LEGAL OPINION CASE NO.112

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Do Sections 11(1) and 23 the Tanzania Citizenship Act violate Tanzania's Obligations Regarding the Equality of Men and Women Under International Human Rights Law and its Own Constitution?

SUMMARY: Tanzania is under international obligations to ensure that women are not discriminated against. Tanzania is bound by the International Convention on the Elimination of Discrimination Against Women (CEDAW), the International Convention on Civil and Political Rights (ICCPR) as well as various other international and regional instruments that guarantee the right to non-discrimination. The present case overtly treats women differently to men in relation to citizenship rights of a spouse. By denying the applicant (Sion Gabriel) the same rights as men to confer citizenship on her spouse, merely because she is a woman is in clear violation of international human rights law.

QUESTION ON WHICH OPINION IS SOUGHT: This case turns on whether sections 11(1) and 23 of the Tanzania Citizenship Act are void for inconsistency with the Tanzanian Constitution as well as its obligations under international human rights treaties. There are two issues involved. The first is the differential treatment of men and women under the Tanzania Citizenship Act. Section 11(1) of the act allows men but not women to confer citizenship on their spouses through marriage. The second issue concerns the ouster of the jurisdiction of the court under section 23 of the same act. That section says that the minister responsible for citizenship decisions need not give any reasons for denying anyone citizenship and oust the jurisdiction of the court to review such a decision. Section 11(1) is, on the face of it, at odds with section 12 (1) and (2) of the 1977 Constitution of Tanzania and with her obligations under international human rights treaties. Section 23 of the *Tanzania Citizenship Act* appears to violate sections 13 of the same Constitution relating to equality before the law as well as section 30(3) regarding the enforcement of rights. The issues on which opinion is sought can be clustered as follows 1) What are Tanzania's obligations under International human rights treaties are regards treatment of men and women? 2) Does Tanzania law square with these obligations? 3) Are provisions of the Citizenship Act at war with both the Constitution and international human rights law? 4) If the answer to (2) and (3) is yes, what recommendations can be made in this case to ensure respect for both the Constitution and international human rights treaties to which Tanzania is party?

ANALYSIS: The answers to these questions are in four parts. Part One looks at the prohibition against discrimination generally and that against women in particular under the human rights instruments that Tanzania has ratified. The aim is to establish whether the equality provisions of the Constitution comport with these definitions and with the obligations they impose. This Part also discusses some comparative approaches to the question from the United States. Part Two analyses the relevant provisions of the Tanzania Constitution, the relevant sections of the *Tanzania Citizenship Act* as well as the Republic's reports to the CEDAW Committee. Part Three looks at the constitutionality of provisions of the *Tanzania Citizenship Act* ousting the jurisdiction of court in matters of citizenship. The final part offers some recommendations on possible human rights challenges that could be mounted against Tanzania's citizenship law.

Part One: Discrimination under International Human Rights Law

This case is not only about discrimination against women, it is also about the violation of an alien's constitutional rights through ouster of the Court's jurisdiction in matters of citizenship. There are three causes of action involved here: sex discrimination, the protection of the right to equality before the law and enforcement of the right to the equal protection of the laws. We begin the analysis with a discussion of sex discrimination and equal protection provisions of the key human rights provisions.

i. Sex Discrimination and Equal Protection under International Human Rights Instruments

There are two very different definitions of sex discrimination in international human rights law: the broad, all-inclusive definition in the Convention for the Elimination of all forms of Discrimination Against Women, CEDAW and the narrow, process-based definition in the other Human Rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, ICCPR.

CEDAW does not, strictly speaking, define sex discrimination. Instead it gives a definition of 'discrimination against women.' Article 1 provides that for the purposes of the Convention:-

> "[T]he term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[1]

This definition has three components. First, conduct or legislation can be discriminatory both in terms of its effect and as well as in terms of its purposes. Something is discriminatory in effect if it does, in fact, have discriminatory impact. It is discriminatory in terms of its purposes if, in fact, the legislature intended to be so. Second, under CEDAW, "discrimination against Women" is not limited to state action or other actions done under colour of law. Even private discrimination is prohibited. Thirdly, the ambit of discrimination is expanded beyond the traditional categories by the use of the phrase "or any other field."[2] Put differently discrimination against women cannot be immunized from scrutiny under CEDAW by fact that it does not involve "political, economic, social, cultural and civil" questions.

[1] Art. 1, CEDAW.
[2] Id.

On the face of it, this all-encompassing definition may appear to set too stringent a standard. Yet, in significant respects, this definition mirrors that in Article 1 of the Convention for the Elimination of all forms of Racial Discrimination, CERD. There are reasons for this. In important respects, sex discrimination has many of the elements of racial discrimination: both are based on immutable characteristics- the person against whom there is sex or race discrimination can do nothing about his or her race or sex; both forms of discrimination intersect and are reinforced by other forms of discrimination. Thus, for instance, discrimination against a group because of its religious beliefs intersects with discrimination against the same group on race and sex grounds. Victims of sex or race discrimination are thus doubly discriminated against precisely for this reason. Equally pernicious is the ease with which both racial and sex discrimination are privatized and removed from the realm of state action.

Other international human rights instruments do not contain a definition of "discrimination against women."[3] Instead they outlaw sex discrimination and mandate equal treatment for men and women.

We begin with the Charter of the United Nations. The Charter articulates the purposes of the United Nations, one of which is "to achieve international co-operation….. in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, *sex*, language, or religion."[4] This purpose is then articulated in the form of specific obligations in the universal declaration of human rights. The declaration furnishes "a common standard of achievement for all peoples and all nations." So far as is relevant to this case, the Universal Declaration articulates three different notions of equality: 1) an equality of rights 2) a recognition that "characteristics based on race, sex, religion, colour or ethnic origin" do not of themselves constitute relevant differences justifying inferior treatment and 3) a right to enjoy equal protection of the laws. Article 1 enunciates a general principle of equality. It proclaims that all human beings "are born free and equal in dignity and rights."[5] Article 2 guarantees to "everyone… all the rights and freedoms set forth in [the] declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[6] As for law's protection, the Declaration proclaims that "all are equal before the law and are entitled without any discrimination to equal protection of the law."[7]

To forestall the frustration of these rights through failure of effective remedies, the Declaration affirms the right of everyone to "an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[8] These rights are to be determined through "a fair and public hearing by an independent and impartial tribunal."[9]

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[3] Art.2, International Covenant of Civil and Political Rights, ICCPR, Art. 3 of International Covenant on Economic, Social and Cultural Rights, ICESCR, Art. 2 of African Charter of Human and Peoples Rights, ACHPR.
[4] See UN Charter, Art. 1(3)
[5] Universal Declaration of Human Rights, 1948. Art. 1.
[6] See *id,* Art. 2
[7] *id,* Art. 7.
[8] *id.* Art 8.
[9] *Id.* Art. 10.

A preliminary objection may be made that the Universal Declaration is just that: a declaration and that therefore it gives no rights that should be respected by the United Republic of Tanzania. We shall return to this question below. First, however, we turn to the other human rights instruments that Tanzania has, in addition to CEDAW, actually ratified.

The most relevant of these is the International Covenant on Civil and Political Right, ICCPR. Under Article 2, each state party undertakes "to respect and to ensure to all individuals[10] within its territory and subject to its jurisdiction, the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status." Under Article 4, states may derogate from their obligations under the Covenant. But even then, the measures they take may "not involve discrimination solely on the basis of race, colour, sex, language, religion or social origin." And under Article 26, the Covenant simply states that "all persons are equal before the law and are entitled without any discrimination to equal protection of the law."[11] Under the same article the "law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Compared to CEDAW, the ICCPR is more narrowly focused on equality of treatment and of rights under the law. Moreover, ICCPR bars only state action or actions done under colour of law. Its provisions do not reach private violations of rights. Many of the other human rights instruments echo the approach of ICCPR. Article 3 of the International Covenant on Economic, Social and Cultural Rights, ICESCR, requires the state parties to "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant."

Similarly, Article 2 of the African Charter of Human and Peoples Rights, ACHPR, guarantees to every individual "the rights and freedoms recognized and guaranteed by the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social arising, fortune, birth or other status."[12] Under Article 18 on the family, the state must ensure that they eliminate "all forms of discrimination against women" and also "ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[13] Implicitly, then, the ACHPR, imposes the obligations arising under the Universal Declaration and other Human rights covenants to State parties to the charter. Exactly which declarations and conventions the Charter refers to is a question of interpretation. Is it the conventions and declarations that existed when the charter came into force or is it the declarations and conventions that existed when it was made? Or, as applied to particular state party, is it the conventions and declarations in force on the day the particular state party ratified the Charter? I would think that the best all round view is that this expression refers to the conventions and declarations that existed the day the convention came into force. This would mean that though the Charter was adopted by the Organisation of African Unity, OAU on the 17th of June, 1981, for the

[10] These are not rights of citizens, they are rights of individuals subject to the jurisdiction of a state party to the covenant, whether citizen or not.
[11] Similar language-equal protection-has been used by the US court to scrutinize and strike down paternalistic or invidiously discriminatory legislation.
[12] Art.2 ACHPR
[13] id. Art. 18.

purposes of the stipulation in Article 18 the relevant conventions and declarations are those in place on the 21st of October, 1986 when the Charter came into force.

One small matter needs to be cleared out of the way. Though international Conventions and declarations outlaw discrimination, international law does not altogether prohibit race or sex considerations in policy matters. CEDAW explicitly allows state parties to engage in benign or positive discrimination for the purposes of ameliorating the consequences of past human rights violations. This accords with the general principles of law. The correct view of the matter is probably as stated by the Permanent Court of International Justice, PCIJ, in the *Minority Schools in Albania case*.[14]

In that case, the PCIJ said that "equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations." This recognises that the formal treatment of two individuals who are not similarly situated may in law amount to equality of treatment but it may not, substantively, amount to fair treatment. It would seem then that the appropriate test of acceptable differentiation centres upon what is just and reasonable or objectively and reasonably justified. In other words, taking someone's sex into account or considering other specific distinction is not always *per se* impermissible. It is taking someone's sex into account for arbitrary reasons or certain unjust purposes that is prohibited.

To this point I have concentrated on explaining precisely what types of discrimination are prohibited under the international human rights instruments that Tanzania is bound by. In next section I return to the question left open earlier on in the analysis. The Universal Declaration of Human Rights is not a treaty, does it impose any obligations on Tanzania?

ii. Customary International Law: What obligations do the UN Charter and the Universal Declaration of Human Rights impose of the United Republic of Tanzania.

Tanzania became a member of the United Nations upon independence. Under Article 56 of the UN Charter it has the obligation - in concert with others or alone- to promote, among others, "universal respect for and observance of human rights and fundamental freedoms of all without distinction as to race, sex, language or religion." This responsibility includes adherence to the rights enumerated in the Universal Declaration and elaborated in all other UN sponsored covenants and declarations. These responsibilities are, in turn, anchored in the fact, made clear by the Charter itself, that in the modern age how a state treats its citizens is a matter of international concern. It is therefore important to understand the precise nature of the obligations imposed on or voluntarily assumed by Tanzania under both the Charter and other international instruments.

Let us return to the UN Charter. It provides that respect for human rights is one of several ways of creating conditions of international peace, stability and well-being. The Charter says that in order to create the condition for peaceful and friendly relations among nations ...

> "the United Nations shall (among other goals) promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion."[15]

[14] *Minorities in Albania Case*, PCIJ, Series A/B, 1935 no. 64.
[15] UN Charter, Art. 1 (3)

And further that the people of the United Nations "reaffirm faith in international human rights, in the dignity and worth of the human person, in the equal rights of men and women…."

The Charter itself does not itemize these fundamental rights and freedoms. It is left to the second basic document, the Universal Declaration of Human Rights to elaborate these rights. Paragraph 5 of the Universal Declaration preamble reaffirms " the faith" of the "peoples of the United Nations" in the "dignity and worth of the human person and in the equal rights of men and women…" The Charter explains why a Universal Declaration was thought necessary. It notes that " a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge."

What precisely is the status of the Universal Declaration as a matter of international law and as a source of enforceable rights? Does it create any binding obligations for Tanzania? On the authorities, it would appear that it does. According to the US Court of Appeals for the Second Circuit[16], a U.N. Declaration is ….. "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated."[17] Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community."[18] Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States."[19] Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law".[20]

The view of the Second Circuit finds some support in the earlier opinion of the Restatement (Third), Foreign Relations Law of the United States. The Restatement sets down the categories of contemporary customary international law of human rights. On gender discrimination the Restatement says:[21]

> "The United Nations Charter (Article 1(3)) and the Universal Declaration of Human Rights, (Article 2) prohibit discrimination on various grounds, including sex. Discrimination on the basis of sex in respect of recognised rights is prohibited by a number of international agreements including the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and more generally by the Convention for the Elimination of all forms of Discrimination Against Women… The domestic laws of a number of states, including those of the United States mandate equality for, or prohibit discrimination against, women generally or in various respects. Gender based discrimination is still practiced in many states in varying degrees but

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16 *Filartiga v. Pena Irala*, 630 F.2d 876; 1980 U.S. App. LEXIS 16111

17 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat).

18 E. Schwelb, Human Rights and the International Community 70 (1964).

19 34 U.N. ESCOR, supra.

20 Waldlock, Human Rights in Contemporary International Law and the Significance of the European Convention, Int'l & Comp. L.Q., Supp. Publ. No. 11 at 15.

21 *Restatement (Third), Foreign Relations Law of the United States*. Comment following section 702. Quoted in Steiner & Alston, International Human Rights in Context: Law, Politics, Morals pp. 905-906.

> freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law.

If the Second Circuit and the Restatement are right, then both the Charter and the Universal Declaration are now covered under Article 38 of the *Statute of the International Court of Justice* as "international custom….of a general practice accepted as law." In order to qualify as such the two instruments must enjoy "a general recognition among states" as "obligatory."

Where the conditions for custom to become binding law are satisfied, a long-standing practice passes into *jus cogens* or a peremptory norm of international law. On this analysis, then, the prohibition against sex discrimination is *jus cogens* and obligatory for Tanzania. But the Tanzania government may contest the Restatement's conclusion that the Universal Declaration has now passed into international customary law. That, however, would not conclude the matter for the purposes of this case.

Tanzania has also signed a range of international instruments prohibiting sex discrimination. What obligations has Nigeria acquired by ratifying these covenants and treaties? We now turn to these instruments.

ii. Obligations under CEDAW and other International Human Rights Treaties

As of 1st October, 2004 Tanzania was one of 178 countries who are state parties to CEDAW. By virtue of this ratification the Republic is one of over 90% of UN members who have ratified the Convention. Tanzania signed CEDAW in August 1985 and ratified it in 1986. Unlike countries such Egypt, Bangladesh, Australia and numerous other states, Tanzania entered no reservations to CEDAW. Indeed, it has always fulfilled its reporting obligations under CEDAW from the very first. Upon coming into force of CEDAW, Tanzania submitted its first report promptly and this was discussed by the Committee on the Elimination of All forms of Discrimination Against Women in January 1987. The addendum to that initial report was submitted in 1989 and discussed and accepted by the Committee in 1990. The Republic combined its second and third reports covering the period 1990 to 1996 and submitted them to the Committee in 1996.

There is therefore nothing in the record that suggests that suggests denunciation or equivocation by the Republic as regards its obligations under CEDAW. On the contrary, every action by Tanzania since it ratified the Convention show a clear and unequivocal agreement to be bound by all the provisions of CEDAW.

Likewise other international human rights instruments. Tanzania ratified both the International Covenant of Economic, Social and Cultural Rights, ICESCR and the International Covenant on Civil and Political Rights on 11th September, 1976.

The enactment of the 1977 Constitution for the United Republic of Tanzania therefore antedates accession to the UN Charter and the Universal Declaration and the ratification of ICECSR and the ICCPR. The Constitution predates the ratification of CEDAW. What ramifications, if any do these time-lines have on Tanzania's obligations under international law?

We begin with the ratifications of ICCPR and the ICESCR. Both predate the 1977 Constitution. It is arguable that Tanzania made its Constitution fully alive to its continuing obligations under international law. There is a presumption that a state will "not legislate

contrary" to its international obligations. The proper principle of interpretation is that where an act and a treaty deal with the same subject, the court will seek to construe them so as to give effect to both without acting contrary to the wording of either.

It is often argued, in interpreting acts of Parliament, that where two acts of Parliament are in conflict over some subject, the later in time prevails. *A fortiori*, it may be said here, where there is conflict between an earlier treaty and a later statute, it must be presumed that the legislature intended to modify the full force of the treaty obligation. This argument, though plausible, must be severely qualified. As a rule, for a court to accept such an interpretation, the language of the later enactment, in this case the Constitution, must be unambiguous. As I argue below, the language of the 1977 Tanzanian Constitution is consistent with the Republic's continuing obligations under both ICESCR and ICCPR. We must therefore presume that the Republic never intended to modify or repudiate any of its international obligations under the two Conventions when it enacted the 1977 Constitution.

The question whether a later enactment by a state modifies that state's international obligations arose for decision by the United States District Court for New York in the case of *United States v. Palestine Liberation Organisation*.[22] Under the 1987 *Anti-Terrorism Act* all Palestine Liberation Organisation, PLO, offices in the United States were to be shut down. The then Attorney General interpreted this stipulation to include the office of the PLO Mission to the United Nations. Such an action would have been in breach of the United States obligations under the United Nations Headquarters' Agreement. The District Court ruled that it could not be clearly and unambiguously established that the *Anti-Terrorism Act* intended to violate an obligation arising under the Headquarters' Agreement.

Likewise, the 1977 Constitution must be in interpreted in a way that does not do violence to either the ICESCR and the ICCPR.

How about CEDAW? Tanzania ratified CEDAW after making the 1977 Constitution. Are any of the Convention's obligations weakened by this fact? It is to this question that I now turn. It may be argued that Tanzania ratified CEDAW fully cognisant of the commandments of its own Constitution. In spite of that, the Republic entered no reservations to CEDAW. As a matter of interpretation, this fact should raise a presumption that the Republic saw no contradiction between the text of CEDAW and the commandments of its own Constitution. Such a presumption implies that when faced with rival interpretations of the Constitution, the Court must prefer the interpretation that gives full effect to CEDAW. To see what this might mean in practice, I now turn, in Part Two below, to the relevant provisions of the Constitution of the United Republic of Tanzania.

Part 2: The Republic's Obligations under the 1977 Constitution

The entry point to this discussion is the preamble to the Tanzania Constitution. Even though this is not enforceable in court, it provides the ethical content and values against which specific provisions of the constitution are to be interpreted and understood. The preamble commits the Republic to principles of freedom and justice and to the creating an independent judiciary to ensure "that all human rights are preserved and protected."[23]

[22] *USA v. Palestine Liberation Organisation*, 695 F. Supp. 1456 (1988)

[23] p. 13, Constitution of the United Republic of Tanzania, 1977.

Part I- sections 1-5 of Chapter One - is constitutive. Parts II, that is, sections 6 to 11 of the same chapter, are statements of foundational principle. Section 3(1) of Part I, proclaims the United Republic "a *democratic* and socialist state which adheres to multiparty democracy."[24] The principles commit the Government to the triple duty of ensuring that 1) "human dignity and other *human rights* are respected and cherished;"[25] 2) "human dignity is preserved and upheld in accordance with the spirit of the *Universal Declaration of Human Rights*;"[26] and 3) "all forms of *injustice*, intimidation, discrimination, corruption, oppression or *favouritism* are eradicated."[27] (*emphasis added*).

Though the constitution makes it clear that "*the provisions of this part of this chapter are not enforceable by any court*"[28] similar provisions in other constitutions have been held to be of interpretative value in giving meaning to the enforceable parts of the constitution. In India Courts have long regarded such principles as embodying the spirit of the Constitution. A line of decisions[29] from the Indian Supreme Court have held that principles such as these are useful in supplementing the bill of rights. The court has even been willing to allow Parliament to amend fundamental rights in order to give effect to these principles so long such amendments do not attack the core of the right. General provisions in the constitution may also be construed to in light of the directive principles. As one commentator has observed:

> "the Indian experience has shown that the value and influence of constitutional principles can largely be determined by the willingness of the courts to apply the principles."[30]

Read this way, that is, as interpretive guides, these provisions add life to the provisions of the Bill of Rights and Duties set out in Part III of the 1977 Constitution. Like the Universal Declaration, the Constitution recognises the three different rights essential to equality: the equality of rights, the principle of non-discrimination and the right equal protection of the laws. Section 12 (1) proclaims that "[a]ll human beings are born free and are *all equal."*[31] The next section, 13 (1) says that "[a]ll persons *are equal before the law* and are entitled, without any discrimination, to *protection and equality* before the law."[32] This provision is, in terms, an amalgam of similar clauses in the Indian, American and Irish Constitutions. Cases from those jurisdictions interpreting the reach of the concept of equal protection may therefore have some relevance in this opinion.

Sub-section 2 of that section provides further that "[n]o law enacted by *any authority* in the United Republic shall make provision that *is discriminatory either of itself or in its effect*."[33] The definition of discrimination under section 13 is somewhat unusual. Subsection (5) says that "[f]or the purpose of this Article, the expression "*discriminate*" means to satisfy the needs, the

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[24] *id.* Section 3(1)
[25] *id.* Section 9(a)
[26] *id.* Section 9(f)
[27] *id.* Section 9(h)
[28] *id.* section 7(2)
[29] see *State of Kerala v. Thomas*, A.I.R. 1976 S.C. 389; *Mukesh v. State of M.P.* A.I.R. 1985 S.C. 537; *Laxmi Khanna v. Union of India*, A.I.R. 1987 S.C. 232; *Chief Justice v. Dikshitulu*, (1979) 2 S.C.C. 34; *A.B.K. Singh v. Union of India*, A.I.R. 1981 S.C. 298.
[30] see Bertus de Villiers, *The Constitutional Principles: Content and Significance* in Birth of a Constitution, ed. Bertus de Villiers.
[31] *supra* note 23, section 12(1)
[32] *id.* section 13(1)
[33] *id.* section 13(2)

rights or other requirements of different persons on the basis of their *nationality, tribe, place of origin, political opinion, colour, religion* or *station in life* such that certain categories of people are regarded as *weak or inferior* and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications."[34] (*emphasis added*)

There are three things to note about these provisions. First, they, like the Universal Declaration, recognise three different notions of equality. This opens more scope for judicial interpretation than constitutions that simply grant only equal protection of the laws. Secondly, unlike CEDAW but very much like the ICCPR, these provisions apply only to state action. In other words, on the face of it, the 1977 Constitution does not bar private individuals from violating the constitutional rights of others. Indeed, sections 13(3) above and 13(4) below appear to put this matter beyond dispute. Sub-section (4) specifically providing that "*[n]o person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.*"[35] Though this provision raises important questions whether in fact Tanzania is complying fully with its international law when its constitution appears to immunize private conduct from scrutiny, it is fortunately, not a question involved in the case we have here. Thirdly, the anti-discrimination provision appears deliberately to avoid outlawing sex discrimination. The relevant criteria for the purposes of article 13 are "nationality, tribe, place of origin, political opinion, colour, religion or station in life." Is this a closed list or an open list? Put differently, can more grounds of discrimination be added to this list or are these the *only permissible* grounds for an anti-discrimination suit in Tanzania? For our purposes, I shall argue that it does not matter what view one takes.

I make two arguments in this regard. The first is the meat and bones of this Part of the opinion. I contend here that the *anti-discrimination clauses* of the 1977 Constitution, that is, sections 13(2), (4) and (5), do not, on the face of it, prohibit sex-discrimination. But this is not fatal. Both the language of the *equal protection clause* -section 13(1) - and the *equality clause* - section 12(1) are sufficient to support a sex discrimination claim such as that involved in this case. The second argument, developed in Part 3 below, rests on the proposition that the Government of Tanzania has violated the constitutional rights of Sion Gabriel's husband by denying him the right to challenge in court the rejection of his application for citizenship by naturalization. Put another way, then, I am arguing as follows. One, that based on the Tanzanian Constitution and international human rights law, the Government is in double violation of Sion Gabriel *right to equality* under section 12(1) and her *right to equal protection of the laws* under section 13(1). Two, that the Government has, through the provisions of the Citizenship Act, violated Sion Gabriel's Husband's constitutional rights by denying him the right to challenge the decision of the government not to naturalize him.

I turn now to an elaboration of the first argument. The proper starting point is Tanzania's own Report to CEDAW Committee. Speaking of its efforts to implement CEDAW provisions regarding the "citizenship rights" of women, the government reports that:

> "The position has not changed since 1990. The nationality of women depends on various factors such as birth and marriage. Men and women have equal rights in respect of citizenship except in certain circumstances."

[34] *id.* section 13(5)
[35] *id.* section 13(4)

These 'certain circumstances' are then described as follows:

> "Whereas a foreign woman married to a Tanzanian man acquires citizenship automatically (subject to denouncing her former citizenship, as required by law) a foreign man marrying a Tanzanian woman does not enjoy the same rights."

The Government then concludes that "[t]his position regarding citizenship has not caused problems." This conclusion is not tenable. Sion Gabriel is in Court precisely because this legal position "regarding citizenship" has "caused problems" for her and her family. The conclusion then must be that contrary to the Republic's assertions in its CEDAW report "men and women in Tanzania" do not have "equal rights in respect of citizenship." This result violates both the provisions of the Tanzanian Constitution and obligations under CEDAW.

This is easier clarified by looking at section 12 (1) of the Constitution again. That section proclaims that "all human beings are born free and are *all equal*." Equality as used in this provision means either or all of the following things.

First, that likes should be treated alike. The relevant question is whether two individuals are in fact alike. The principle of equal treatment, it has been said "requires that all individuals be treated similarly to the extent that they are the same and treated differently to the extent that they are different."[36] A difference is relevant "if, but only if, it bears an empirical relationship to the purpose of the rule."[37] The threshold issue for a court, then, is what characteristics the state should take into account in making a decision whether any two individuals are *relevantly* alike. Since 1948 international human rights instruments have ordained that individuals cannot be treated unequally only on account of differences based mainly or wholly on characteristics such as "race, sex, religion, colour, ethnic or national origin or political opinion." Read this way, section 12 (1) means that Tanzania cannot, in terms of its own Constitution, bar its female citizens from conferring citizenship on their alien spouses.

But equality of treatment need is not the only requirement inherent in the idea of equality protected by section 12(1). Consider a second notion of equality implicit in that section. Tanzania has argued to the CEDAW committee that women and men in the Republic are treated alike. If we accept this argument, implausible as it seems in light of the clear provisions of the *Citizenship Act*, we must conclude -given the evidence of this case- that even though men and women are treated equally, the results of that treatment is inequality of rights between Tanzanian men and women. For, if it is true that men and women are treated equally, why is it that the result of that treatment is that men can confer citizenship on their alien spouses but women cannot?

The conclusion, then, must be that Tanzania has violated the provisions relating to equality either because 1) it is treating women and men differently and thus violating the requirement that *likes should be treated alike* or 2) it is treating men and women in a formally equal manner but that this treatment is resulting in substantive violation of the woman's right to equality by denying her a benefit that is given to men *qua* men by the *Tanzanian Citizenship Act*. Under whichever of these two readings of section 12(1) we take, the Citizenship Act has violated the Constitution and must to that extent be void. Reading section 12(1) this way gives "legal

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[36] See *Note: The Structure of Equal Protection Review* in Stone, Seidman, Sunstein & Tushnet, Constitutional Law at p. 536

[37] *id.* at p. 537

recognition to the realisation that apparently equal treatment could entrench disadvantage."[38] Putting the matter this way shows up the arbitrariness of the violation in particularly sharp relief: Tanzanian men are able to confer citizenship on their alien spouses *only because they are men*. Women are not able to do so *only because they are women*.

In the event that the court is unsure as to the contents of the concept of equality protected by section 12(1), that doubt can be removed by interpreting that section in light of the obligations that Tanzania has under the human rights instruments that it has ratified, in particular CEDAW and ICCPR. The South African Constitutional Court has used precisely this approach when faced with gaps in the Constitution or a dearth of local judicial authorities on particular provisions. This use of international law has been justified on the grounds that to grant "individuals the full measure"[39] of the bill of rights, it is necessary to interpret the rights therein generously. In South Africa customary international law and self–executing international treaties are binding yet the Constitutional Court has ruled that even those treaties that are not binding -because not enacted by Parliament- "may be used as tools of interpretation."[40] The rationale for this as explained by the Court is that:

> "International agreements and customary international law…. provide a framework within which [the bill of rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments such as the United Nations Committee of Human Rights, the Inter American Commission on Human Rights, the Inter American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and, in appropriate cases, Reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of the provisions of [the bill of rights]." [41]

The Constitutional Court was not only willing to borrow this international jurisprudence for the purpose of giving life to the bill of rights, it was prepared to go even further. Chaskalson J argued that even experiences from other countries with a longer history of rights jurisprudence would be invaluable in interpretation of the bill of rights in the South African Constitution. He had not doubt that:-

> "[C]omparative bill of rights jurisprudence will no doubt be of importance, particularly in the early days of the transition where there is no developed jurisprudence in this branch of law on which to draw."[42]

But even if I am wrong in urging the Tanzania High Court to read section 12(1) of the 1977 Constitution in this way, the Tanzania Government would still not be out of the woods and the Citizenship Act would still be unconstitutional on the basis of other provisions of the Constitution. Let us consider the ramifications of the equal protection clause of Section 13. The relevant sub-section says that "[a]ll persons *are equal before the law* and are entitled, without any discrimination, to *protection and equality* before the law." The general principle the court in India have held is that "equal protection of the laws means the right to equal treatment in

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[38] See Sandra Fredman, *Combatting Racism with Human Rights* in Discrimination and Human Rights: The Case of Racism, ed. Sandra Fredman.
[39] See *Minister of Home Affairs (Bermuda) v. Fisher* [1980] AC 319 at 328-329. Quoted in *State v. Makwanyane*, *infra*, note 40.
[40] *The State v. Makwanyane*, CCT/3/1994.
[41] Chaskalson J, *id.* at para. 35.
[42] *id.* para. 37.

similar circumstances." Under equal protection, certain types of discrimination may be permissible if they are rationally related to a legitimate state objective. The key test under these conditions is "reasonableness." The test applied in India is a modification of the test that the US Supreme Court applies in such cases. A consideration of US cases may therefore give content and meaning to equal protection.

The leading case in this regard is the United States Supreme Court decision in *Frontiero v. Richardson*[43]. *Frontiero* does not bind Tanzanian courts but it provides a highly persuasive framework for analyzing the content of the equal protection clause as it may apply in the Sion Gabriel case. The issue before the Supreme Court in *Frontiero* was, like the matter before us, the legal disparity of rights between men and women as spouses. Under Federal Law, a male member of the uniformed service could automatically claim his spouse as a dependant, thereby receiving greater quarters allowance and medical benefits. However, a woman in the uniformed services could claim comparable benefits *only if* she demonstrated that her husband was, in fact, dependent on her for more than half of his support. The Court considered the matter and ruled that this differential treatment violated the equal protection portion of the due process clause of the 5th amendment to the US Constitution.

Said the Court:

> "…sex like race and national origin, is an immutable characteristic determined solely by the accident of birth. [The] imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'

The Court considered that "classifications based on sex, like classifications based upon race, alienage and national origin, are inherently suspect and must, therefore, be subject to close judicial scrutiny."

In deciding *Frontiero*, the Court quoted its earlier decision in *Reed v. Reed* with approval. At issue in *Reed* was an Idaho statute that established a hierarchy of persons entitled to administer the estate of a person who dies intestate e.g. 1) Parent 2) child 3) sibling. The statute provided further that when two or more person individuals were equally entitled to be appointed as administrators of an estate, the male applicant must be preferred to the female. Idaho justified this differentiation on the basis that it avoided conflicts where two or more persons were entitled to administer a decedent estate.

The Court voided the statute on the basis that it provided "dissimilar treatment for men and women who were similarly situated." Likewise in Tanzania. Though the Constitution of the Republic guarantees equality before the law as well as protection of the law without discrimination, the Citizenship Act allows the Government to treats in a dissimilar fashion men and women who are similarly situated. This is precisely the sort of arbitrary legislative choice that the 1977 Constitution was meant to prohibit. The violation lies in the fact that though both men and women are equal, if they get married to foreigners they have unequal rights; the woman having fewer rights solely because of her sex. To sustain such a statutory preference, so arbitrary and patently unconstitutional on the face of it, the state needs a compelling reason. The starting point of judicial inquiry must surely be a presumption that

[43]cite as *Frontiero v. Richardson*, 411 US 677 (1973)

men and women are equal in rights, responsibilities and opportunities as ordained by the Constitution.

In *Reed*, the Supreme Court thought the statute under attack particularly pernicious because it did not bear "a rational relationship to a state objective that is sought to be advanced by [its] operation." Even though accepting that the state had a legitimate interest in minimizing conflicts that may eventually end up in probate courts, the Supreme Court had not doubt that this gender classification was "the very kind of arbitrary legislative choice forbidden by the equal protection clause."

The Government of the Union may argue that American cases are no use in interpreting particular sections of the 1977 Constitution. But even that argument would not end the enquiry. As pointed out earlier, Tanzania has entered no reservations to CEDAW or to any other of the relevant human rights instruments. Even if the Republic rejected American cases referred to above, it cannot as easily wish away the specific obligations that it has acquired by voluntarily ratifying these instruments.

Let us evaluate the extent of the obligations imposed by these instruments. So far as is pertinent to the case in issue in this opinion, the relevant obligation is in Article 16 read together with the undertaking in Article 2 of CEDAW. Under Article 16, State Parties undertake to ensure equality of rights between men and women with reference to marriage and family. The states commit themselves to taking all "appropriate measures to eliminate discrimination against women in all matter relating to marriage and family relations." In particular, they promise to "ensure on a basis of equality" that men and women shall have the same rights 1) "to enter into marriage"[44]; 2) "to freely to choose a spouse and to enter into marriage with their free and full consent"[45]; 3) "and responsibilities during marriage and at its dissolution"[46]; 4) "and responsibilities as parents, irrespective of their marital status, in matters relating to their children"[47]; 5) "to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights"[48]; 6) "and responsibilities with regard to guardianship, ward-ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation"[49] 7) "personal rights as husband and wife, including the right to choose a family name, a profession and an occupation"[50] and 8) "for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property."[51]

The provisions of the Citizenship Act disabling women from conferring citizenship on their non-Tanzanian spouses not only violate Nigeria's undertaking in Article 2 and Article 16 1(a) but also provisions of the 1977 Constitution. Collaterally, the effect of the Act is to impose additional burdens on the women with regard to their married life. The Act erects barriers to what a family can do together. Sion Gabriel's family must face different visa requirements when they travel; they may have to pay different user fees for services otherwise available for free or for a modest fee for Tanzanians; their right to jointly own property or invest may be

[44]Art. 16 1(a)
[45] Art. 16 1(b)
[46] Art. 16 1(c)
[47] Art. 16 1(d)
[48] Art. 16 1(e)
[49] Art. 16 1(f)
[50] Art. 16 1(g)
[51] Art. 16 1(h)

severely restricted. Each of these additional burdens arises from the fact that the Tanzanian Citizenship Act has chosen to treat Tanzanian women differently from the men. This differential treatment of women is based solely on the fact that they are women. There is no compelling state interest or policy objective claimed by Tanzania for imposing these disabilities on women. In legal terms, these burdens are, taken together, additional violations of the obligations imposed on Tanzania by Articles 2 and 16 of CEDAW and by its own Constitution.

On this reading, there is little doubt that Sion Gabriel's rights to equality and equal protection under sections 12(1) and 13 (1) and various provisions of CEDAW have been violated. What remedies can the court give given this conclusion? This is the subject matter of Part Four of this opinion. Before taking up that issue, however, I would like to return to an issue that I raised before.

I argued earlier on that Sion Husband's constitutional rights have also been violated. What is the legal basis for that assertion? In which particular ways has that right been violated?

Part 3: Has the Government of Tanzania violated the Constitutional Rights of Sion Gabriel's Husband?

Sion Gabriel has been married to her husband for nearly 30 years now. One could argue that 30 years and two children later is a compelling reason by itself for naturalizing the man as a citizen of the Republic. However, in light of the fact that his applications for naturalization have so far been denied, such an argument will not persuade the registration authorities. His claim to citizenship by naturalization must, therefore, be founded on law.

The entry point is, once again, the 1977 Constitution. Like many other constitutions, that of Tanzania makes a crucial distinction between the rights and freedoms of "every citizen" and the rights and freedoms of "every person." The rights to vote[52], to move into and live in any part of Tanzania,[53] to information[54], to take part in the governance of the country[55], to participate in decisions affecting him or her[56], to equal opportunity to hold any office[57] and the duty to protect the independence and sovereignty of Tanzania[58] belong to "every citizen." All other rights, including the right to equality before the law,[59] the right to personal freedom,[60] the right to privacy and personal security,[61] the right to enforce fundamental rights,[62] the freedom of expression,[63] the freedom of association,[64] the freedom of religion,[65] the right not to be

[52] *supra* note 23, section 5, *Constitution of the United Republic of Tanzania*, 1977
[53] *id.* section 17(1)
[54] *id.* section 18(2)
[55] *id.* section 21(1)
[56] *id.* section 21(2).
[57] *id.* section 22(1).
[58] *id.* section 28(1).
[59] *id.* section 13(1)
[60] *id.* section 15(1)
[61] *id.* section 16(1)
[62] *id.* section 30(3)
[63] *id.* section 18(1)
[64] *id.* section 20(1)
[65] *id.* section 19(1)

discriminated against[66] and the right to take legal action to ensure protection of the constitution[67] are all rights that the Constitution grants to "every person" not "every citizen."

The distinction between rights that belong to "every citizen" and those that belong "to every person" has special application to this opinion. We must keep in mind that the immediate trigger for Sion Gabriel's application to court is the persistent refusal by the Tanzanian Government to naturalize her husband as a citizen of the Union. In coming to its decision, the Union Government has relied on powers given by the *Tanzania Citizenship Act*. It is important to review that Act in light of the bill of rights.

Two of its provisions are relevant: section 22, 23 and 11. Section 22 says that every application for naturalization under the act must be made to the Minister.[68] The next section, 23, says that the Minister "shall not be required to assign any reason for the grant of refusal to grant any application under this Act and the decision of the Minister on any application under this Act shall not be subject to appeal to or review in any court."[69] Section 11 is the provision most directly in issue in this case. It says, so far as is relevant, that "a woman who is married to a citizen of the United Republic shall at any time during the life-time of the husband be entitled, upon making an application in the prescribed form, to be naturalized as a citizen of the United Republic."[70]

As already argued, section 11 clearly violates Sion Gabriel rights to equality and to equal protection of the laws be denying her a benefit that would automatically be available to a similarly situated man. What is easy to overlook is the fact that section 23 of the constitution violates many more sections of the constitution. Let us see why.

It is beyond argument that in light of the clear language of the constitution, residents of Tanzania have legitimate constitutional rights that can be enforced by the courts. The substantive rights that person in Tanzania enjoy have been detailed above.

But the Constitution does not merely give rights, it provides an effective machinery for their enforcement. Section 13(3) is a general declaration of the entitlement to a judicial remedy. It provides that "[t]he civil rights, duties and interests of *every person* and community *shall be protected and determined by courts of law* and other state agencies or under the law."[71] In the context of the right to equality and to equal protection, the Constitution obligates the state under section 13(6) to make "make procedures" that ensure that "when the rights and duties of *any person* are being determined by the court or *any other agency*, that person shall be entitled to a *fair hearing* and to the *right of appeal* or other legal remedy against the decision of the court or *the other agency* concerned."[72] For the avoidance of doubt, section 29 (1) emphasizes that "*every person* in the United Republic has the right to enjoy fundamental human rights and the benefits of the fulfillment by *every person* of his duty to society."[73] Among the duties vested in *every person* in Tanzania is the duty to obey the laws of the land under section 26(1). Under sub-section (2) of that section there is a collateral right vested in *every person* "to take legal action to ensure the

[66] *id.* section 13(2)
[67] *id.* section 26(2)
[68] see section 22, *Tanzania Citizenship Act*.
[69] *id.* note 30, section 23.
[70] *id.* section 11,
[71] Section 13(3), *Constitution of the United Republic of Tanzania*, 1977
[72] *id.* section 13(6)
[73] *id.* section 29 (1)

protection of this constitution and the laws of the land."[74] As to who may bring cases to court, section 30(3) gives a plenary right to seek redress in broad and generous terms. It says:

> "any person alleging that any provision in this part of this chapter or in *any law* concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court."[75]

There are several remarkable things about these provisions. First, they offer a comprehensive range of remedies for judicial remedies to "every person" in the Republic, not merely to citizens. Secondly, they obligate the state to facilitate the "fair hearing" and "appeals" on matters relating to the enforcement of the rights of *every person* by making the necessary procedures. Thirdly, the enforcement section makes it possible to redress both actual as well as anticipated violations.

With this in mind, let us return to section 23 of the citizenship act. That section says that the minister need not give any reasons for his decision and that his decision cannot be challenged in court. That section is unconstitutional on the face of it and is discriminatory in a manner prohibited by the 1977 Constitution as applied. On the face of it, that section flatly contradicts both section 30(3) - *governing the right of redress* - and section 13(6)- *obliging the state to make procedures for the redress of violations of rights and imposing a duty to a fair hearing*[76] *and a right of appeal*. As applied, this section must inevitably burden non-nationals than nationals. Only non-nationals are ever likely to apply for citizenship by naturalization. Therefore the ouster of jurisdiction from the courts to adjudicate decisions of the minister must inevitably deny non-nationals the opportunity to have their rights adjudicated by the courts in Tanzania. In short, the citizenship act makes a distinction between nationals and non-national by eroding an alien's right to litigate matters arising under the act. But as we have seen, the Constitution does not itself make this distinction. To my mind, as applied, section 23 of the Act is a form of discrimination on the basis of nationality prohibited by section 13(1), (2) and (5) of the 1977 Constitution.

Part 4: What Remedies are Available to Sion Gabriel in this Matter?

One possible argument could be made against Sion Gabriel in this case, namely, that as a matter of international law " it is generally accepted that a state has the right to exclude from citizenship anyone who it wishes (provided this does not entail stripping existing citizens of their right to a domicile)."[77] This would mean that who to grant citizenship to is a matter left by international law to the domestic jurisdiction of the United Republic. This implies that the Citizenship Act cannot be challenged on the basis of obligations imposed by CEDAW or, impliedly, by the 1977 Constitution. That argument, though plausible, misconceives both the nature of domestic jurisdiction and of the nature of the application in this case.

There is often a misunderstanding about the nature and scope of the domestic jurisdiction of a state with regard to its treaty obligations. As noted by one commentator:

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[74] *id.* section 26(2)

[75] *id.* section 30(3)

[76] The standard elements of a fair hearing are that 1) the person or authority making a decision must be impartial, that is, that he has no personal interest in the outcome; 2) a decision should not be taken until the person affected by it has had an opportunity to state his case; 3) the person or authority making the decision must give reasons for the decision. Section 23 of the *Citizenship Act* violates all three requirements.

[77] Sandra freedman, *supra* note. 38 at p.16.

> "the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somehow inherent, natural, or fundamental. It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law, but those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their "nature.' All are susceptible of international legal regulation and may become the subjects of new rules of customary law of treaty obligations."[78]

The proper inquiry starts by establishing what matters international law has left to the domestic jurisdiction of states. This is precisely the question involved here. Put differently, this opinion is not about the right of Tanzania to decide who will be its citizens. International law has left that matter to the Republic as part of its domestic jurisdiction.[79] The issue in this case is different: Is Tanzania at liberty, under international law, to treat its women citizens differently from its men citizens? The Republic does not have a duty under international law to grant its men the right to confer citizenship on their non-Tanzanian spouses. That is a choice that Tanzania makes as a matter of its own domestic law. However, if Tanzania decides to grant its men citizens the right to do so, it is then immediately required, as a matter of international law, to grant the same right to its women citizens.

In short, if a state decides, as matter of its domestic jurisdiction, to confer certain rights to its citizens, it cannot, in the absence of truly compelling arguments, cherry-pick which of its nationals will enjoy those rights. Under international law, there is no relevant difference between Tanzania making a decision that only the Hehes can confer citizenship by marriage and deciding, as it has done in this case, that only men can confer these rights. In both cases, the state has used an impermissible characteristic -ethnicity in the case of the hypothetical Hehe and sex in the case of Sion Gabriel – to dish out benefits of citizenship. The obligation not to discriminate in precisely this manner is a question of international law. The choice for Tanzania is either, *put negatively*, to impose the same burdens on men that it has placed on women or, *put positively*, to confer the same benefits on women that it has conferred on men.

On this analysis, the objection that Tanzania can confer citizenship on whom it wishes therefore has no relevance.

A second argument may be made that CEDAW and all other human rights instruments referred to in this opinion have no application in Sion Gabriel's case because these treaties and conventions have not been re-enacted as part of Tanzania's domestic law. On this reckoning they cannot be independent sources of rights cognizable in the courts of Tanzania. This argument has some force. The Commonwealth's approach to the enforcement of international law was stated in Australian case of *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh FC*.[80] In that case, the Court explained that an international treaty to which Australia is a party did not become Australian law unless it was incorporated into domestic law by statute. As the Court saw it, this paradox result whereby a treaty ratified by the Government failed to

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[78] Preuss, *Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction*, Hague Receuil (Extract, 149) at 8, reprinted in H. Briggs, The Law of Nations 24 (1952).

[79] Although even this issue is now tangentially influenced by a growing body of treaty law such as the *Convention on the Status of Refugees*.

[80] No. 95/013, 7th April 1995: Lexis Transcript.

become local law arose from the fact that treaties were made by the executive but legislation was made by Parliament.

Nonetheless, the fact that a treaty was not local law did not mean that it had no legal consequences. According to the Court if a local statute was ambiguous or otherwise needed interpretation, the courts should favour the interpretation that accords with Australia's international obligations. More important, the Court argued that in the absence of clear Parliament or the executive action to the contrary, the ratification of a treaty created a legitimate expectation in the citizens that the government would act in accordance with the obligations stipulated in the treaty. Citizens could therefore legitimately order their lives consistent with the provisions of such treaties.

A fortiori, the fact that CEDAW and other human rights instruments have not been incorporated into the domestic law of Tanzania does not render such instruments ineffectual as against the Government. CEDAW and other human rights have three elements important to this opinion. First, they create a legitimate expectation that Tanzania will treat men and women as equal in rights. Two, they provide standards that the Government has undertaken to follow and by which it can be judged. The Tanzanian Government's own CEDAW Reports accept this. Thirdly, where Tanzanian law has gaps, is ambiguous or is in conflict, these instruments may be used to resolve the conflicts and remove the ambiguities.

To this point, the following conclusions can be made: 1) Tanzania is obliged by customary international law (the Charter and Universal Declaration of Human Rights) to outlaw sex discrimination and to repeal laws whose effect is to disadvantage women *qua* women; 2) The Republic has voluntarily undertaken, through CEDAW and ICCPR and the African Charter to eliminate sex discrimination both in its Constitution and in its practice. Indeed the provisions in its own constitution enforcing equality and mandating equal protection of the laws have this very effect; 3) The Tanzania Citizenship Act violates both the provisions of the 1977 constitution and obligations under CEDAW and other Human Rights Instruments.

Given these conclusions, the question is how can CEDAW, Other human rights conventions and the 1977 Constitution be used to get the remedies that Sion Gabriel now seeks? There are two preliminary considerations.

First, it is important to note that the Tanzanian Constitution does not have an explicit supremacy clause. This, however, is not fatal. The constitution is fundamental law even without a supremacy clause. If there is a conflict between an obligation imposed by the Constitution and a competing obligation imposed by statute, the statutory obligation must yield. Moreover, as a canon of interpretation the court must read the provisions of the Constitution in manner that a) ensures overall coherence of the Constitution and the freedom and equality values for which it stands and b) is consistent with Tanzania's on-going obligations under international law generally and under CEDAW in particular.

Secondly, although CEDAW has not been re-enacted as a statute of the Tanzanian Parliament, as is the practice within the British Commonwealth, it has legal consequences. Those consequences are threefold. One, CEDAW may be used to settle disputes before the court. If the dispute involves a statute and the statute does not itself provide standards by which it is to be interpreted, the court can and should formulate standards from CEDAW or from any other applicable international human rights treaty. Two, CEDAW has application in relation to legislation. When Parliament enacts new legislation on any matter, it shall legislate consistent

with the Tanzanian Constitution and, to the full extent possible, consistent with the Republic's continuing obligations under international human rights law. Three, CEDAW and other human rights conventions may be used to resolve inconsistencies within the Constitution or between statutes.

Given these considerations, the appropriate remedies are declarations on the constitutionality of certain provisions of the Tanzania Citizenship Act and an order that Sion Gabriel's Husband should be naturalized as a citizen of the Republic.

a. On the Citizenship Act:

1. A declaration that as applied to Sion Gabriel, section 11 is unconstitutional for being inconsistent with section 12(1), 13(1) and 29(2) of the Constitution of Tanzania. This provision in Citizenship Act allows the Government to treats in a dissimilar fashion men and women who are similarly situated. This is precisely the sort of arbitrary legislative choice that sections 12(1), 13(1) and 29(2) of 1977 Constitution and the provisions of CEDAW- *especially Article 16 read together with the undertaking in Article 2-* and other human rights instruments referred to in this opinion- *the Universal Declaration, ICESCR, ICCPR, ACPHR* -were meant to prohibit. The core of the violation lies in the fact that though both men and women are equal, if they get married to foreigners they have unequal rights; the woman having fewer rights solely because of her sex. To sustain such a statutory preference, so arbitrary and patently unconstitutional on the face of it, the state needs a compelling reason.

2. A declaration that as a jurisdiction ousting clause, section 23 of the Citizenship Act violates section 13(6), section 26(2) and section 30(3) of the Constitution as well as Article 8 of the Universal Declaration of Human Rights and article 2 of the ICCPR. Section 23 purports to take away rights and obligations that have been explicitly granted by the Constitution and by these international human rights instruments.

3. A declaration that as applied to Sion Gabriel's husband, section 23 of the Citizenship Act is inconsistent with section 13(1), (4) and (5) for being discriminatory against aliens in terms of their right of access to the courts. Only non-nationals are likely to be denied the opportunity to test the decisions of the minister under section 23. they are denied that right *qua* non-nationals. Yet the Constitution gives them the right to sue in the courts of Tanzania.

b. On Sion Husband's Entitlement to be Naturalized as a Citizen of Tanzania

1. 30 years and two children later have in my view created a compelling argument for naturalizing Sion Gabriel's Husband as a citizen of Tanzania. In the absence of compelling arguments to the contrary, the government has a duty to naturalize him. Such a duty can be inferred from the doctrine of legitimate expectations. Sion Gabriel's Husband has established sufficient connections with the union.

2. In the alternative, the Court should issue a declaration that the right to a fair hearing under section 13(6) (a) includes an obligation to furnish reasons for a decision. As that section makes clear, the obligation to give a fair hearing is incumbent both upon the court and "any other agency." "Any other agency" in this context is wide enough to include both a quasi-judicial tribunal and a minister of government. Pursuant to such a declaration the court should order the minister, for the time being responsible for

citizenship, to furnish Sion Gabriel's husband with reasons for his refusal to naturalize him as a citizen of Tanzania.

c. Recommendations that are Applicable after Domestic Remedies are Exhausted

1. Though in my estimation this case is very strong on the arguments, there is a residual risk, as with every case before the courts, that it could, eventually, be decided against Sion Gabriel. Such a decision would be a major setback to the enforcement of the constitutional and human rights of women in Tanzania. It would also mean an unusually conservative and cramped reading of provisions of the 1977 Constitution. However, an adverse decision need not be the end of the matter. Under Article 60 of the African Charter, UN human rights conventions are applicable to State parties to the Charter by reference. In this regard, these Conventions can be a basis of an application by Sion Gabriel to the African Commission on Human and Peoples' Rights. The Charter provides an avenue for the internationalisation of the case once all domestic remedies are exhausted.

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