

# Harmful Practices: An Obstacle in the Realisation of Women's Rights in Tanzania

**Norah Hashim Msuya**

<https://orcid.org/0000-0002-4117-8003>

University of KwaZulu-Natal

[noranewtz@yahoo.com](mailto:noranewtz@yahoo.com)

## Abstract

This article considers harmful practices in Tanzania that violate women's rights. Most provisions of international human rights treaties that focus primarily on women in Tanzania have not been adequately incorporated into national legislation. Efforts to implement such international treaties are often met with suspicion or hostility from the communities owing to a prevalent patriarchal system and its accompanying customs. Women are systematically being denied their rights to autonomy, health and education with the excuse of 'harmful practices.' Although the universality of human rights norms and the right to enjoy one's own culture and respect for cultural diversity have been challenged, it is undeniable that, whenever a state enters into an agreement with the intention of being governed by international law, that state has a legal obligation to comply with such international law or treaty. This article seeks to explore aspects of existing cultural practices and traditions that need to be abolished to conform to the provisions of international law. It is argued that traditional and cultural practices should adhere to the values of equality and women's rights and that a strong legal framework is essential for addressing harmful practices.

**Keywords:** harmful practices; women's rights; human rights; gender discrimination

## Introduction\*

Efforts to outlaw harmful practices have been equated with neo-colonial attitudes or failure to consider cultural sensitivities in Africa. Debates are often based on the premise that, with respect for human rights, culture and tradition should be protected as the sole source of validity in any global moral order.<sup>1</sup> But proponents of universalism argue that ‘the contents of human rights are universal and apply to every person irrespective of culture.’<sup>2</sup> By definition, human rights are supposed to be universally applicable, though the universality of human rights norms has been challenged by the right to enjoy one’s own culture and reverence for cultural diversity.<sup>3</sup> Universalists maintain that human rights, as laid out by current human rights laws, embody universal ideals and rights that are universally relevant and applicable to all people.<sup>4</sup> However, some relativists have challenged this idea, pointing out that ethical systems develop in the context of local cultures and that universal applicability should not be assumed.<sup>5</sup> Within relativism, there are two stances: first, the more extreme strong relativist view that there is no such thing as universal human rights, as all beliefs and values are culturally relative and therefore apply only within certain cultures.<sup>6</sup> Second, the less extreme relativist view states that, while ethical systems do come out of particular cultural settings, this does not mean that these ethical systems do not share some overlap; therefore a comprehensive human rights doctrine may be possible.<sup>7</sup> Thus, culture can be misconstrued as a justification to avoid the re-negotiation of well-established patriarchal social structures and could be a convenient excuse to sustain the existing power balance, which exacerbates the precarious situation of African women.

The preamble to the United Nations’ (UN) founding document of international human rights law, the Universal Declaration of Human Rights (UDHR) of 1948,<sup>8</sup> serves to provide ‘a common standard of achievement for all people and all nations’, indicating that it is to be applied universally, irrespective of local practices of any particular

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\* Some of the data used in this article is based on my thesis, ‘Harmful Cultural and Traditional Practices: A Roadblock in the Implementation of the Convention on the Elimination of Discrimination against Women and the Maputo Protocol on women’s rights in Tanzania’ (PhD Thesis, University of KwaZulu-Natal 2017).

1 Jing Geng, ‘The Maputo Protocol and the Reconciliation of Gender and Culture in Africa’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019) 1–20.

2 Colleen Good, ‘Human Rights and Relativism’ (2010) 19(1) *Macalester Journal of Philosophy* 27–52 at 27.

3 *ibid.*

4 Norah Msuya, ‘The Concept of Cultural Relativism and Women’s Rights in Sub-Saharan Africa’ (2019) 54(8) *Journal of African and Asian Studies* 1–14 at 4.

5 *ibid.*

6 Good (n 2).

7 Elvin Hatch, ‘The Good Side of Relativism’ (1997) 53(3) *Journal of Anthropological Research* 371–381 at 379.

8 UN Universal Declaration of Human Rights <<http://www.un.org/depts/dhl/unms/founders.shtml>> accessed 30 July 2021.

country. The adoption of the UDHR was followed by other UN international human rights instruments to which Tanzania has become party, thereby binding it to obligations, including: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>9</sup> These instruments protect a wide range of civil, political, economic, social, and cultural rights as well as the human rights of women, children, persons with disabilities, and minorities. They also prohibit discrimination on any grounds, including sex, religion, ethnicity, disability, or any other condition that requires special consideration. The CRC provides that ‘States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.’<sup>10</sup> The obligation on state parties to pursue targeted policies is of an immediate nature, and delays cannot be justified on any grounds, including culture and religion.

The main international treaty which protects women, the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) adopted a universal approach instead of a relativist one to culture and custom.<sup>11</sup> States that have signed the CEDAW are required to change or eliminate traditions and customs that discriminate against women in terms of Article 2(f) of CEDAW. This is strengthened by the CEDAW state parties’ commitment to eradicate social and cultural patterns that continue to facilitate discrimination against women.<sup>12</sup> This means that harmful social and cultural patterns cannot continue to be legitimised or justified by cultural diversity.

Tanzania is also a party to regional human rights instruments, including the African Charter on Human and Peoples’ Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to ACHPR on the Rights of Women in Africa (the ‘Maputo Protocol’). As a party to these instruments, it is legally obliged to ensure that all authorities, including customary authorities entrusted with state functions under domestic law, should respect human rights law and not commit, participate in or condone any human rights violations. Furthermore, the authorities must protect all persons on their territory and under their jurisdiction against human rights abuses by non-state actors, which include secret societies, witch doctors and practitioners of female genital mutilation (FGM). Tanzania’s international human rights commitments oblige its government to combat discrimination and to protect and promote, inter alia, the rights of women, children, persons with disabilities and other

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9 Tanzania is also a signatory to the Optional Protocol to CRC on the Sale of Children, Child Prostitution, and Child Pornography (2004).

10 Article 24(3).

11 Joyce Maluleke, ‘Culture, Tradition, Custom, Law and Gender Equality’ (2012) 15(1) PELJ 2–22.

12 CEDAW Art 5(a).

vulnerable persons. Some of these instruments explicitly require the state party to eradicate harmful practices.

Despite its considerable contribution in setting global standards for women's rights, the CEDAW does not contain adequate protection for African women. One of the limitations of the Convention is its cultural insensitivity, precisely because of the commonly held belief that culture and women's human rights are mutually exclusive or inevitably at odds, as the former is deemed to be a barrier to the realisation and full enjoyment of the latter.<sup>13</sup> The Maputo Protocol rebuts such perceptions by placing local African reality in a global standards context through internal dialogue and reform.<sup>14</sup> The Maputo Protocol has remedied weaknesses of the CEDAW in terms of accommodating the universal rights of African women while bearing in mind the cultural sensitivities of their communities. On the one hand, the Maputo Protocol draws inspiration from global human rights norms through the 'cut and mix' approach. On the other, it has contextualised these international norms to correspond with African reality.<sup>15</sup> In that sense, it overcomes the universalism/relativism dichotomy in the women's rights discourse. Most importantly, Article 17 of the Protocol provides that 'women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.' From this, it can be inferred that the Maputo Protocol reconciles the doctrine of universalism and cultural relativism to some extent.

The ACRWC defines 'harmful' cultural practices as 'practices affecting the welfare, dignity, normal growth and development of the child, particularly those customs and practices prejudicial to the health or life of the child, and those which are discriminatory, based on sex or another status.'<sup>16</sup> The Maputo Protocol provides that state parties must 'prohibit and condemn all forms of harmful practices which negatively affect women and which are contrary to recognized international standards'<sup>17</sup> and explicitly requires state parties to prohibit 'through legislative measures, backed by sanctions ... all forms of [FGM] ...'.<sup>18</sup>

While Tanzania subscribes to both the CEDAW and the Maputo Protocol, many of the provisions of these instruments remain infringed, and discrimination and violence

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13 Temelso Gashaw, 'The Interplay Between Gender and Culture: How the African Human Rights System Sought to Accommodate Universality and Cultural Relativity of Women's Rights' Engenderings (31 August 2020) <<https://blogs.lse.ac.uk/gender/2020/08/31/the-interplay-between-gender-and-culture-how-the-african-human-rights-system-sought-to-accommodate-universality-and-cultural-relativity-of-womens-rights/>> accessed 28 July 2021.

14 *ibid.*

15 General Comment No. 2 on Article 14.1(a), (b), (c) and (f) and Article 14. 2(a) and (c) of the Protocol on the Rights of Women in Africa, adopted by the African Commission on Human and Peoples' Rights at its 55th Ordinary Session held from 28 April–12 May 2014 in Luanda, Angola.

16 Article 21.

17 Article 5.

18 Article 5(b).

against women persist.<sup>19</sup> Tanzania is a common law country, so it follows the dualism principle which requires further incorporation of international treaties into its domestic laws, through legislation. Before those international treaties can come into force, parliament is tasked with the duty of enacting legislation to implement them and the executives are mandated to initiate the process of incorporating them into the municipal laws of the country.<sup>20</sup>

Existing laws that safeguard the rights of women are often not implemented or practised because of a prevalent patriarchal system and its customs.<sup>21</sup> There are 125 tribes in Tanzania with dissimilar social and cultural patterns subject to the socio-economic circumstances of each group.<sup>22</sup> Therefore, social and cultural patterns are not uniform, and aspects of traditional practices and customs vary from one tribe to another.

Notwithstanding the existence of various international instruments and various pieces of national legislation safeguarding the rights of women in Tanzania, discrimination and abuse of women persists.<sup>23</sup> Some of these cultural practices are slowing down the amendment of discriminatory laws. This article explores the impediments to the implementation of national and international women's rights, caused primarily by the deeply embedded culture and traditions of the country. Violence against women, including harmful practices, are forms of discrimination because any harmful practice against women can be regarded as violence and a demonstration of gender-based discrimination. Harmful practices are an expression of the unequal power balance between males and females and hence an infringement of women's rights. This article aims to investigate how women's rights are abused in Tanzania and often committed with impunity behind the shield of culture, notwithstanding the presence of domestic and international human rights laws that provide for and safeguard the enjoyment of human rights. The article further outlines how and why some of the cultural practices are harmful to women, with the goal of ascertaining the gaps in law reform. Comparative

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19 United States Department Bureau of Democracy, Human Rights and Labor: Country Report on Human Rights Practices for 2014 <[www.state.gov/j/drt/rls/hrrpt/humanrightsreports/#wrapper](http://www.state.gov/j/drt/rls/hrrpt/humanrightsreports/#wrapper)> accessed 15 February 2019.

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

21 Legal and Human Rights Centre (LHRC) *Tanzania Human Rights Report 2012* (2013) 107.

22 Maluleke (n 11).

23 LHRC (n 21) 107.

lessons from other African countries will be provided throughout the article to gain a deeper insight to address the challenges facing women's rights.

### Traditional Practices that Infringe Women's Rights

All societies have definite customs that replicate their beliefs and ethics, which may reflect affirmative as well as undesirable features.<sup>24</sup> Nevertheless, there are also social and cultural patterns, which are detrimental to certain groups, particularly girls and women. Such harmful practices infringe on domestic and international human rights laws. These practices persevere for reasons that they represent an aura of morality in the eyes of the society that practices them.<sup>25</sup> Notwithstanding colonial involvement and the way it was concluded, the post-colonial legal system in Tanzania is pluralistic, as it recognises common law, based on a combination of the laws of the colonisers, customary laws and those laws based on religion, for example Muslim, Christian and Hindu.<sup>26</sup> Customary law is among the sources of law in Tanzania and its application is qualified by the Judicature and Application of Law Act. The Act requires customary law to be in effect only when it does not conflict with statutory law.<sup>27</sup> However, those religious and customary laws are both applicable in family law, which is why the pluralistic system conforms to some minimum standards.<sup>28</sup> Apart from the pluralistic system that has the potential to cause conflict, it is also detrimental to women who may be caught between two legal systems, despite the country reflecting and acknowledging diversity.<sup>29</sup>

In 2014 the CEDAW Committee and the Committee on the Rights of the Child adopted a Joint General Recommendation/Comment on harmful practices that link them to violence and discrimination against women and girls. It offers an understanding of harmful practices as 'persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.'<sup>30</sup> The Joint General Recommendation establishes four criteria that determine whether practices are harmful:<sup>31</sup>

- They constitute a denial of the dignity or integrity of the individual, and a violation of human rights and fundamental freedoms;

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24 Reymond Williams, *Culture and Materialism* (Verso 2005) 78.

25 Jean Zorn, 'Issues in Contemporary Customary Law: Women and the Law' in Anita Jowitt and Tess Cain (eds), *Law Society and Governance in the Pacific* (ANU Press 2010) 95.

26 Benedict Mapunda, 'Treaty Making and Incorporation in Tanzania' (2003) 28 *East Africa Law Review* 156–165.

27 Judicature and Application Laws Act, Chapter 358 of the Laws of Tanzania [R.E. 2002] s 9.

28 Tanzania Law of Marriage Act 5 of 1971.

29 Patrick Glenn, *Legal Tradition of the World* (Oxford University Press 2010) 132.

30 CEDAW Committee on the Rights of the Child, Joint General Comment No. 18 of 14 November 2014, V15 5.

31 *ibid*, V16 5–6.

- They constitute discrimination against women or children and result in negative consequences for them as individuals or groups;
- They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children; and
- They are imposed on women and children by family and/or community members or society at large, regardless of whether the victim provides or is able to provide full, free and informed consent.

This article seeks to examine the manifestations of harmful practices dominant in Tanzania and elsewhere in Africa, such as widow inheritance and cleansing; domestic violence; marriage by abduction; FGM; child marriages and payment of dowry; virginity testing; and *nyumba-ntobhu* (ghost marriage). These practices were highlighted by the CEDAW Committee. The Committee requested Tanzania to view its cultures as dynamic aspects of the country's life and social fabric and to implement changes where necessary.<sup>32</sup> It urged the state to put in place, without delay, a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women, in conformity with Articles 2(f) and 5(a) of the Convention.

The Tanzania NGO's shadow report to CEDAW established that traditional, patriarchal marital and family models of life and gender role distribution are still present and nurtured by ideological and structural influences.<sup>33</sup> The CEDAW Committee concluding observations on the combined seventh and eighth Tanzania periodic reports recommend that Tanzania should harmonise, without delay, customary and religious law with statutory law and ensure alignment with the provisions of the Convention.<sup>34</sup> Definitions, trends, legal and the normative framework of each practice will be provided. The negative effect of each practice on women and girls in Tanzania and how it has amounted to discrimination and inequality will also be analysed.

### **Widow Inheritance and Cleansing**

This is a cultural practice that entails a widow to be 'inherited' by another family member. It often concerns an older or younger brother of the deceased who has the right to be the widow's new husband.<sup>35</sup> This practice, which is also known as levirate

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32 CEDAW, 'Concluding Observations for Tanzania fourth, fifth and sixth periodic report' 41st Session CEDAW/C/TZA/Q/6 (30 June–18 July 2008).

33 Tanzania NGO's, 'Shadow Report to CEDAW in Response to the United Republic of Tanzania's Seventh and Eighth Periodic Consolidated Report on the Implementation of the CEDAW 2008-2014' 2015.

34 The Committee considered the combined seventh and eighth periodic reports of the United Republic of Tanzania (CEDAW/C/TZA/7-8) at its 1391st and 1392nd meetings, on 26 February 2016 (see CEDAW/C/SR.1391 and 1392).

35 LHRC (n 21) 148.

marriage, prevails among the Kinga tribe of Makete in the Njombe region and the Sangu of the Mbeya region in Tanzania.<sup>36</sup> Sometimes widows are coerced to have sexual intercourse with one of her husband's relatives to be 'purified'.<sup>37</sup> Widow cleansing is common among the Iraqw of the Manyara region and the Kurya and Luo tribes in the Mara region.<sup>38</sup> In the Luo tribe, this tradition specifically dictates that a widow is obligated to offer sex to a brother of her deceased husband within forty days of the husband's death to eliminate the bad luck, which would otherwise haunt her.<sup>39</sup> In the Kurya tribe, if a widow passes away before being 'cleansed', she cannot be buried, as it is believed that her 'uncleanliness' would bring a curse upon the clan.<sup>40</sup> They normally hire men by paying them up to ten cattle, in addition to the amount of US\$150 to 'cleansed' the 'body' of the widow.<sup>41</sup> In the event that a widow refuses to marry or have intercourse with the selected man, she is expelled from the matrimonial house and denied custody of her children and her inheritance.<sup>42</sup> A woman's consent to remarry is usually forced or influenced by members of the family or the community. This does not amount to free agency. The requirement of free and full consent is recognised in several international human rights instruments, including Article 16(2) of the UDHR and Joint General Recommendation of the CEDAW and CRC that stipulate free and full consent in the context of marriage that entails 'non-coercive agreement to the marriage with full understanding of the consequences of giving consent'.<sup>43</sup> Many widows agree to marry the male relative because of fear of violence and the loss of her children and property. Widow cleansing and inheritance are among the detrimental cultures that negatively affect women in Tanzania.<sup>44</sup>

This custom, which has different practices and meanings in various cultures, respectively, serves as a societal safeguard for, and control over the widow and her children. The tradition has been justified on the grounds that it safeguards the deceased's wealth, by remaining in the patrilineal family.<sup>45</sup> Long ago, the tradition of widow inheritance was a common practice in numerous tribes in Tanzania among the Sukumas, the Hayas and

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36 Sophia Wambura and Pellagia Khaday, 'Stopping Shaming and Naming: The Abuse of Power for Sexual Exploitation' In Tanzania Women Judges Association (TAWJA) *Sexual Abuse Under Customary Practices* (TAWJA 2010) 18.

37 Kefa Otiso, 'Custom and Culture of Tanzania' in Toyin Falola, *Culture and Custom of Africa Series*, 9 (Greenwood 2013) 145.

38 *ibid.*

39 AllAfrica, 'Why Wives' Inheritance Should be Discouraged?' (2014) *Tanzania Daily News* (Dar es Salaam, 12 January 2014) <<http://allafrica.com/stories/201401130400.html>> accessed 12 September 2019.

40 Wambura and Khaday (n 36) 149.

41 *ibid.*

42 Otiso (n 37) 146.

43 CEDAW (n 30) 4.

44 Stella Peter and Martha Malyi, 'Widow Inheritance and Cleansing Practiced Widely in Tanzania' *We Write for Rights* SAUT Centre for Human Rights (Mwanza 24 August 2013) <<https://wewriteforrights.wordpress.com/2013/08/24/widow-inheritance-and-cleansing-practiced-widely-in-tanzania/>> accessed 12 September 2019.

45 LHRC (n 21) 149.

the Chagas. The widow used to be taken into the custody of her deceased husband's brother who was expected to father children with her to perpetuate the family of his deceased brother.<sup>46</sup> The aim was also to protect widows and their children from facing hardship after the death of their provider. However, there were processes to follow and sometimes remarriage and sexual intercourse did not come into play.<sup>47</sup> The family clan used to appoint a person to help the widow and family members<sup>48</sup> on the basis that women were considered to be weak and thus could not be involved in economic activities or any decision-making. Therefore, it was essential for a clan to appoint a man to administer the deceased's family. However, the continuation of this practice is no longer justified because those still practicing it now ignore the customary values of protection and care and exploit the situation for sexual intercourse with the widow and ownership of her property.<sup>49</sup>

This practice exposes widows to the risk of contracting sexually transmitted diseases such as HIV/AIDS. It also regards women as family property that could be passed from one man to another without consent to be 'cleansed'. This phenomenon is clearly a consequence of the dowry which is usually negotiated and given to the bride's family by the groom's family.<sup>50</sup> In most cases the bride-to-be is not involved in such negotiations.<sup>51</sup> Families justify the practice of forcing widows to be disinherited, because they argue that all members of the husband's family would have contributed to the bride price, which renders her family property even during widowhood.<sup>52</sup> Once she has been disinherited, a widow loses her husband's property, as it is transferred to the new husband. If the widow seeks separation or divorce from the new husband, the dowry has to be reimbursed.<sup>53</sup> Often, many widows' families are unwilling or incapable of repaying the dowry, and their brothers or fathers may use force to return them to their in-laws.

The Tanzania Law of Marriage Act is silent on dowry payment and leaves widows at the mercy of the husband's relatives over inheritance after his death.<sup>54</sup> International instruments to which Tanzania is a signatory are very clear on this kind of harmful tradition. Article 5 of the CEDAW requires states to eliminate harmful customs that are grounded in the notion of the superiority or inferiority of either men or women or stereotyped roles for both sexes. The CEDAW requires states which are party to it to consider the specific difficulties faced by rural women in this regard.<sup>55</sup> This international

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46 AllAfrica (n 39) 149.

47 Otiso (n 37) 146.

48 *ibid.*

49 *ibid.*

50 AllAfrica (n 39) 149.

51 LHRC (n 21) 146.

52 Mary Kimani, 'Taking on Violence Against Women in Africa' (2012) Africa Renewal: Special Edition on Women 21.

53 *ibid.*

54 Act 5 of 1971.

55 CEDAW Art 14.

instrument urges the same marriage rights for men and women,<sup>56</sup> such as to marry of their own free will and full consent.<sup>57</sup>

The Maputo Protocol, which guarantees the rights of all African women, is likewise very specific on the widow's rights regarding abusive cultural practices. Article 6 of this instrument provides that no marriage should take place unless there is free and full consent of both parties.<sup>58</sup> Thus, forcing a widow to get married to a member of her husband's family infringes on this right. This Protocol precisely provides for widow's rights under Article 20 which states:

State parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions: a) That widows are not subjected to inhuman, humiliating or degrading treatment; b) That a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children; c) That a widow shall have the right to remarry and, in that event, to marry the person of her choice.<sup>59</sup>

In addition to the above, women have been guaranteed the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS.<sup>60</sup> So subjecting widows to inheritance and 'cleansing' processes is to deny them this right. The culture of widow inheritance has been reported to exist in some communities in other parts of Africa, such as the Eastern Cape and KwaZulu-Natal provinces of South Africa.<sup>61</sup> Widows in these areas are exposed to a random luck of the draw, organised by the clan, to determine the identity of the next husband.<sup>62</sup> Widow cleansing is an act of violence against women and a violation of human rights.

Identifying widow cleansing as a violation of human rights underlines the government's obligation to implement and enforce legislation to eliminate this practice. The UDHR calls for 'equal and inalienable rights' for all people, 'without distinction of any kind.'<sup>63</sup> It demands the right to security of the person, the right not to be held in slavery or subjected to inhuman treatment, the right to equal protection before the law, and the right to equality in marriage. But weak excuses such as cultural relativism coupled with discriminatory social norms and practices, the under-representation of women in decision-making structures and processes, a lack of resources to fight for women's

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56 *ibid* Art 16(1)(a).

57 *ibid* Art 16(1)(a) and (b).

58 Maputo Protocol Art 6(a).

59 CEDAW Art 20.

60 Maputo Protocol Art 14.

61 Maluleke (n 11).

62 *ibid*.

63 Lea Mwambene, 'Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi' (2018) 18 African Human Rights Law Journal 527–550.

rights and, above all, the absence of societal and/or political will, are strong impediments to giving women the same human rights that men enjoy.

The Revised SADC Protocol on Gender and Development reinforces the full and free consent of both parties entering into a union, with no exception.<sup>64</sup> A number of Southern African countries have recently developed national initiatives aimed at ending forced marriages.<sup>65</sup> For example, in 2015 South Africa, through the South African Law Reform Commission, proposed criminalising forced marriages as a result of, among others, harmful cultural practices.<sup>66</sup> The Prohibition of Forced Marriages and Child Marriages Bill responds to concerns expressed by the Gender Directorate.<sup>67</sup> Besides criminalising forced marriages and child marriages, the Prohibition Bill will affect international law and the constitutional values of human dignity. It will require that marriages are entered into freely and without any form of coercion and will provide for the prosecution and penalties of persons who commit offences.<sup>68</sup>

### **Domestic Violence**

Violence against women is universal, and while it has many roots, especially in cultural traditions and customs, it is gender inequality that lies at the heart of violent practices. The term ‘domestic violence’ is broadly defined in the Declaration on the Elimination of Violence against Women to include physical, sexual, and physiological damage or threats of damage in public and in private.<sup>69</sup> It signifies violence that is gender-based and as an infringement of human rights, sexual discrimination and inequality. This Declaration, which is an auxiliary document to CEDAW, confers the obligation on state parties to denounce violence against women and not to invoke any customs, traditions or religious considerations in order to dodge their responsibilities with respect to its abolition.<sup>70</sup> It is reported that in Tanzania, fifty per cent of the women who are in a relationship with a man or who are married, experience bodily or sexual violence from their partners.<sup>71</sup> Section 6 of the Law of Marriage Act of Tanzania provides a declaration against spousal corporal punishment, but it does not make such a practice an offence, nor does it give any sanctions. Section 107(2)(c) of this law simply recognises cruelty, whether mental or physical, as proof of the breakdown of a marriage.

In 1998 Tanzania amended its Penal Code to include additional sexual offences with reference to the Sexual Offences Special Provisions Act. However, those amendments

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64 Article 8.2.

65 Mwambene (n 63) 530.

66 South African Law Reform Commission, Discussion Paper 132, Project 138: The Practice of Ukuthwala 2015.

67 The Gender Directorate is part of the Department of Justice and Correctional Services.

68 Prohibition Bill s 2.

69 UN Declaration on the Elimination of Violence against Women 1993 Art 1.

70 *ibid* Art 4.

71 US Department of State, ‘Tanzania Country Reports on Human Rights Practices for 2007’ <<https://www.dol.gov/ilab/reports/child-labor/findings/tda2007/tanzania.pdf>> accessed 8 June 2019.

that are gender-sensitive are also silent on the matter of domestic violence. Marital rape is not criminalised in the Sexual Offences (Special Provisions) Act 8 of 1998 or the Penal Code, 2002. The lack of legal provisions prohibiting domestic violence is compounded by high rates of sexual and domestic violence. In principle, the law approves marital rape in Tanzania, as a wife cannot withdraw her consent to the conjugal rights of her husband until she is lawfully divorced and separated from him. Despite these laws, there has not been much change in attitudes, and the challenge lies in how to make people aware of the laws and abide by them.<sup>72</sup> This was one of the problems pointed out by the Tanzania Country Report On Implementation Of The Beijing Platform For Action And The Outcome Document Of The Twenty-Third Special Session Of The General Assembly – Beijing +10 which provides an overview of achievements and challenges with specific experiences arising from the implementation of the Beijing Platform for Action.

Occurrences of females being assaulted to death by their spouses have often been reported.<sup>73</sup> Most African cultures play a powerful role in shaping women's experiences of domestic violence.<sup>74</sup> These cultures created certain barriers erected by family, society, and legal systems that influence a woman's ability to get out of an abusive relationship and strive for legal protection.<sup>75</sup>

Many women, especially in rural areas, do not have enforcement support systems or traditions that denounce domestic violence.<sup>76</sup> Tanzanian cultures take abuse as a method of correction, inflicted on individuals from an early age.<sup>77</sup> Teachers and parents apply corporal punishment to discipline students in schools and at home. Children grow up witnessing their fathers assault their mothers, believing that it is acceptable for a man to abuse a woman.<sup>78</sup> Moreover, some parents involve their children in customary practices that harm their children's bodies, although they are culturally accepted. Some parents have been reported to cause grievous bodily harm to their children through this abusive way of instilling discipline.<sup>79</sup> These and other customary practices send a message to girls that they have no control over their bodies.

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72 Wambura (n 36) 149; UNGA, Twenty-Third Special Session 'Tanzania Country Report on Implementation of the Beijing Platform for Action and the Outcome' (Beijing +10,' 2005) 8.

73 Flora Myamba, 'Domestic Violence Rights Movements in Tanzania; An Exploration (PhD Thesis, Western Michigan University 2009) 81. Another example is the case of *R v Elvans* 2003 Criminal Section No 48.

74 Heidi Boas, 'Understanding Cultural Perspectives on Domestic Violence in African Immigrant Communities' American Bar Association Commission on Domestic Violence 2009 13.

75 *ibid.*

76 Boas (n 74) 1.

77 Maria Mtambalike, 'Domestic Violence in Tanzania: The Never-ending Story (2013) *We Write for Rights* SAUT Centre for Human Rights (Mwanza 11 August 2013) <<https://wewriteforrights.wordpress.com/2013/08/11/2/>> accessed 10 February 2019.

78 Myamba (n 73) 81.

79 LHRC (n 21) 147.

Furthermore, it is believed that it is proper for husbands to use violence to discipline their spouses.<sup>80</sup> Domestic abuse has been justified as punishment for trivial and unintentional domestic oversights on the part of the wife.<sup>81</sup> This culture has had the effect on some women to believe that assaulting a wife is justified when she misbehaves<sup>82</sup> and will feel embarrassed when mistreated and ashamed to report the violence.<sup>83</sup> In fact, some tribes, such as the Kurya of the Musoma Region adhere to customary rules that allow abusers to validate their acts of violence.<sup>84</sup> In this tribe, a man is legitimately allowed to assault his spouse as a form of discipline if the assault does not result in grievous harm.<sup>85</sup> The perception that domestic issues are not to be subjected to public law prosecution and court systems is predominant in Tanzania.<sup>86</sup>

Domestic violence is regarded as a private matter that should be resolved informally by the family or community instead of reporting it to the police.<sup>87</sup> Victims seek help from their relatives or traditional or religious leaders who discourage them from reporting the abuse and urge them to be more subservient to their husbands to avoid further abuse.<sup>88</sup> This culture also affects law enforcers because the police are often blamed for turning a blind eye to complainants.<sup>89</sup>

The practise of polygamy exacerbates domestic violence. For example, in some cases where there is a quarrel between the wives, and a husband chooses to side with his 'favourite' wife, other wives are abused in an effort to discipline the offender(s) and to please the favourite wife.<sup>90</sup> Tanzania's laws make provision for one man to have more than one wife.<sup>91</sup> Conversely, international law emboldens monogamy as the best form of marriage.<sup>92</sup>

Another factor that contributes to domestic violence practices is the economic inequality between males and females.<sup>93</sup> This serves to discourage women from leaving abusive relationships because they are financially dependent on their husbands.<sup>94</sup> Men are

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80 Boas (n 74) 1.

81 *ibid.*

82 Mtambalike (n 77) 1.

83 *ibid.*

84 *ibid.*

85 Myamba (n 73) 81.

86 Leila Sheik, 'Violence Against Women is a Violation of Human Rights' *Tanzania Daily News* (Dar es Salaam, 21 March 2013).

87 Boas (n 74).

88 Myamba (n 81).

89 LHRC (n 21) 148.

90 WHO, 'Tanzania Domestic Violence a Serious Concern' (2006) <<http://www.irinnews.org/report/58788?>> accessed 7 September 2019.

91 Law of Marriage Act 1971 s 9(3) [CAP 29 RE 2012].

92 CEDAW Art 5(a).

93 Jacqueline Rugalabam, 'Domestic Violence in Tanzania: The Experience of Women in Chamwino Rural District in Dodoma' (Master's thesis, Erasmus University 2010) 189.

94 WHO (n 90)1

reported to abuse their wives by denying them basic needs.<sup>95</sup> Likewise, economic dependence precludes women from affording the services they need to take legal action against their husbands. As a result, the abuse continues.<sup>96</sup> There are very few domestic violence shelters in Tanzania, with most regions having none.<sup>97</sup> Also, psychological counselling is neither common nor available, particularly in the countryside, where seeking counselling is culturally unacceptable by some communities.<sup>98</sup>

Although domestic violence is rampant, it is gravely under-reported, because women fear the stigma attached to it. A study conducted in 2005 revealed that fifteen per cent of married women had been physically abused in the preceding twelve months, whereas thirty-three per cent had undergone some form of violence by their partners.<sup>99</sup> Rape continues to be a severe problem in Tanzania and women are deprived of their daily freedom of movement because of this. It was established by a 2010 Demographic Health Survey (DHS) where 48.9 per cent of wives aged between fifteen and forty-nine, revealed that their spouses decide whether or not they could visit a family or travel.<sup>100</sup> Tanzania needs to abide by its international commitments by adopting explicit provisions of law which punish domestic violence and govern family affairs. The East African Community Treaty of 1999 to which Tanzania is a state party, is against gender-based violence. Article 124 of this Treaty states that: ‘Each member state shall take such other measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every respect.’

Most African states have enacted laws that criminalise domestic violence. South Africa was the first country to pass the Prevention of Family Violence Act in 1993, which was reviewed and substituted with the present Domestic Violence Act of 1998, followed by Mauritius in 1997.<sup>101</sup> Other African countries that have enacted legislation against domestic violence include Namibia in 2003, Malawi in 2006, and Ghana in 2007. Zimbabwe and Sierra Leone also passed related legislation.<sup>102</sup> Although the Constitution

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95 Sheik (n 86) 1.

96 Boas (n 74) 1.

97 Issa Yussuf, ‘Tanzania: Safe Shelters to Help Gender Violence Victims’ *Daily News* (Dar es Salaam, 16 May 2013) 1.

98 *ibid.*

99 Norah Msuya, ‘Harmful Cultural and Traditional Practices: A Roadblock in the Implementation of the Convention on the Elimination of Discrimination against Women and the Maputo Protocol on women’s rights in Tanzania’ (PhD thesis, University of KwaZulu-Natal 2017) 156.

100 The Organisation for Economic Co-operation and Development (OECD), ‘Development Centre’s Social Institutions and Gender Index (SIGI)’, ‘United Republic of Tanzania Social Institution and Gender Index’ (2012) <<http://www.genderindex.org/sites/default/files/datasheet/TZ.pdf>> accessed 17 May 2020.

101 Cynthia Bowman, ‘Theories of Domestic Violence in the African Context’ (2003) 11 *American University Journal of Gender, Social Policy & the Law* <<https://ssrn.com/abstract=629081>> 847 accessed 10 February 2019; Ito Eze-Anaba, ‘Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges’ (2007) 14 *Cardozo Journal of International and Comparative Law* 21 at 78.

102 *ibid.*

of the United Republic of Tanzania of 1977 does not expressly provide for the rights of women, in general, gender-based violence is a crime, and the legal framework should adhere to restrictions in this regard.<sup>103</sup>

### *Marriage by Abduction*

This is a customary practice of abducting girls to marry without their consent, which is common in Tanzania among the Chagga, Sukuma and Nyamwezi tribes.<sup>104</sup> According to this customary practice, a man and his associates kidnap a girl to compel her and her family to approve marriage negotiations.<sup>105</sup> Because of rape having taken place, the family is then compelled to accept the man as their daughter's husband.<sup>106</sup> Girls as young as twelve are snatched.<sup>107</sup> The captured girls are drugged to 'soften them up', after which sexual intercourse with the kidnappers is forced upon them.<sup>108</sup> A girl kidnapped cannot return to her family, as the community will reject her chances of marrying another. Therefore, young girls end up by marrying men chosen by their parents rather than risk being abducted.<sup>109</sup> The captors, will however, offer reparation, that could be regarded as dowry to the parents.<sup>110</sup> Nevertheless, nowadays some families rile against this practice by refusing the reimbursement, while opting to lay charges of rape and abduction against the abductor.<sup>111</sup>

This tradition is also prevalent in other African countries. In South Africa, it is known as *ukuthwala*, mainly practised by the Xhosa tribe, and in some interior areas of KwaZulu-Natal and the Eastern Cape.<sup>112</sup> This culture has been reported to be worse in countries such as Ethiopia and Somalia.<sup>113</sup> Girls are kidnapped to become sex slaves.<sup>114</sup> While the customary practice of marriage by abduction is rooted in tradition and culture, the original intention<sup>115</sup> was that once a parent has refused to approve a daughter's boyfriend, the daughter will plan her kidnapping compelling her family to allow her to marry.<sup>116</sup> The original purpose behind this practice was that it put pressure on parents to

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103 Penal Code [CAP 16 R.E. 2002].

104 Wambura (n 36) 150.

105 *ibid.*

106 Michelle Lillie, 'Cultural Forms of Human Trafficking in Africa' (2003) <<http://humantraffickingsearch.net/wp/cultural-forms-of-human-trafficking-in-africa/>> accessed 13 July 2015.

107 Marsha Freeman, Beate Rudolf and Christine Chinkin (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 426.

108 *ibid.*

109 Kizito Makoye, *Reporting of Rape, Kidnapping in Tanzania Rises* (Thomson Reuters Foundation 2014).

110 *ibid.*

111 Wambura (n 36) 151.

112 Department of Justice and Constitutional Development 'Gender Directorate, South Africa' 2010.

113 Alem Gena, 'Ethiopia: Surviving Forced Marriage' *The New Humanitarian Newsletter* (23 February 2007).

114 Lillie (n 106).

115 Freeman (n 107).

116 Department of Justice and Constitutional Development (n 112).

accept the relationship and to receive the dowry from the undesirable boyfriend.<sup>117</sup> Initially, this culture involved only certain women of marriageable age. But in recent times, it serves as a smokescreen to legitimise actions that constitute a violation of many girls' rights.<sup>118</sup>

The practice of *ukuthwala* is well articulated in a landmark criminal appeal case of *Jezile v S and Others* (WCC).<sup>119</sup> The issue before the court was whether the cultural practice of *ukuthwala* is a defence against the crimes of human trafficking, assault and rape with the intent to do grievous bodily harm. The appellant was charged with human trafficking, assault and rape offences and convicted by the Magistrate's Court. One of his defences at the appeal hearing was that he was in a customary marriage with the complainant and that it is an integral part of *ukuthwala* that the 'bride' may not only be coerced, but will invariably pretend to object (in various ways) since it is required, or at least expected of her to do so.<sup>120</sup>

The facts of the case indicated that in December 2009, the appellant, a 28-year-old male residing in Philippi, went to a rural village in the Eastern Cape in search of a bride. He noticed the complainant, who was then fourteen and in Grade 7. She was living with her extended family and maternal grandmother, and he decided that she would make a suitable wife. The appellant, who was a complete stranger to the girl, requested his family to start traditional *lobola* negotiations with the complainant's family members. The negotiations were concluded in one day, and the following morning the complainant was called to a gathering where only male members of the two families were present. She was informed of the impending marriage. Her uncle and another man took her to the house of the appellant, who had never been introduced to her. The complainant was instructed to change into *amadaki*, special attire for a new bride. An amount of R8 000.00 was paid as *lobola*, and various traditional ceremonies were performed, after which she became the appellant's customary law wife.<sup>121</sup>

A few days later, the complainant fled from her new marital home and hid, but she was found and promptly returned to the appellant by her own male family members. She was then beaten by the appellant and his uncle for refusing to wear the *amadaki*. Shortly thereafter, she was taken to Cape Town by the appellant, against her will. She refused to have sexual intercourse with the appellant, and he proceeded to rape her, severely beating her. She suffered open, septic wounds as a result of the assaults. Later, she managed to escape and report to the police station. She was deeply traumatised.<sup>122</sup> The Court held that *ukuthwala* is no defence for the crimes of rape, human trafficking and assault with the intent to do grievous bodily harm. This judgment, which was delivered

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117 Makoye (n 109).

118 *ibid.*

119 Unreported case no 127/2014, 23 March 2015.

120 Paragraph 52.

121 Paragraph 9.

122 Paragraphs 10–29.

by a Full Bench of the Western Cape Division must be applauded as an example of how the experience of a girl sensitised judges to the harm that can be caused by cultural practices. The Court dealt comprehensively with the meaning and history of *ukuthwala*. It then demonstrated the importance of this judgment by linking it to intersectionality, in particular, to highlight the negative impact it could have on individuals. It concluded that rethinking is necessary to bring about significant social change and the realisation of constitutional ideals for Black women and children.

Marriage by abduction places a burden on young girls to be wives prematurely, bearing kids as well as caring for the in-laws in most incidences. This culture also puts the health of girl children in danger with a significant risk of contracting sexually transmitted diseases such as HIV, and other complications related to pregnancy, including maternal or infant mortality and fistula. It also deprives girls of the opportunity to pursue educational programmes that will enhance their development. Tanzania's government has taken a step to deal with this culture by enacting the Sexual Offences (Special Provisions) Act, which effected amendments to the Penal Code by broadening the definitions to include many circumstances in which women and children could be exploited.<sup>123</sup> Section 133 of this law stipulates that it is an offence to ‘carnally know a woman of any age with the intention to marry her or cause her to be married or carnally known by any other person, to take her away, or to detain her against her will.’ The same section imposes a penalty of seven years imprisonment for such an offence.

Section 134 of the same law addresses the offence of abduction of girls under sixteen years. This law also provides for a severe penalty for sexual exploitation of girls under eighteen, which ranges from a minimum period of imprisonment of five years to a maximum of twenty.<sup>124</sup> The courts have declared the abduction custom obnoxious and against Article 16(1)(b) of the CEDAW and incriminated the offenders of rape in the case of *Leonard Jonathan v Republic*, 2003 Criminal Appeal No. 53 (unreported). The High Court ruled that the ‘victims of abduction’ could ‘prosecute their captors’ for rape because they had not given consent to sexual relations or to the alleged traditional marriage. The landmark decision on marriage by abduction in Africa is that of the African Commission on Human and Peoples’ Rights in the case of *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* which found that the state of Ethiopia had violated women’s rights under the African Charter on Human and Peoples’ Rights by allowing the practice of marriage by abduction.<sup>125</sup> Furthermore, Tanzania has incorporated the UN Convention on the Rights of the Child of 1990 by enacting the Law of the Child Act of 2009 that defines anyone under the age of eighteen years as a child. The Act specifically bars behaviours associated with outdated customs such as abduction marriage involving children. Both the Maputo Protocol and CEDAW stipulate the requirement for both parties to consent to a

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123 Section 130 of the Penal Code, Cap 16 R E 2002.

124 Wambura (n 36) 151.

125 *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* Communication 341/2007.

marriage.<sup>126</sup> Nonetheless, these laws alone cannot solve these customary problems. Training and continual public awareness campaigns are needed to address these issues.

### Female Genital Mutilation

Female genital mutilation (FGM) denotes all actions that involve part or full amputation of the outer female genital organs for non-medical reasons.<sup>127</sup> FGM is also known as ‘female genital cutting.’<sup>128</sup> In Tanzania, this culture is mostly practised in the Dodoma, Manyara, Singida, Mara, Kilimanjaro and Arusha regions, where 7,9 million young girls and women are estimated to have been victims of this tradition.<sup>129</sup> FGM is usually seen as a rite of passage and performed on girls ranging in age from eight to twenty-five to prepare them for marriage. In rural areas, it is commonly performed by traditional practitioners known as *ngaribas*, while in urban areas, it is usually executed by midwives and medical practitioners.<sup>130</sup> The FGM practise is performed in order to control young females’ sexual desire in the belief that they will be satisfied only by their matrimonial partners.<sup>131</sup> It is also believed that it will enable men to have easy intercourse with their wives.<sup>132</sup> Society considers FGM essential for its families’ dignity and glory and treats girls who have undergone the procedure respectfully. They also acquire upper status and recognition in society and the belief is that they will marry caring, respected and rich men.<sup>133</sup> Other ethnic groups, including, the Gogo, Maasai and Nyaturu, conduct FGM in the belief that it constitutes a cure for treatable urinary and vaginal tract infections known as *lawalawa*.<sup>134</sup> In other communities, especially the Manyara region, in the Manjaro area, FGM has been linked with business, to the extent where even older women have been reported to undergo FGM as part of a business deal,<sup>135</sup> with the aim that the removed flesh be sold as charms to mining merchants and other traders.<sup>136</sup>

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126 CEDAW Art 16(b) and Maputo Protocol Art (a).

127 WHO, ‘Female Genital Mutilation’ Fact Sheet 241 (2013) <<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 24 August 2019.

128 *ibid.*

129 UNICEF, ‘Female Genital Cutting/Mutilation: A Statistical Overview and Exploration of the Dynamics of Change’ (2013) <[https://www.unicef.org/publications/index\\_69875.html](https://www.unicef.org/publications/index_69875.html)> accessed 15 August 2019.

130 ‘28 Too Many’, *Country Profile: FGM in Tanzania*. (2013); Moses Galukande, ‘Eradicating Female Genital Mutilation and Cutting in Tanzania: An Observational Study’ (2015) 1147 *BMC Public Health* 1–10.

131 *ibid.*

132 Wambura (n 36).

133 28 Too Many (n 130).

134 Internationale Zusammenarbeit (GIZ), ‘Female Genital Mutilation in Tanzania’ (2011) Country Fact-Sheet Ending Female Genital Mutilation <[http://accf.org/wp-content/uploads/2017/02/1387188563\\_Ending-Female-Genital-Mutilation.pdf](http://accf.org/wp-content/uploads/2017/02/1387188563_Ending-Female-Genital-Mutilation.pdf)> accessed 12 June 2019.

135 UNICEF (n 129).

136 *ibid.*

The FGM culture adversely affects females in more than twenty-seven African, Middle Eastern and Asian countries. It is estimated that more than twenty-five million girls and women have undergone FGM, and an additional three million girls in Africa will suffer the same fate annually, should existing trends last.<sup>137</sup> Young girls in Tanzania are coerced by the community, including their peers, to undergo FGM, and they are subjected to stigma and victimisation should they decline.<sup>138</sup> They will not be respected nor marry and may end up getting divorced if, after the wedding, it is discovered that that they did not get ‘cut.’<sup>139</sup> The taboos surrounding those who have not undergone FGM affect their daily duties and everyday lives within their communities. For instance, they will not be allowed to prepare food for their in-laws, open stable doors, or do laundry in the river with other girls as this is believed to bring bad luck.<sup>140</sup> Some women who have not undergone the procedure and have difficulty conceiving, could even be cut after marriage. Should the family of the husband face problems or misfortune, such a wife would be blamed for their ill fate.

Apart from the social marginalisation that adversely affects girls’ chances of marrying,<sup>141</sup> the physical, psychological and health effects of FMG also affects their right to equality, as it has a negative impact (up to twenty-five percent) on their education, with regard to performance and school attendance, which ultimately leads to the fate of young girls being unable to participate in economic or educational endeavours. This situation leads to feelings of insecurity and the potential for further abuse.<sup>142</sup> The harmful physical and psychological effects of FGM prevent most girls who undergo it from completing their education.<sup>143</sup> Many girls leave school as soon as they have undergone FGM, as the practice often involves a ceremony to perform the cutting, followed by a month-long seclusion for the wounds to heal, followed by a family and community celebration after the seclusion.<sup>144</sup> Girls whose education has been thus curtailed, will be prevented from acquiring the knowledge and skills required for the labour market, thus affecting their earning potential for life. Isolation from formal schooling deprives girl children of the equal position of women in these societies.<sup>145</sup>

Apart from the long-term consequences of FGM for girls’ and women’s mental health, the effect on their physical health must also be mentioned. The FGM procedure is

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137 28 Too Many (n 130).

138 *ibid.*

139 Galukande (n 130).

140 Children’s Dignity Forum, ‘Voices of Child Brides and Child Mothers in Tanzania’ (2010) Peer Research Report on Child Marriage in the Tarime District, Mara Region, Tanzania 194 <[www.forwarduk.org.uk/ download/](http://www.forwarduk.org.uk/download/)> accessed 8 November 2020.

141 *ibid.*

142 WHO (n 127).

143 Hilda Kimonge, ‘Impact of FGM on the Education of Girls with Hearing Impairment’ (Master of Education Thesis, Kenyatta University 2011) 37.

144 *ibid.*

145 V Khanna and E Weiss, *Child Marriage and FGM Realities, Responses and the Way Forward* (UNFPA Asia 2013) 18.

usually conducted under extremely unhygienic and unsafe conditions causing considerable loss of blood,<sup>146</sup> subjecting victims to tetanus and HIV.<sup>147</sup> Other complications are haemorrhaging, shock, severe pain, urine retention, bacterial infection, open wounds in the genital area, and permanent injury to nearby genital tissue.<sup>148</sup> Urinary tract infections, infertility, cysts, recurring bladder and childbirth difficulties are some of the lasting complications caused by the surgical alteration of female genitalia.<sup>149</sup> A study undertaken in the Dodoma region indicates that there was a significant connection between FGM and perineal injury.<sup>150</sup> FGM is also considered a precursor to child marriage in Tanzania. Once a girl undergoes FGM, the community assumes that she is ready for marriage even when she is under the age of eighteen.<sup>151</sup>

The Maputo Protocol recognises FGM as a type of gender-based violence—a harmful practice and a violation of girls’ and women’s human rights. Article 5(b) of the Protocol specifically obliges state parties to ban and eliminate all forms of FGM. Universal norms also demand that state parties forbid and denounce FGM by taking all available legislative measures of punishment, public awareness, the guarding of females at risk of being subjected to detrimental cultures and support for women who have undergone FGM.<sup>152</sup> The FGM culture hinders free progress and degrades victims’ self-respect and dignity, as guaranteed by Article 3 of both CEDAW and the Maputo Protocol. The practice is also in conflict with international treaties that guarantee health rights, which include ‘sexual and reproductive health’ for women, as well as the right to protect them from ‘sexually transmitted infections and HIV.’<sup>153</sup>

Tanzania is among the countries that domesticated the provisions of the Maputo Protocol and the CEDAW regarding FGM. In 1998 Tanzania amended its Penal Code to outlaw FGM on girls under the age of eighteen, with the adoption of the Sexual Offences Special Provisions Act 1998 (SOSPA), which amended the Penal Code CAP 16. Section 21 of the Act criminalises FGM upon anyone under the age of eighteen and provides punishment in the form of imprisonment of five to fifteen years or a fine not exceeding TShs300 000 or both. The FGM problem is also covered by section 169A of the Penal Code in relation to the offence of cruelty to children. However, this law does not apply to women above eighteen and does not provide for a minimum sentence. The Penal Code does not provide a clear definition of FGM nor does it make references to the different types of FGM that are prohibited. Section 169 only makes reference to

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146 Internationale Zusammenarbeit (GIZ) (n 106).

147 Galukande (n 130).

148 *ibid.*

149 WHO (n 127).

150 Jordan Sichone and others, ‘The Effect of Female Genital Mutilation on Perineal Injuries Among Women in Labour in Dodoma Region, Tanzania’ 2019 12(4) *South Sudan Medical Journal* 123.

151 Plan International, ‘Tanzania: Fighting FGM and Child Marriage’ (Plan International 2020). <<https://plan-international.org/EU/case-study-tanzania-FGM-child-marriage>> accessed 8 November 2020.

152 Maputo Protocol Arts 1(b), 2 and 5 and CEDAW Art 5.

153 Maputo Protocol Art 14 and CEDAW Art 12.

FGM in passing as one of the acts that, when performed on a person below the age of eighteen, constitutes the offence of cruelty to children. The absence of a clear definition of FGM creates legal uncertainty about the acts that constitute FGM. Furthermore, it potentially undermines the effectiveness of the objectives of the amendment of the Act in protecting the rights of women against FGM.

The gender desks at police stations have helped to reduce the occurrence of FGM practices.<sup>154</sup> Communities, such as the Makonde, Ndengereko and Maasai, that used to practice this culture, have abandoned it and instead, perform ‘alternative rites of passage’ (ARP) ceremonies for their girls.<sup>155</sup> Although there have been some arrests under this law, prosecution rates are low,<sup>156</sup> since officials responsible for law enforcement are not always fully aware of the law and its purpose, resulting in the matter not being taken seriously.<sup>157</sup> This situation was evidenced in the case of *Zakayo Katungo v Selemani Ningoli*,<sup>158</sup> where a suspect was released due to the failure of police to continue with the case because of a lack of credible evidence.<sup>159</sup> The doctor’s report was one of the required pieces of evidence that was supposed to have been collected when the case was reported. The victim was also not sent to hospital for a doctor’s report. The law has not been effectively enforced since then.<sup>160</sup>

Ignorance within society is another reason for the ineffective enforcement of this law. The fact that FGM takes place in underground spaces makes detection difficult.<sup>161</sup> The fear of being arrested has caused the practice to be carried out more secretly in some regions, though in other areas, such as Mara, FGM continues to occur en masse with little or no law enforcement.<sup>162</sup> It is notable that nowadays, in some regions such as Manyara and Kilimanjaro, FGM is carried out on infant girls of one month to one year old to avoid being arrested while, at first, women between the ages of eight and thirty were affected.<sup>163</sup> Some girls have been reported to be trafficked to nearby Kenya to be circumcised.<sup>164</sup> Various NGOs in Tanzania are taking measures to eradicate FGM by promoting different strategies, such as the health risk approach, the human rights approach and emphasising the empowerment of women.<sup>165</sup> The introduction of ethnic

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154 Johanna Waritay and Ann-Marie Wilson, *Working to End Female Genital Mutilation and Cutting in Tanzania: The Role and Response of the Church* (Tearfund 2012) 1–30 at 2.

155 *ibid.*

156 LHRC (n 21).

157 *ibid.*

158 District Court of Morogoro, Miscellaneous Criminal Case 1 2002 (unreported).

159 LHRC (n 21).

160 Camilla Yusuf and Yonatan Fessha, ‘Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law Against Female Genital Mutilation in Tanzania’ (2013) *African Human Rights Law Journal*.

161 Sia Msuya, ‘Female Genital Cutting in Kilimanjaro, Tanzania: Changing Attitudes?’ (2002) 7(2) *Tropical Medicine and International Health* 159–165 at 159.

162 28 Too Many (n 130).

163 Msuya (n 99) 156.

164 Waritay (n 154).

165 *ibid.*

heritage in the school curriculum in Tanzania will help young girls advance self-realisation to achieve freedom from external coercion, including ‘cultural expectations’ and ‘political and economic oppression.’

### **Child Marriage and the Payment of Dowry**

The CEDAW Committee defines child marriage as ‘marriage of a child below 18 years.’<sup>166</sup> Girls under eighteen are not physiologically, physically, and psychologically fit for marriage and the responsibilities of childbearing.<sup>167</sup> Tanzania has a high rate of child marriage,<sup>168</sup> predominant in the coastal regions.<sup>169</sup> Government statistics show that four out of ten women in Tanzania marry before they are eighteen.<sup>170</sup> This practice mostly affects females as, on average, females marry five years earlier than males.<sup>171</sup> Generally, girls are considered fit for marriage after they have reached puberty. Marriage is considered as a means of safeguarding them from pregnancy and pre-marital sex, which degrade family honour and may reduce the amount of dowry a family may receive.<sup>172</sup> Girls as young as nine have been forced into marriages by their guardians, relatives or even parents.<sup>173</sup>

Tanzania’s 2015-16 Demographic and Health Survey statistics indicate that overall, twenty-seven per cent of adolescent women between the ages of fifteen and nineteen are mothers already or are pregnant with their first child. Adolescent girls with no education are five times more likely than those with secondary or higher education to have children (fifty-two percent versus ten per cent).<sup>174</sup> Teenage childbearing also varies according to economic status, ranging from thirteen per cent among adolescents in the wealthiest households to forty-two percent in the poorest families.<sup>175</sup>

There are cases where girl children were forced to marry men who were old enough to be their grandparents.<sup>176</sup> The traditional practice of dowry also allows older and richer men to persuade desperate and/or greedy guardians and parents to permit them to wed

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166 CEDAW General Recommendation No. 2 in Marriage and Family Relation GAORG (1994) Doc A/47/38.

167 Human Rights Watch, ‘Tanzania: Child Marriage Harms Girls’ (29 October 2014) <<https://www.hrw.org/news/2014/10/29/tanzania-child-marriage-harms-girls>> accessed 10 November 2020.

168 *ibid.*

169 UNFP, ‘Marrying Too Young: Ending Child Marriage in Tanzania’ (2012).

170 Human Rights Watch (n 167) 380.

171 *ibid.*

172 *ibid.*

173 Girls not Brides, ‘Child Marriage Around the World: Tanzania’ (2014) <<http://www.girlsnotbrides.org/child-marriage/tanzania/>> accessed 10 November 2020.

174 Tanzania Demographic and Health Survey and Malaria Indicator Survey (2015-16 TDHS-MIS) (2016) 4 <<https://www.dhsprogram.com/pubs/pdf/SR233/SR233.pdf>> accessed 7 August 2021.

175 *ibid.*

176 Girls not Brides (n 173).

girls for monetary gain.<sup>177</sup> Girls are coerced to wed men who are older and more experienced, provided that they are wealthy enough to provide a substantial dowry.<sup>178</sup> Girls who protest may be beaten, verbally abused, or driven from their homes by family members.<sup>179</sup> Most of these early marriages end in separation and divorce when the involved partners realise they are not suited to each other.<sup>180</sup> Younger spouses are usually not able to sustain their families financially and are not ready to take on parental responsibilities.<sup>181</sup> In addition, most girls in forced marriages end up experiencing domestic violence and abuse from their husbands and/or their in-laws.<sup>182</sup> Some experience assault, rape and even abandonment by their husbands and are then left to care for their children without any financial support.<sup>183</sup> Many live in seclusion and isolation; their every movement being prevented by their spouses and in-laws.<sup>184</sup> Many arranged marriages convict young wives to a life of semi-slavery.<sup>185</sup> Some girls are forced to flee their homes and family to escape forced marriages and they end up migrating to towns where they engage in cheap forced labour to survive.<sup>186</sup>

This culture stunts the social development of girls as it puts an end to their schooling.<sup>187</sup> They also forfeit their chance of growing to adulthood before marriage or making independent choices about their lives. The quality of a community is determined by the competence of its individuals; this includes the level of knowledge, health, education, resources and skills. Thus, there is a proven link between the lack of education, poverty and under-development, which means that these factors contribute to the cycle of poverty in societies.<sup>188</sup> Child marriage further endangers girls physically and has adverse biological and social consequences.

The child marriage culture exacerbates gender inequality. The inferior status of young girls is strengthened by the reality that, in severe cases, they are coerced to marry aged men. Therefore, child marriage is in conflict with Article 2 of the Maputo Protocol and CEDAW, which obliges state parties to ‘embody the principle of the equality of men and women and to condemn discrimination against women, in all forms.’ Child marriage is also inconsistent with Articles 12(2)(c) and 10(f) of the CEDAW of the Maputo Protocol. These provisions stipulate that parties must ensure that proper

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177 *ibid.*

178 UNFP 2012 (n 169) 381.

179 *Girls not Brides* (n 173).

180 *ibid.*

181 Human Rights Watch (n 167).

182 *ibid.*

183 Brenda Akia, ‘No Way Out: Child Marriage and Human Rights Abuses in Tanzania’ *Human Rights Watch Short Reports* (2014) 45.

184 *Girls not Brides* (n 173).

185 Akia (n 183).

186 E Warner, ‘Behind the Wedding Veil: Child Marriage as a Form of Trafficking’ (2011) 12(2) *Journal of Gender, Social Policy & the Law* 233–271.

187 *Girls not Brides* (n 173).

188 Akia (n 183).

procedures are in place to eradicate inequality in education by reducing the rate of female students dropping out from school and establishing programmes to assist girls and women who have permanently left school. Child marriage deprives young females' right to education. Furthermore, the child marriage practice is in contravention of Articles 2(b) and 14 of the Maputo Protocol and Articles 12 and 13 of the CEDAW, which denounce detrimental traditional practices that put the health and safety of women at risk.

Furthermore, Article 16(1)(b) of the CEDAW and Article 1(c)(I) of the UN Supplementary Convention on the Abolition of Slavery and the Slave Trade, and Institution and Practices Similar to Slavery of 1956 to which Tanzania is a signatory, condemn any practice that deprives a woman of the right to reject a marriage that is based on 'payment of money or in-kind to her parents or another person.' The law recognises traditions and culture in Tanzania, so it is not an offence to give or receive a dowry in consideration of or on the occasion of that marriage.<sup>189</sup> The dowry received by a parent who consents to the marriage of a girl under eighteen years old is in contravention of this Convention. Parents, especially in the coastal regions of Tanzania, have been exploiting this practice to earn money for themselves by forcing their young daughters to marry wealthy older men.<sup>190</sup>

Apart from adopting the regional human rights instruments, a number of mechanisms and institutions in Africa have served to recognise and take steps to address child marriage.<sup>191</sup> Among them is a campaign to end child marriage in Africa, launched by the African Union (AU)<sup>192</sup> in 2014 to raise awareness of the harmful impact of child marriage.<sup>193</sup> The campaign requires African states to take appropriate social, legal and economic measures to address child marriage.<sup>194</sup> The AU also appointed a Goodwill Ambassador for Ending Child Marriage, and the African Committee of Experts on the Rights and Welfare of the Child (the Committee) appointed a Special Rapporteur on Child Marriage in 2014.<sup>195</sup> In addition, the AU adopted an African Common Position on the AU Campaign to End Child Marriage in Africa (the AU Common Position) in 2015. The Common Position urges all member states to take legislative and strategic measures to combat child marriage.<sup>196</sup>

The Tanzanian government has made an effort to deal with this traditional practice by domesticating the African Charter on the Rights and Welfare of the Child and has enacted the Law of the Child Act, which defines the age of a child as any person under

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189 Warner (n 186).

190 Girls not Brides (n 173).

191 African Union Common Position on the Campaign to End Child Marriage in Africa, adopted by the Heads of State and Governments of the African Union in July 2015.

192 Formerly the Organisation of African Unity, which was disbanded on 9 July 2002.

193 African Commission on Human and Peoples' Rights (2018) 2.

194 *ibid.*

195 African Commission on Human and Peoples' Rights (2018) 3.

196 Commitment A1-A5.

the age of eighteen.<sup>197</sup> In addition to this, the Ministry of Community Development, Gender and Children, in partnership with, the Graça Machel Trust, the UNFPA Tanzania, the Children's Dignity Forum and the Tanzania Media Women Association, initiated a campaign to combat child marriage.<sup>198</sup> It has been difficult to end this culture because of its current lawfulness under the Law of Marriage Act, as discussed above.<sup>199</sup> The then responsible minister stated that the revision procedure will take time as this Act must be handled carefully to reach a reasonable consensus. He specified that amending the age of marriage too quickly may lead to chaos for Tanzanian religions, customs, and cultures, which approve early marriages.<sup>200</sup>

The minimum age of marriage in Tanzania was successfully challenged in 2016 by the High Court decision in the case of *Rebeca Z Gyumi v Attorney-General*,<sup>201</sup> where the Court ruled that sections 13 and 17 of the Law of Marriage Act are unconstitutional and directed the government to change the law within one year to confirm that the minimum age of marriage for girls and boys must be eighteen years. The appeal against this ruling filed by the Attorney-General was dismissed by the Court of Appeal in October 2019 and the High Court decision was upheld.<sup>202</sup> However, to date, nothing has been undertaken by the government to make this amendment. Tanzania commits itself to the International Conference on Population and Development (ICPD) to review the Marriage Act and key legal and institutional frameworks by 2025 to address gender inequality.<sup>203</sup> In the same spirit as the ICPD, Tanzania has promised to improve school health programmes, yet age-appropriate reproductive health education was not introduced.<sup>204</sup> Further, Tanzania responded to the recommendations on Universal Periodic Review to combat the phenomenon of early and forced marriage by amending the relevant legislation accordingly, but simply took note of it instead of accepting it.<sup>205</sup>

Parents have been using this law to push their young daughters into early marriages.<sup>206</sup> Furthermore, deprived girls and parents who have been affected by this culture need

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197 Section 4(1) of the Law of the Child Act of 2009.

198 Girls not Brides (n 173).

199 Sections 13 and 14 of the Law of Marriage Act allow girls to get married from the age of 14 years.

200 Hilda Mhagama, 'Tanzania: Network Asks Government to Rethink Decision on Early Child Marriages' *AllAfrica Report* 5 August 2016 <<http://allafrica.com/stories/201608050234.html>> accessed 10 November 2020.

201 *Rebeca Z Gyumi v Attorney-General Miscellaneous Civil Case 5 of 2016 HC Dar es Salaam*.

202 *Attorney-General v Rebeca Z Gyumi* (Civil Appeal 204 of 2017) [2019] TZCA 348.

203 The 25th anniversary of the International Conference on Population and Development (ICPD25) Report (Nairobi Summit 12 to 14 November 2019) <<https://www.nairobisummiticpd.org/commitment/united-republic-tanzania-commitment-accelerating-icpd-promise>> accessed 10 November 2020.

204 *ibid.*

205 United Republic of Tanzania's responses to recommendations of the Universal Periodic Review Report (22 September 2016) 134.14 <[https://www.uprinfo.org/sites/default/files/document/tanzania\\_united\\_republic\\_of\\_session\\_25\\_may\\_2016/recommendations\\_and\\_pledges\\_tanzania\\_2016.pdf](https://www.uprinfo.org/sites/default/files/document/tanzania_united_republic_of_session_25_may_2016/recommendations_and_pledges_tanzania_2016.pdf)> accessed 28 July 2021.

206 UNFP (n 169).

educational help to cope with the effects.<sup>207</sup> Communities that regard child marriage as tradition and culture also need to be advised that this custom is harmful, not only to the children but also the partners and their families, the government, and the community at large.<sup>208</sup>

### Virginity Testing

The cultural practice of ‘virginity testing’ is still considered a virtue in some communities in Tanzania, especially among those in the coastal regions of Mtwara, Lindi, Tanga and Zanzibar.<sup>209</sup> These communities place a considerable value on virginity for religious, social and economic reasons.<sup>210</sup> Virginity testing involves the procedure of identifying whether a girl is a virgin and has never had sexual intercourse<sup>211</sup> and presents in various forms in different societies. For instance, in Mtwara and Lindi, girls at the young age of eight and before the onset of puberty are taken to a campsite in the bush by traditional elders, where they remain for weeks.<sup>212</sup> In these camps, which are known as *unyago*, they are taught sexual practices and how to live with a husband.<sup>213</sup> The traditional healers and community elders check their virginity and break the hymen to ready them for initial intercourse.<sup>214</sup>

It has been revealed that in the *unyago* camps, girls are encouraged to practise what they have been taught with boys of their age and sometimes with older men, despite their young age.<sup>215</sup> They are also trained not to rely on one man alone, but to gain economic security and sexual satisfaction. This cultural custom is known as to possess *mafiga matatu*, denoting the ‘three pillars’ or stones that hold up a wood-burning stove.<sup>216</sup> *Unyago* is a ritual that takes place in secrecy, and girls are customarily told, upon threat of death, not to speak about their experiences in the camp.<sup>217</sup> These societies claim that during *unyago* young girls are being tutored about their community role, traditional dances, respect for elders, and domestic duties.<sup>218</sup> Other forms of *unyago* are also practised by ethnic groups in Tanzania, such as the Gogo and Lugulu,<sup>219</sup> that take pride in it, believing that it serves to relay important social messages of self-respect and the strength of women in the community.<sup>220</sup> However, *unyago* has been singled out as the

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207 *ibid.*

208 Human Rights Watch (n 167).

209 Kumiko Sakamoto, ‘Social development, culture, and participation: Toward theorizing endogenous development in Tanzania’ (PhD thesis, Waseda University 2002) 47.

210 *ibid.*

211 *ibid.*

212 Sakamoto (n 209).

213 *ibid.*

214 Lawrence Mbogoni, *Aspects of Colonial Tanzania History* (African Books Collective 2013).

215 *ibid.*

216 Sakamoto (n 209).

217 *ibid.*

218 UNICEF (n 129).

219 *ibid.*

220 *ibid.*

main cause of child pregnancy as it is perceived to be a highly sexualised social event.<sup>221</sup> This culture affects young girls who are compelled to become sexually active before they attain the age of majority.<sup>222</sup>

Another form of virginity testing which has prevailed in the Tanga region, is the presence of an ‘intact hymen’ to be examined on the wedding day.<sup>223</sup> It is understood that the hymen will break during first intercourse, causing bleeding.<sup>224</sup> After the marriage ceremony, the bride and groom are given a white sheet on which they must ‘consummate their marriage’ after which the sheet is presented to groups of family members and friends who usually wait outside<sup>225</sup> to examine it for bloodstains as proof of virginity.<sup>226</sup> This process humiliates brides and failing ‘virginity tests’ leads to ‘stigmatisation’ and bullying by the community as it is done in public.<sup>227</sup> Virginity is also an essential element in Islamic communities where girls are frequently observed.<sup>228</sup> Reportedly, most Muslim girls in areas such as Tanga and Zanzibar resort to anal sex instead to ensure that they are virgins on their wedding day. This practice exposes them to sexually transmitted diseases and HIV.<sup>229</sup> So great is the terror of humiliating one’s family and failing the test that girls resort to questionable methods of faking virginity, thereby compromising their health.<sup>230</sup>

Other societies in Tanzania are practising the virginity test on girls by examining their hymen and the tautness of the muscles behind the knees. Girls who are discovered not to be virgins are assaulted and required to reveal the names of their ‘sexual partners,’ who are then required to compensate the victims’ family with money and to marry them.<sup>231</sup> Thus, society believes that girls will abstain from sex because they would be afraid of being named and shamed.<sup>232</sup> They also believe that the culture of ‘virginity testing’ significantly decreases the spread of sexually transmitted diseases as well as early and unexpected pregnancies that lead to school dropouts. The intention of this practice may be seen as well-meant, but it constitutes gender discrimination, with boys and girls not treated equally. This cultural practice is unhealthy and increases violence against women and girls who fail unreliable tests. It is mostly carried out in the home

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221 Maggie Bangser, “‘Falling Through the Cracks’ – Adolescent Girls in Tanzania: Insights from Mtwara” (2010) (Juárez and Associates 1213 National Boulevard, Los Angeles) 170.

222 *ibid.*

223 UNICEF (n 129).

224 Liv Haram, ‘Prostitutes or Modern Women? Negotiating Respectability in Northern Tanzania’ in Signe Arnfred (ed), *Re-thinking Sexualities in African Sexuality, Gender and Society in Africa* Research Programme Nordic Africa Institute (2004) 211–233.

225 *ibid.*

226 Bangser (n 221).

227 *ibid.*

228 Haram (n 224).

229 Bangser (n 210).

230 Sakamoto (n 209).

231 UNICEF (n 129).

232 Mbogoni (n 214).

by parents or other relatives.<sup>233</sup> Girls who are found not to be virgins are ostracised, labelled prostitutes, and beaten by their parents,<sup>234</sup> which affects them psychologically.<sup>235</sup> Lack of virginity also affects their prospects of marriage and the size of the dowry that their parents are entitled to receive.<sup>236</sup> ‘Virginity testing’ is a detrimental tradition that originated in a deeply rooted discriminatory belief system and interpretation of the role and status of women in the community.<sup>237</sup>

The virginity testing practice violates several girls’ rights, such as the right to dignity, bodily integrity and privacy.<sup>238</sup> It also exposes girls to sexual malpractices, since ‘digital penetration’ amounts to sexual abuse.<sup>239</sup> This culture, which is mainly applicable to women only, infringes girls’ right to equality, which is enshrined in the Constitution and several international human rights instruments.<sup>240</sup> Virginity testing places a burden on women as they are required to uphold a high moral standard, only to be wedded to praiseworthy men who might have deflowered or impregnated many other girls, risking the spread of HIV/Aids. Furthermore, this culture exacerbates the discrimination against girls who are not virgins and who, in some instances, may have been raped. Carrying out ‘indecent acts’ with underage persons is considered a crime by the Penal Code of Tanzania, although the law is silent on virginity testing.<sup>241</sup> Currently, no other Tanzanian law addresses virginity testing, which perpetuates the subservient status of women in society. It also furthers ignorance, illiteracy and poverty. Tanzania’s government needs to take measures to outlaw cultural traditions that violate women’s rights. Other countries in Africa such as eSwatini, Zimbabwe, South Africa and Malawi have also been reported to practise this culture,<sup>242</sup> despite having laws prohibiting it, such as the Children Act 5 of 2005 of South Africa.<sup>243</sup>

The practice of virginity testing seems to have been abandoned in South Africa in the middle of the twentieth century, but has recurred in the 1990s, probably as a defence against the virulent spread of HIV/AIDS.<sup>244</sup> This culture which is known as *ukuhlolwa*

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233 *ibid.*

234 *ibid.*

235 UNICEF (n 129).

236 *ibid.*

237 Bangser (n 221).

238 Those rights are guaranteed by Arts 12(2) and 13 of the Constitution, Art 3 of the Maputo Protocol, and Art 3 of CEDAW.

239 Bangser (n 221).

240 *ibid.*

241 Section 135 of the Tanzania Penal Code CAP 16 [R.E. 2002].

242 Bangser (n 221).

243 Section 12(4) of the Children’s Act of 2005 prohibits virginity testing of children under the age of sixteen, while s 12(5) allows virginity testing provided that: the child has given consent to the testing, it is done as prescribed and after proper counselling of the child. Section 12(6) of the same Act prohibits disclosure of the outcome of a virginity test without the consent of the affected child.

244 John Mubangizi, ‘A South African Perspective on the Clash Between Culture and Human Rights, with Particular Reference to Gender-related Cultural Practices and Traditions’ (2012) 13(3) *Journal of International Women’s Studies* 33–48.

in South Africa, is believed to be supported by some higher level government institutions.<sup>245</sup> Though procedures of virginity testing in South Africa may differ from one tester to another and from one community to another, it is mostly undertaken by older females.<sup>246</sup> They perform a ‘physical examination’ of a girl’s private parts to establish whether the hymen is intact. When not, the girl would fail the test.<sup>247</sup> In the past, the tests were normally executed privately by a mother, grandmother or aunt, but nowadays virginity testers are elderly women. The testing is regularly taking place in public at celebratory events at big venues.<sup>248</sup> Girls who pass the virginity test are normally awarded a formal certificate. Girls who undergo *ukuhlolwa* and found not to be virgins are required to pay a certain number of cows to the chief and they are forbidden to participate in any traditional activities.<sup>249</sup> Events such as rape or heavy physical activity, which are out of the girls’ control and may cause damage, are not taken into account.<sup>250</sup>

The controversy surrounding South African virginity testing is unique, as it encourages a return to customary culture as a preventive public health approach in the fight against HIV, which is a contemporary epidemic.<sup>251</sup> This concept has exposed the legislation that creates tension between universal human rights and cultural relativism.<sup>252</sup> This is a cultural practice that requires an unbiased and multi-faceted strategy to achieve success. Some municipal councils, such as uThukela in KwaZulu-Natal, have been reported to provide bursaries to young women on the grounds of their virginity.<sup>253</sup> Girls who are awarded these bursaries are also required to produce evidence that they stay virgins throughout their studies by being tested each school holiday.<sup>254</sup> The award, which is known as the uThukela District Municipality’s Maidens Bursary Award has been condemned by gender activists, media, civil society, lawyers, and political parties such as the Economic Freedom Fighters (EFF).<sup>255</sup> Although legislative and constitutional measures are of paramount importance, complete reliance on them will not end this clash between culture and women’s rights. An example of this can be seen in the

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245 Erica George, ‘Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities’ (2008) 96 California Law Review 1447 <<http://scholarship.law.berkeley.edu/californialawreview/vol96/iss6/2/>> accessed 21 June 2021.

246 Mubangizi (n 244).

247 Thulani Gqirana, ‘Virginity Tests for Bursaries are Unconstitutional – Gender Equality Commission’ *News24* (17 June 2016) <<http://www.news24.com/SouthAfrica/News/virginity-tests-for-bursaries-are-unconstitutional-gender-equality-commission-20160617>> accessed 24 June 2021.

248 Marianne Merten, ‘Virginity Testing: Gender Equality Commission Bans “Maiden Bursaries”’ *Daily Maverick* (16 September 2016) <[http://www.dailymaverick.co.za/article/2016-06-16-virginity-testing-gender-equality-commission-bans-maiden-bursaries/#.V9vf6\\_nnako](http://www.dailymaverick.co.za/article/2016-06-16-virginity-testing-gender-equality-commission-bans-maiden-bursaries/#.V9vf6_nnako)> accessed 2 August 2021.

249 *ibid.*

250 *ibid.*

251 George (n 245).

252 Mubangizi (n 244).

253 Gqirana (n 247).

254 Merten (n 248).

255 Gqirana (n 247).

ineffectiveness of legislation against FGM in Tanzania, which was discussed earlier, where criminalising FGM has pushed the practice underground and encouraged tests for younger children instead.

### **‘Cleansing’ of Young Girls in Malawi**

The traditional culture of ‘cleansing’ has recently been suspected of spreading HIV to more than 100 young girls in Malawi, where tradition forces girls to have sex with a male prostitute known as a ‘hyena’ when they attain puberty. This action is seen by the community as a form of ritual ‘cleansing’ instead of rape.<sup>256</sup> After their first period, girls aged between twelve and fourteen years are forced to have intercourse with the hyena for more than three days to mark their passage from childhood to adulthood. Should the girl refuse, it is believed that illness or serious misfortune could strike her family or the entire village.<sup>257</sup> One of these hyenas, Eric Aniva, has declared himself to be HIV positive since 2012. He alleged that he had been hired by the parents to have sex with their young girls although he had not disclosed his HIV status to the public for many years.<sup>258</sup> This shocking revelation is a case in point in terms of the danger that young girls are exposed to because of outdated and unconstitutional cultural practices.

### ***Nyumba-ntobhu* (Ghost Marriage)**

‘Ghost marriage’ is a cultural practice prevalent in the Ikoma, Iraqw and Kurya, communities in Tanzania.<sup>259</sup> The practice known as *nyumba-ntobhu* also occurs in the western part of Tanzania.<sup>260</sup> It involves same-sex matrimony, according to which a woman takes a young girl into her home as a ‘ghost’ relation.<sup>261</sup> An older woman will take a younger woman to ‘marry’ her husband and bear his children. The older woman becomes a lady ‘husband’ by paying a dowry for the girl and adheres to all other required rituals for a marriage in the community.<sup>262</sup> A *nyumba-ntobhu* marriage is not the same as lesbian matrimony, and is not sexual in nature, but a legal and social relationship.<sup>263</sup> Aged women marry young girls for the purpose of having their ‘own’ children and to have household help.<sup>264</sup> The girl who was chosen by the female husband,

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256 Ed Butler, ‘The Man Hired to Have Sex with Children’ *BBC News, Malawi* (21 July 2016) <<http://www.bbc.com/news/magazine-36843769>> accessed 20 June 2020.

257 J Browne, ‘Meet the Man Hired to Have Sex with Children’ *UNILAD News* (21 July 2016) <<http://www.unilad.co.uk/news/meet-the-man-hired-to-have-sex-with-children/>> accessed 21 June 2020.

258 Eric Aniva was arrested on 26 July 2016 following orders by Malawian President, Peter Mutharika, and he could be charged with defiling children and exposing them to HIV.

259 Wambura (n 36).

260 *ibid.*

261 Eleuther Mwangeni, Austin Ankamah and Richard Powell, ‘Sex Preference and Contraceptive Behaviors Among Men in Mbeya Region Tanzania’ (2001) 27(2) *Journal of Family Planning and Reproductive Health Care* 85–89.

262 Hleziphi Naomi Nyanungo, ‘Female Husbands without Male Wives: Women, Culture and Marriage in Africa’ *Open Society Initiative for Southern Africa (OSISA)* (2014).

263 *ibid* 264.

264 LHRC (n 21).

bears the children of the man, while the legal ‘father’ of the children will be the female husband.<sup>265</sup>

The payment of dowry confers on the female husband the same rights over the children as a legal father. The female husband usually supports the children acting as their legal and social father, regardless of who the biological father might be.<sup>266</sup> The biological father will have neither legal nor social rights over the children. A female husband is culturally regarded as a man, hence, she is permitted to take on male roles, not usually allowed for females.<sup>267</sup> For example, she could take part in politics and decide not to carry possessions on her head.<sup>268</sup> This type of marriage is a practice which serves as an opportunity through which females exercise social influence and support in communities where succession and inheritance pass through the male line.<sup>269</sup> In these communities, daughters or their offspring are not allowed to continue the family line. Thus, women who only have female children, have fears of losing their inheritance because of the absence of male successors.<sup>270</sup> To counteract this, women with no male children marry a young woman who will bear sons for their families.<sup>271</sup>

This type of marriage is also practiced by wealthy couples who do not have children of their own. Older unmarried women are major practitioners of this culture as they desire male heirs to inherit their wealth, names and property.<sup>272</sup> In most cases, when the older female’s husband dies, the young married girls stay to raise their children without support.<sup>273</sup> The married girl is usually compelled to bear the children of any man preferred by her female husband and is not permitted to get married to another male.<sup>274</sup> At times, the married girls are forced by their female husbands to exchange sexual favours for small household gifts.<sup>275</sup> The chosen men are instructed not to use protection in order to impregnate the ghost wife.<sup>276</sup> Ghost wives are prevented from marrying men

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265 *ibid.*

266 L Sotolani, “‘Nyumba-nthobu’: Marriage in Tanzania and the Role of Women’ *Critical Private Law Studies* (2015) 4.

267 *ibid.*

268 Peter May, *The Ghost Marriage* (Paper Planes Books 2010) 37.

269 *ibid.*

270 Children’s Dignity Forum (n 140) 27.

271 *ibid.*

272 May (n 268).

273 *ibid.*

274 Nyanungo (n 251).

275 Wambura (n 36).

276 *ibid.*

of their choice and are further forced to care for their offspring and ghost in-laws without assistance.<sup>277</sup> They may even be driven to prostitution.<sup>278</sup>

The female husband can also force the wife to have intercourse with a man off the streets who are not known in the village, to ensure that they do not return to claim their child.<sup>279</sup> Most of these ghost wives face hard work and abuse at the hands of their older female husbands. They normally have no rights over the children they give birth to and are unable to return to their parents, who cannot afford to repay the dowry to the female husbands if their marriage fails.<sup>280</sup> Some ghost wives who have managed to get out of this traditional marriage claim to have lived a life of imprisonment.<sup>281</sup>

The culture of ghost marriage is harmful in light of Article 1(g) of the Maputo Protocol, which stipulates that ‘harmful practices’ include all ‘practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.’ Girls caught up in such marriages lose their dignity and integrity by being forced to associate sexually with different men without experiencing love and affection. They are denied any decision-making capacity in terms of sexuality, which endangers their health. Moreover, in terms of Article 12 of CEDAW and Article 14 of the Maputo Protocol the practice is unlawful in the sense of girls being forced into sexual intercourse with different men without protection, which leads to sexually transmitted infections. The wives are sold like commodities to bear children for strangers and many become involved in prostitution. They serve as slaves to take care of female husbands, a practice which is contrary to Article 6 of CEDAW and Article 3(3) of the Maputo Protocol. Although the Law of Marriage Act of Tanzania is clear on the meaning of marriage to the exclusion of same-sex marriages, nothing has been done to outlaw or condemn ghost marriages.<sup>282</sup>

Society seems to accept this tradition, and no legal action has yet been undertaken against a degrading and inhuman culture. Traditional practices that affect women should be abandoned because origins can be traced back to a patriarchal system that disdains women without male children, and childless women even more. Tanzania needs to take measures to deal with this culture which so affects the rights of women, as stipulated in Article 4(4) of the Maputo Protocol, which states that ‘State parties shall adopt and

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277 Florence Majani, ‘Tanzania Marriages of Convenience’ *Mail and Guardian* (14 November 2014) <<http://mg.co.za/article/2014-11-13-tanzania-marriages-of-conveniencevisited>> accessed 12 November 2020.

278 Tulanana Bohela, ‘Why Some Tanzanian Women are Marrying Women’ *BBC News* (26 August 2015).

279 *ibid.*

280 Children’s Dignity Forum Voice of Child Brides and Child Mothers in Tanzania: A Peer Report on *Child Marriage in Tarime District, Mara Region, Tanzania*’ (2010) 15. <[www.forwarduk.org.uk/download/194](http://www.forwarduk.org.uk/download/194)> accessed 12 November 2020.

281 Majani (n 277).

282 Law of Marriage Act s 9(1) defines marriage as the voluntary union of a man and a woman which is intended to be a life-long commitment.

implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and the protection of women from all forms of violence, particularly sexual and verbal violence.'

The culture of ghost marriages still prevails in countries such as Kenya, where it is practised by the Abagusii and Nandi communities of Western Kenya<sup>283</sup> and allegedly also by the Balobedu people of South Africa and the Igbo of Benin and Nigeria, where a woman is simultaneously a wife and a female husband.<sup>284</sup> In these tribes, married women who are independently wealthy opt to set up their own compound, separate from their husbands, and marry one or more girls to be their wives and bear them children.<sup>285</sup> Such a woman becomes a 'female husband' in her own compound while remaining the wife in her husband's compound. The Balobedu is the only African tribe that still has a female monarch, known as the Rain Queen, who herself has been known to be a female husband to many wives.<sup>286</sup> Some women who prefer a *nyumba-ntobhu* marriage say that it helps them get rid of gender-based domestic violence.<sup>287</sup> There seems to be a lesser likelihood of violence in female marriage models, and women husbands often offer a higher dowry than men because they are more desperate to marry a young girl.<sup>288</sup> However, this remains a form of gender violence, as it was termed by Tanzania's former Minister of Information and Culture, Fenela Mukandara.<sup>289</sup> All forms of gender-based violence needs a global revision of its national legislation in order to harmonise it with human rights instruments to which Tanzania is party, with a view to guaranteeing gender equality.

## Recommendations

Based on the above observations and findings, the following recommendations are offered:

### **Traditional and Cultural Practices Should Adhere to the Values of Equality and Women's Rights**

It is essential to be sensitive to cultural practices—however, culture and religion should not be used as an excuse to condone discrimination and insensitivity towards individuals. Awareness must be raised among the general public and sensitivity and regard for custom must be demonstrated by observing the values of equality and human rights as promoted by the international norms with regard to the status of women in the community. Therefore, outdated customary practices need to be revised or discarded in accordance with universal human rights standards. The notion that traditional standards

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283 Nyanungo (n 251).

284 *ibid.*

285 Bohela (n 278).

286 *ibid.*

287 Sotolani (267).

288 Children's Dignity Forum (140).

289 Majani (n 277).

are static and indisputable, disregards the fact that their inconsistency with human rights needs modification. Hence, many valuable efforts by international and national communities that query harmful and detrimental cultural values that militate against equality have been ignored. While the African prejudice against many Western views of African traditional rules and all things African is taken into account, it is essential to understand that African philosophy and practice have also been influenced and become part of the worldwide globalisation of human rights. By zealously adopting international and regional human rights treaties, like the CEDAW and Maputo Protocol, African countries will improve their adherence to human rights.

### **Strengthening Laws and Policies**

Tanzania needs to strengthen its laws and policies that safeguard women from abuse and a discriminatory culture. The reviews in the legal system that address some of the harmful traditional practices, as discussed above only cover amendments to criminal law.<sup>290</sup> However, they have met with societal disapproval as they neither afford assistance and support to victims nor mandate preventative measures to be taken when women's rights are violated. Given the harmful effect of these traditions, the adoption of an extensive stand-alone statute, which will address different forms of violence against women, is recommended. Tanzania needs to adopt laws that provide for criminalisation and punishment to also include prevention, support as well as assistance for survivors.

### **The Involvement of Community Leaders**

The focus on existing international human rights instruments to abolish detrimental traditions may create the impression that Western pressure is being exerted to bring about transformation. At times this approach is condemned as controlling and inconsiderate and is regularly considered cultural imperialism in Africa. Struggles to amend harmful practices are more effective when they originate from within the society that practices them. Therefore, efforts to change or eliminate detrimental cultures need the involvement and understanding of policy makers, local community leaders, and the individuals who have witnessed or/and experienced the effect of detrimental traditional practices within communities. 'Traditional and religious leaders have a significant influence on cultural practices and they are essential in the struggle to change society's attitudes. It is strongly argued that if 'traditional leaders' strive to eradicate harmful practices, then individuals in societies may do the same. These leaders will be useful in dispelling the myths that endorse harmful practices, especially those that affect girls and women. They are in a position to promote moral conduct and respect for women's dignity.

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290 The amendments made to the Tanzania Penal Code on FGM and sexual offences.

## **Empowerment of Victims and the Education of Girls**

Girls must be educated and empowered from a young age, to avoid becoming victims. This is necessary, because at present, children grow up believing that harmful traditional practices are normal. Should they grow up with this belief, it is likely that it will be difficult to resist these practices because of their subordinate status in society. Their emancipation can only be achieved by including human rights education in the primary school curriculum, covering all aspects of women's rights and taking measures to keep girls in school and creating awareness of stereotypes and cultural viewpoints. Parental engagement ought to be encouraged to ensure a comprehensive educational approach is implemented, which is beneficial to both girls and boys equally.

The government must take steps to ensure that women have access to and control over economic resources such as land, employment and credit to further self-confidence, necessary for the elevation of females in the family and society. Harmful traditions persist in a setting where females do not have equal access to income, health and education, and are unfamiliar with their fundamental rights. Illiteracy perpetuates subordination. Empowered girls will be able to make their own decisions about their bodies without fear. Programmes that encourage dialogue among males and females to counter domestic violence, which is the usual manifestation of manhood, ought to be introduced and promoted. Furthermore, school programmes and books need to be examined and reviewed to eradicate any bias against the female and create awareness of the relevant instruments for the protection of 'women's rights.'

## **Both Men and Women Must be Involved**

The systematic encouragement of and support for collective action among women themselves is needed. The failure to include women in the development, articulation and enforcement of human rights has made gender subjects invisible and prevented gender-based violations from being scrutinised.<sup>291</sup> Females' voices and concerns should be channelled into appropriate platforms to emphasise their rights. Women's voices must be heard. The attainment of gender equality must involve a shift in mindset, for both males and females to change attitudes, perceptions and behaviour. Efforts to end harmful traditional practices that impact women must involve and address men. This need was illuminated by the fact that most of the harmful traditional practices that were highlighted in this article are conducted for the benefit of men. It is important to involve men by acknowledging their role in society as breadwinners, heads of families as well as community leaders. Therefore, men are in a primary position to support the abolition of detrimental traditions.

## **Conclusion**

It is disgraceful to point out that harmful traditions, protected by law, still exist in Tanzania. Undesirable norms that are inconsistent with and undermine the enforcement

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291 Majani (n 277).

of the provisions of the Constitution, national legislation and international human rights values are still the order of the day. Most of these practices are based on the conviction of male supremacy, while the female experiences human rights violations in the name of tradition. The current situation demonstrates an ignorance of how culture came to be established. Many traditional practices do not reflect their origins, instead, they have been mutated into detrimental practices by those who use tradition as a scapegoat to benefit their purpose.<sup>292</sup> It is a fact that the most harmful practices in the name of tradition experienced by women, are beneficial to male perpetrators. Women's sexuality is controlled by males and their economic and political subordination lowers their status and constrains structural reform and the attitudinal changes required to attain gender equality. Blind adherence to these harmful traditions has facilitated violence against women.<sup>293</sup> It is essential that certain traditions be reviewed and eliminated, in line with universal human rights. Therefore, a limitation of certain customary practices is essential to achieve gender equality. Customs and traditions ought not to stand in the way of the realisation of women's rights but should rather be a means of paving the way forward for women to obtain their rights.

Tanzania is committed to the International Conference on Population and Development (ICPD) to review the Marriage Act and key legal and institutional frameworks by 2025 to address gender inequality.<sup>294</sup> In the same spirit would be a module of engagement on accelerating the ICPD Tanzania promise to improve school health programmes on age-appropriate reproductive health education.<sup>295</sup>

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292 Msuya (n 99).

293 Children's Dignity Forum (n 140).

294 The 25th anniversary of the International Conference on Population and Development (ICPD25) (n 203).

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