimination is provided in Article 13(5) Article 13(4) addresses discrimination by public officers only by stating: “Ni marufuku kwa mtu yeyote kubaguliwa na mtu au mamlaka yoyote inayotekeleza madaraka yake chini ya sheria yoyote au katika utekelezaji wa kazi au shughuli yoyote ya Mamlaka ya Nchi”.</p> <p>Despite the incorporation of the definition of discrimination into the Constitution of the URT, some national laws are still, in effect, discriminatory. For instance the Customary Law (Declaration) Order,⁵ the Law of marriage Act,1971, the Citizenship Act⁶,</p>
Recommendation 2.1	<i>The Constitution should have provisions that make customary law applicable only in so far as it serves to promote the equal rights and dignity of all people in Tanzania. Constitution should declare un-constitution all laws that discriminate and dehumanise women.</i>
Recommendation 2.2	<i>Since the Law in Tanzania does not protect a girl child in respect of marriage, as it does to male children there is a need for the constitution to prohibit this form of discrimination. The Constitution should raise the age of marriage for girls and boys from the current age to 20 years.</i>
Recommendation 2.3	<i>The constitution of Tanzania should have a specific provision protecting rights relating to marriage including equality and non discrimination during and upon the termination of marriage. It is specifically recommended that upon the dissolution of marriage spouses should be entitled to fifty percent share of the property acquired during marriage.</i>
Recommendation 2.4	<i>It is recommended that the constitution should create a room for a woman who takes the citizenship of another country on account of marriage not to lose her Tanzanian citizenship. Dual citizenship should be allowed for the certainty of women welfare. Further a spouse of any person who is not a Tanzanian national should be accorded citizenship rights on account of marriage. The constitution should provide for women to pass citizenship to their children. Children of Tanzanians born in other countries should be allowed to choose citizenship after 24 years instead of 18 years.</i>
Recommendation 2.5	<i>The constitutional review commission in Tanzania should devise and adopt measures that will make the women in Tanzania to participate effectively in the constitutional making process at all levels/stages. These measures should be culturally sensitive and accessible by women. Women views should be considered when making final recommendations to be adapted to form a new constitution.</i>
Recommendation 2.6	<i>The Constitution should have provisions that make customary law applicable only in so far as it serves to promote the equal rights and dignity of all people in Tanzania. The Constitution should declare un-constitutional all laws that discriminate and dehumanise women.</i>
Recommendation 2.7	<i>The Constitution should ensure parental responsibility of both men and women regardless of the status of the relationship of parents. This is also already a practice in Kenya based on the new Kenyan constitution. In addition this is provided for in the Maputo Protocol Article 6 and CEDAW Article 16 both of which Tanzania has signed and ratified in respect of the former.</i>
Recommendation 2.8	<i>Property acquired during the marriage should be shared equally that is 50/50 by the spouses as per CEDAW Article 16.</i>
Recommendation 2.9	<i>The 50% share of a surviving spouse should not be subject to distribution upon the demise of another spouse but the surviving spouse should be entitled to a share in the estate of the deceased spouse.</i>

Recommendation 2.10	<p>The constitution should have a clause which provides that before any international instrument is signed by the state (executive) it should be tabled to the Parliament for its authorisation to sign it. Thus once the executive signs the International and Regional Instruments they should be automatically applicable in local courts subject to matters which are against the national values and for which the state should enter reservation while signing. In case there will be emergencies where certain agreements are to be either signed or rejected immediately and the executive considers that it is in the best interest of Tanzania to sign them, the same should be tabled to the national Assembly and their ratification subject to “reserving” those against national interest be applicable automatically in local courts for the interest of Tanzanians.</p>
Recommendation 2.11	<p>In respect of all basic rights, there should be enabling Acts with a clear complaint procedure/ mechanism, starting with the complaint desk at a lower level which if necessary can go up to the court of appeal. This system is available in other consumer and business related laws such as under the Tanzania Communication Regulatory Authority Act, 2003 and the Public Procurement Act. The importance of such a procedure is to enable people who may be dissatisfied with the service to know where to lodge their complaints without fear of being harassed. As such procedures should design mechanisms that will make people speak out their dissatisfaction without fear.</p>
Recommendation 2.12	<p>The above mentioned mechanisms should include having an internal organ with a function to oversee, monitor and to take necessary action where possible including people with necessary expertise and non state actors in order to avoid biasness of decisions and actions.</p>
Best Practices	<p>Kenya Constitution</p> <p>The Constitution of Kenya has clear provisions all through that seek to ensure the equal rights of all people so as to ensure all of a life with dignity. Some notable provisions to this effect include the following.</p> <p>Article 27 that is dedicated to equality and freedom. Article 27(1) states that: “Every person is equal before the law and has the right to equal protection and equal benefit of the law” while Article 27(4) prohibits the state to discriminate against anyone by stating that: “The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth” and Article 27(5) extends this duty not to discriminate to every individual by stating that: “A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”</p> <p>Article 100 is concerned with the representation of marginalised groups in parliament and states that: “Parliament shall enact legislation to promote the representation in Parliament of (a) women; (b) Persons with disabilities; (c) youth; (d) ethnic and other minorities; and (e) marginalised communities.”</p> <p>Ghana</p> <p>Ghanaian women have made a specific demand regarding discrimination. They demand that the Constitution prohibit all customary, religious and other practices that discriminate against persons, not just those that “dehumanize or are injurious to physical health and well-being,”⁷ as is currently stated in Article 26(2) of the constitution.</p>

Thematic area 3	Comprehensive protection of rights of women and children to ensure their dignity
Current Situation in Tanzania	The Bill of Rights though contains some social and economic rights such as the right to work (article 22) and the debatable right to property, (article 24) does not contain the right to health, housing, shelter, education or social assistance. These above mentioned are pertinent for women's enjoyment of the rights which are justiciable under the Bill of Rights i.e. civil and political rights.
Recommendation 3.1	<i>The constitution should direct the state to improve health care and structures on mental health.</i>
Recommendation 3.2	<i>The right to free and compulsory education should be up to secondary level i.e. form four level, accessible, availability and of required quality. In order to encourage patriotism and alleviate inequalities in the education sector there should be compulsory courses such as civics and the history of Tanzania as subjects that every school registered and operating in Tanzania must teach.</i>
Recommendation 3.3	<i>Right to education should be under the bill of rights. The scope of the right should be widened to include the following: The government has obligation to protect and promote education through including the duty that civic education, citizenship, patriotism, respect for one's dignity and life are mandatory. Importance of unity should be part of school curriculums and should be reviewed on regular basis in order to address challenges of keeping our national values.</i>
Recommendation 3.4	<i>The constitution should provide for the right to health including reproductive. The scope of the provision should include measures necessary to improve health rights especially for women and, reduce mobility. The right to maternity leave should take into consideration the welfare of the mother. For instance, when one experiences premature birth- should be entitled to six weeks leave. The constitution should direct that a comprehensive legislation should be enacted to address different aspects related to the rights of women in the context of pregnancy. The Act should address different issues such as whether pregnancy is sickness, situation of bed rest for a long period of time but not more than nine months, the rights of employer and employee during bed rest period among others.</i>
Recommendation 3.5	<i>In respect of all basic rights, there should be enabling legislation with a clear complaint procedure/ mechanism, starting with the complaint desk at a lower level which if necessary can go up to the court of appeal.</i>
Recommendation 3.6	<i>The constitution should lay down a mechanism to enable an establishment of a system for people to contribute towards the elderly who serve societies and die helpless. The system should direct the government to have a system for contributory and non- contributory schemes.</i>
Recommendation 3.7	<i>Constitution should have a specific provision that protects women from GBV in compliance with the Maputo Protocol and CEDAW.</i>

Best Practices	<p>States now protect social and economic rights as described in position paper also do so as independent rights. For example articles 41 and 49 of the constitution of Rwanda provides for protection and promotion of health of all citizens. Article 43(1) (a) of the constitution of Kenya accords the right to health including reproductive health to all.</p> <p>The constitution of South Africa on its part provides in article 27 as follows: 27. Health care, food, water and social security. (1) Everyone has the right to have access to –(a) health care services, including reproductive health care;(b) sufficient food and water; and(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment.</p>
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Thematic area 4	Women representation in decision-making bodies
Current Situation in Tanzania	<p>The Constitution of the URT vaguely addresses this subject in the Directive Principles of State Policy in Chapter I Part II , Article 9(g) that states:“<i>kwamba serikali na vyombo vyake vyote vya umma vinatoa nafasi zilizo sawa kwa raia wote, wake kwa waume, bila ya kujali rangi, kabila, dini au hali ya mtu.</i>”</p> <p>The only specific provision on women representation is made with regard to the National Assembly in Chapter III, Part II, Article 66(b) that states:“<i>Wabunge wanawake wa idadi isiyopungua asilimia thelathini ya wabunge wote ... watakaochaguliwa na vyama vya siasa kwa mujibu wa ibara ya 78, na kwa kuzingatia masharti ya uwiano wa kura</i>”.</p>
Recommendation 4.1	<i>There should be a provision in the Constitution that specifically requires women representation at all levels of governance and decision-making.</i>
Recommendation 4.2	<i>The women representation to National Assembly target should be increased from 30 percent to 50 percent as per Article 9 of the Maputo Protocol.</i>
Recommendation 4.3	<i>In any case no appointive nor elective positions category shall be occupied by more than 2/3 of any gender. Where it becomes impossible to fulfill this recommendation through general election of competitive interviews due to prevailing patriarchal systems which jeopardize women participation, affirmative actions should be undertaken.</i>
Recommendation 4.4	<i>Article 78 on modality of appointing women through affirmative action tickets should continue but there should be a modality that allows special seats MP to be accountable to the interest groups constituencies they should represent such as women youth, people with disability and not only the political parties agenda, an example of such modality can be direct participation by the population in the election as women MP or council</i>

<p>Best Practices</p>	<p>Kenya Constitution</p> <p>The Kenya constitution mainstreams gender equality all through. However, some notable provisions are:</p> <ul style="list-style-type: none"> • Article 27 of this constitution that is dedicated to Equality and Freedom from Discrimination. • Article 27(3) states that: “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”, and Article 27(6) charges the state with the responsibility to correct any past injuries suffered as a result of discrimination by stating that: “To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination”. Article 27(8) places a direct responsibility on the state to ensure, going forwards, the enforcement of all the provisions of Article 27 by stating that: “In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”. • Article 97 that is concerned with the Membership of the National Assembly and it has a specific provision on the minimum number of women that should be members. Article 97(1)(a) states that the National Assembly will have two hundred and ninety elected members while Article 97(1)(b) states that there will be “forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency”. • Article 98 that is concerned with the Membership of the Senate and it states in Article 98(1)(a) that the Senate shall have forty-seven members while Article 98(1)(b) states that: “sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a). . . .” . Articles 98(1)(c) and (d) state that there will be two women members in the Senate representing the youth and people with disability respectively. • Article 232 that is concerned with the Values and principles of Public Service. Article 232(1)(i)(i) states that one of these values and principles is: “affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women”.
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<p>Thematic area 5</p>	<p>Good Governance and Accountability</p>
<p>Current Situation in Tanzania</p>	<p>The National Constitution is the basis of a functional rule of law. Thus the New Constitution must address both basic and Tanzania’s specific critical governance issues as a matter of priority. These issues include reviewing the pillars of the Union between Tanganyika and Zanzibar, providing for a clear separation of powers between the Executive, Judiciary and Parliament, effective measures to curb a growing tendency to institutionalise corruption, embezzlement of public funds with impunity and public scrutiny of public appointments.</p> <p>In Tanzania there has been increasing concerns over public fund embezzlements with impunity of offenders. One way of increasing accountability is by having effective and powerful scrutiny bodies such as ward councils and parliament. However many people are currently complain about the qualifications of those who are elected to occupy such positions, and question their legitimacy and whether they represent the people. We are mindful of the views to do away with even special seats including for women because of lack of tangible benefits for such practice. The issue is that special seats representatives are recruited through political parties and are only accountable to them.</p>

Recommendation 5.1	<i>Special seats for women in constituencies like the practice in Uganda could be adopted in Tanzania.</i>
Recommendation 5.2	<i>Commitment to enforcing affirmative action.</i>
Recommendation 5.3	<i>A uniform transparent system for selecting special seat representatives in Parliament and Municipal Councils is what is needed in all political parties.</i>
Recommendation 5.4	<i>A Criteria and procedures for choosing representatives should be set by the Constitution and more details dealt with in election laws.</i>
Recommendation 5.5	<i>The present electoral constituencies should be done away with. Instead the districts should be used as electoral units where each political party which fields a candidate shall be required to field one man and one woman. This would automatically bring about the equitable 50/50 representation, transparency and enhance accountability to the people and restore respect for Members of Parliament under Special Seats.</i>
Recommendation 5.6	<i>In any case neither appointive nor elective positions category should be occupied by more than 2/3 of any gender. Where it becomes impossible to fulfil this recommendation through general erection of competitive interviews due to prevailing patriarchal systems which jeopardize women participation, affirmative action should be undertaken.</i>
Recommendation 5.7	<i>Article 78 on modality of appointing women through affirmative action tickets should continue but there should be a modality that allows special sits MP to be accountable to the interest groups/ constituencies they represent such as women, youth, people with disability and not only seen to be concerned with the political parties' agenda, an example of such modality can be direct participation by the population in the election as women MP or council.</i>
Recommendation 5.8	<i>Scrutiny and vetting for public office positions should be done ethically and transparently to enhance meritocracy.</i>
Recommendation 5.9	<i>Access to natural resources and equal distribution:–1)The Government should have the last say on the natural resources,2) centralized resources irrespective of locality and effective planning for distribution,3)centralized basket of resources and 4)a system or mechanism where public participates in contracts related to natural resources before the government finalizes the contracts.</i>
Recommendation 5.10	<i>Non Governmental organizations work with the people and in many cases supplement government efforts in development work;1)the government should subsidize activities done by the non -governmental organizations for example the legal aid services, 2) the government to recognize NGO's and what they do and 3)Recognition of the work undertaken by non state actors</i>

Best Practices	<p>Quotas are used to respond to the slow speed at which the number of women in political leadership is rising. Quotas are temporary, compensatory and fast track measures to address historical injustices and the exclusionary practices of political institutions and societies that discriminate against women in electing and appointing political bodies. Worldwide quotas have significantly increased women's participation and representation in both elective and appointive political decision making positions. Quotas can be established in a country's constitution or its electoral law or can be voluntary on the part of political parties or governments.</p> <p>Gender balance in Parliament and politics in general can be a reality if some form of quota system is implemented. Rwanda has achieved a remarkable 56% representation of women in Parliament due to the use of constitutional quota system that is stipulated by the government. This ensures that 30% of seats in all leadership levels are occupied by women. In South Africa, similar provisions have resulted in women occupying 45 % of the seats in Parliament.</p> <p>In Uganda, a parliamentary seat from each of the 39 districts is reserved for women, resulting in an increase in women's political representation. Some other women are elected to parliament on the non-gender specific reserved seats. ⁸</p> <p>In Argentina, the electoral law establishes a compulsory 30 % quota for women candidates for elective positions. This rule has increased women's representation in the Argentinean Chamber of Deputies considerably.</p>
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Thematic area 6	Integration of equity and equality principles throughout the Constitution
Current Situation in Tanzania	<p>Gender equality gaps exist in the constitution and the laws made under it because they are often not gender mainstreamed. The Interpretation of Laws Act, Cap. 1 provides that words importing the masculine gender include the masculine gender. However, in practice gender roles are cast in stone in our society. Consequently, unless women are specifically mentioned, it is generally assumed that those rights where men or "person" are mentioned belong to men and me alone.</p> <p>As a general rule the strategy of gender mainstreaming is aimed at ensuring that the constitution will bring about equality of effect. It acknowledges the fact that laws and policies affect men and women differently on account of their gender/sex.</p>
Recommendation 6.1	<p><i>Women's rights, gender equity and equality require a special attention. The Constitutional review process can address the identified gender gaps to be dealt with in the new Constitution. This can be achieved by mainstreaming gender throughout the constitution.</i></p>
Best Practices	<p>Rwanda and Kenya offer best practices as particularly in Rwandan constitution gender is integrated in so many articles of the constitution of 2003. The South African constitution also continuously highlights gender issues in the country like poverty, education, employment, refugees, economic rights issues, sex workers, just to mention a few.</p>

Thematic area 7		Marriage, Family and Social Welfare
Current Situation in Tanzania		<p>The age of marriage for girls is 14 years. The law of Marriage requires a party to the marriage to prove his/her contribution to the matrimonial property⁹. This requirement has resulted into injustice to many women as it is at times difficult for them to prove their contributions.</p> <p>Law does not criminalise corporal punishment to spouse.</p> <p>The law does not require mandatory registration of marriage only relies on presumption of marriage.</p> <p>Despite the Law of the Child Act emphasising on parental responsibility, children still face problem in getting protection from parents hence large number of children experience abuse and exploitation.</p>
Recommendation 7.1		<i>Constitution should raise the marriage age for girls from the current 14 to 20 years.</i>
Recommendation 7.2		<i>The Constitution should ensure parental responsibility of both men and women as the case in Kenya. Maputo Protocol Article 6 and CEDAW Article 16</i>
Recommendation 7.3		<i>Properties acquired during the marriage should be shared 50/50 by spouse as per CEDAW Article 16.</i>
Recommendation 7.4		<i>A family should be protected as provided for under international human rights conventions discussed herein.</i>
Best Practices		<p>Both the African Charter and the Universal Declaration of Human Rights underscores the importance of a family. Particularly the Banjul Charter provides as follows:</p> <ol style="list-style-type: none"> 1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral. 2. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community. 3. 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. 4. The elderly and the disabled should also have the right to special measures of protection in keeping with their physical or moral needs. <p>The Universal Declaration of Human Rights (UDHR) on its part enjoins the state and society to protect a family as a natural and fundamental group unit of a society.</p>

Thematic area 8		Institutional Framework for Promotion, Protection and Monitoring of Gender Based Rights
Current Situation in Tanzania		<p>Ministry of Community Development, Gender and Children is the key institution dealing with gender issues in Tanzania. The Ministry was established in 1990 to lead gender development in the country. The Ministry, among other things, facilitated the formulation of the Women and Gender Development Policy (2000). The aim of this policy is to ensure that the gender perspective is mainstreamed into all policies, programmes and strategies. In order to meet this objective, the ministry initiated the establishment of gender focal points in ministries, independent government departments, regional and local authorities.</p> <p>The Government also amended the 1977 Constitution in 2000 and 2004 among other things, to increase women's participation in the National Parliament and Local Authorities as its pertinent public institution for decision making.</p>

Recommendation 8.1	<i>It is therefore recommended that the constitution design an appropriate institutional framework to specifically deal with gender issues. This should have a constitutional mandate and report to the National Assembly. It should be responsible for monitoring, promoting and analysing gender issues and principles among others. This should be in addition to other existing mechanisms such as the Ministry of Community Development, Gender and Children and the Commission for Human Rights and Good Governance.</i>
Recommendation 8.2	<i>Establish a national Gender Council as an independent public office with a mandate to promote, monitor and analyse and report on gender issues to the National Assembly.</i>
Recommendation 8.3	<i>Establishment of a family court or registries.</i>
Recommendation 8.4	<i>Establishment of a family court or registries.</i>
Recommendation 8.5	<i>Establishments of Equality court. This can either be established as a separate court or establish equality registries within the existing courts which enhances access to litigating on equality related cases and promotes the protection of human rights.</i>
Best Practices	In South Africa the constitution has established the Commission for Gender Equality (CGE) that makes submissions in Parliament, local government and other institutions dealing with public policy on issues of gender equality significance. The CGE has an officer stationed at the Parliament office in Cape Town who analyses every Bill and scrutinizes those sent to provinces through gender lens. For example, in the current ongoing debate on the Traditional Leaders Bill, the CGE made a submission against the Bill because it was derogating from the Constitutional Principles on Gender Equality. The CGE is spearheading the campaign to remove the Bill from Parliament by mobilizing other institutions, which have also included it in their submissions as far as it relates to their mandate.

Thematic area 9		Consumer Rights
Current Situation in Tanzania		Tanzania does not have any specific legislation on consumer rights and protection. The principles of consumers are scattered in various legislation such as the Food Drugs and Cosmetics Act, 2003, Fair Competition Act, 2003 and other common law principles. As the result people including lawyers hardly know their entitlements in respect of the infringement of consumer rights against defective goods, misleading advertisements and other violations.
Recommendation 9.1		<i>The new constitution should include specific constitutional provisions to protect consumers against such violations, Further, there should be provisions for consumer rights as part of fundamental human rights in the Constitution and, that such rights should include but not limited to:</i> <i>(a) Information on competing goods and services;</i> <i>(b) protection from misleading, false advertising and labeling of goods and services;</i> <i>(c) protection from dangerous and hazardous goods;</i> <i>(d) unfair competition and anti-trust;</i> <i>(e) safety of goods; and</i> <i>(f) the right to reject defective goods.</i>

Best Practices	<p>The unregulated market which renders people vulnerable to defective goods is a violation of many international obligations under human rights instruments that Tanzania has ratified. This includes the violation of the right to life, property, community development, health and the right to information.</p> <p>Other countries including South Africa and India have specific legislation on consumer protection. The government of Ghana accepted to include specific provision of consumer rights into the constitution in its White Paper.</p>
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Thematic area 10		Constitution Making Process Enhancement
Current Situation in Tanzania		Part of the constitution review process involves a referendum where by Tanzanians will be required to vote YES or NO. The draft constitution will obviously be a result of the views that have been aired out by Tanzanians and collected by the Constitutional Review Commission. Hence the expectation is that the draft constitution will to a great extent reflect the will of the people. The above notwithstanding however, going by the same logic the controversy that have been expressed during the opinion collection are likely to also be reflected in the draft constitution. Thus there is a possibility that Tanzanians may agree and be comfortable with a major content of the draft constitution and yet be uncomfortable with some of the content. According to section 36 (5) Where the majority of the votes cast in the referendum is “No”, the Constitution of the United Republic of Tanzania, 1977 shall remain in force.
Recommendation 10.1		<i>If people will accept most of the content of the draft constitution but be against just a few issues there should be three options of voting. That is YES, NO and YES with modifications.</i>
Recommendation 10.2		<i>Controversial issues should be identified and be dealt with by a team of experts so that in the end result a consensus should be reached before such issues are included in the list of issues to be subjected to the referendum.</i>
Best Practices		Other countries have considered the issues raised above and devised mechanisms to address them. For example in South African constitutional review process, first a set of 34 principles was set. The Constitutional Court was given mandate to certify whether the draft constitution conformed to the set 34 principles. When it observed that the draft constitution had not conformed to the set 34 principles in respect of formation of provinces it returned it back so that the errors could be corrected. Also in Egypt the Constitution Declaration of 2011 contained a clause which provided that if people through a referendum reject (vote No to) the draft constitution they will go back to the process whereas Yes meant accepting the draft constitution as it is.

(Footnotes)

- 1 The United Republic of Tanzania, Ministry of Lands, Housing and Urban Development (1994) Report of the Presidential Commission of Inquiry into Land Matters, Vol. I, Land Policy and Land Tenure Structure, published in cooperation with the Scandinavian Institute of African Studies, Uppsala, Sweden, p. 145
- 2 The United Republic of Tanzania, Ministry of Lands, Housing and Urban Development (1995), NATIONAL LAND POLICY, paragraph 4.1.1, p.9.
- 3 The Constitution of Kenya, 2010 Article 62(2)(3)
- 4 The Constitution of Kenya, 2010 Article 63(1)
- 5 Cap.358 R. E. 2002.
- 6 Act No.6 of 1995, Cap. 357.
- 7 Press Release: Ghanaian Women Recommend Changes to Constitution, op cit p. 1
- 8 See Article 78 (1) (b) of the Constitution of Uganda
- 9 Section 114 of the Law of Marriage Act Cap.29

