

**IMPLEMENTATION OF INTERNATIONAL LAW OBLIGATIONS  
TO NON-DISCRIMINATION: EXAMINING THE LAW OF THE  
CHILD ACT 2009**

**IMPLEMENTATION OF INTERNATIONAL LAW OBLIGATIONS  
TO NON-DISCRIMINATION: EXAMINING THE LAW OF THE  
CHILD ACT 2009**

**By**

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**A Dissertation Submitted to the Faculty of Law in Partial Fulfillment of the  
Requirement for Award of the Degree of Master in International Laws (LL.M) of  
Mzumbe University**

**2017**

## **CERTIFICATION**

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a compulsory dissertation titled: “Implementation of International Law Obligations to non-discrimination: Examining the Law of the Child Act of 2009”, in partial fulfillment of the requirements for the award of the degree of Master of Laws of Mzumbe University.

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## **DECLARATION**

I, **Johanitha Projest**, do hereby declare that this dissertation is a result of my own original work never had it been presented or submitted for any degree of master's award of Higher Learning Institution and will never be presented to any other university for similar or any other related award.

Signed \_\_\_\_\_

Date \_\_\_\_\_

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## **DEDICATION**

I dedicate this entire work to Almighty God for His awesome assistance all the way long. Thanks for your faithfulness my dear God. Again, the same is dedicated to my prayer partner prophet T. B. Joshua and my family specifically my husband Mr. Living Emmanuel Killongoce, my parents Mr. and Mrs. Projest Rwehabula for their great love they had shown me in all circumstances of happiness and hard-ships.



## **LIST OF ABBREVIATIONS**

ACRWC	-	African Charter on the Rights and Welfare of the Child
CAP	-	Chapter
CAT	-	Court of Appeal of Tanzania
CEDAW	-	Convention on the Elimination of all forms Discrimination against Women
CERD	-	Committee on the Elimination of Racial Discrimination
CHRGG	-	Commission for Human Rights and Good Governance
CHRGGA	-	Commission for Human Rights and Good Governance Act
CRC	-	Convention on the Rights of the Child
EA	-	East Africa
ECECR	-	European Convention on the Exerciser of Children Rights
GA	-	General Assembly
GN	-	Government Notice
HCD	-	High Court Digest
HRC	-	Human Rights Committee
ICCPR	-	International Covenant on Civil and Political Rights
ICERD	-	International Convention on the Elimination of Racial Discrimination
ICJ	-	International Court of Justice
ILC	-	International Law Commission
LCA	-	Law of the Child Act
NGO	-	Non Governmental Organisations
Pg	-	Page
TLR	-	Tanzania Law Report
UDHR	-	Universal Declaration of Human Rights
UDRC	-	Universal Declaration on the Rights of the Child
UN	-	United Nations

UNCEF	-	United Nations International Children`s Emergency Fund (now United Nations Children`s Fund)
URT	-	United Republic of Tanzania
USA	-	United States of America

## **LIST OF LEGAL AND INSTITUTIONAL INSTRUMENTS**

### **Domestic laws**

Basic Rights and Duties Enforcement Act no 33 [Cap 3 of 1995 R. E 2002]

Commission for Human Rights and Good Governance Act [Cap 391 of 2001R.E 2002]

The Constitution of the United Republic of Tanzania Cap 2 of 1977 (as amended from time to time)

The Law of the Child Act of 2009

### **Regional treaties**

African Charter on Human and Peoples' Rights of 1981

African Charter on the Rights and Welfare of the Child of 1998

### **International instruments**

Convention against Discrimination in Education of 1966

Convention on Discrimination in Respect of Employment and Occupation of 1958

Convention on the Elimination of all forms Discrimination Against Women 1979

Convention on the Rights of the Child of 1990

Declaration of the Rights of the Child of 1924

International Covenant on Civil and Political Rights of 1966

International Convention on the Elimination of Racial Discrimination of 1966

Universal Declaration of Human Rights of 1948

### **International institutions**

Office of the United Nations High Commissioner for Human Rights

Human Rights Council

Human Rights Committee

Committee on the Rights of the Child

**Regional institutions**

African Commission on Human and People's Rights

African Court on Human and Peoples' Rights

**Domestic institutions**

The High Court of Tanzania

Subordinate courts; Resident magistrates' courts, district courts and primary courts

The Commission for Human Rights and Good Governance

## LIST OF CASES

### Domestic cases

*Amina Taratibu Monde v Suleiman Ahmed Mtalika* [2000] TLR 56

*Elizabeth Mohamed v Adolf John Magesa* Matrimonial Appeal No.14/ 2011 High Court of Tanzania at Mwanza (Unreported)

*Magreth Andrew V. Bakari Mbagha* (1969) HCD 5

*Violet Ishengoma Kahangwa and Jovin Mutabuzi v The Administrator General and Mrs. Eudokia Kahangwa* [1990] TLR 72.

### List of cases from other jurisdictions/ countries

*Kennelly v Davis* (1969) 221 So.2d 415

*Matheka and another v Matheka Nairobi* [2005] EA 251

*Martin v Martin* (1968) 240A.2d 363

*Metropolitan Life Insurance Company v. Thompson* 250 F. Supp. 476. 479 (E. D. Pa. 1966)

*Nahlik v Austria* No. 10 of 2013

*State v Palmer* (1983) 439 So.2d 174

*South West Africa* ICJ Report No. 1

## **ABSTRACT**

This study is all about implementation of international law obligations to non discrimination by examining the Law of the Child Act 2009 specifically looking at the challenges facing children born out of wedlock when it comes to right to inheritance. Challenges facing children born out of wedlock in relation to right to inheritance cut across the whole world and eventually the world has witnessed different movements towards protection of their rights. These children were not afforded any right from their biological father since they were regarded to be conceived in adulterous acts. Nowadays changes are happening they are afforded many rights without considering the status of their birth. These rights include right to education, right to play, right to social security, right to adequate standard of living, right to access information and right to inheritance just to mention few. Discrepancies come on the implementation of right to inheritance as the same has been subjected to religious belief of the father particularly in Tanzania.

In complying with international obligation, Tanzania as state has done many things towards the prevention of discrimination against children born out of wedlock on birth status. Tanzania gave its concerns by ratifying several conventions, treaties and enacting the Law of the Child Act of 2009 to ensure children's rights are protected. It is through this Act any person is prohibited from depriving a child a reasonable enjoyment out of the estate of the parents. As far as children born out of wedlock are concerned, right to inheritance is subjected to religious belief of the father. Through findings it has been noticed that, no any religion that offer right to inheritance to children born out of wedlock. This is a controversial issue which challenges not only implementations of international conventions and treaties instruments but also hinders fully enjoyment of right to property of children born out of wedlock. For the moment we have contradicting court's decisions regarding this issue which lead to controversial jurisprudence in Tanzania. As such something of worth has to be done to rescue this situation facing children born out of wedlock when it comes to right to inheritance.

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## CHAPTER ONE

### GENERAL INTRODUCTION AND BACKGROUND INFORMATION

#### 1.1 Introduction

Implementation of international law obligations to non discrimination is based on the legal principles of equality. Thus non-discrimination is the core to international human rights conventions and treaties<sup>1</sup>. Though there are progresses achieved through the adoption of international conventions against discrimination on the ground of birth status, it does not mean that the situation in the legal system is now fully satisfactory<sup>2</sup>. There are some challenges despite the adoptions and enactment of laws preventing discrimination in relation to birth status, thus researches have advanced more arguments in preventing discrimination against children born out of wedlock.

Principles concerning protection of children rights internationally against discrimination were put forward in the Declaration of the Rights of the Child (DRC) of 1924. The declaration made clear that states has to make sure children enjoy special protection, be afforded opportunities and be provided with facilities, by law and by other means<sup>3</sup>. The aim was for promotion of good healthy, normal physical, mental, moral, spiritual, and social development in conditions of freedom and dignity. The paramount consideration

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<sup>1</sup> Reference is made to conventions, declarations and treaties prohibiting any kind of discrimination including The Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966, Convention on the Rights of the Child of 1989, the African Charter on Human and Peoples' Rights of 1981 and the African Charter on the Rights and Welfare of the Child of 1998.

<sup>2</sup> Stephen R. A (2007) *Family Law: Autonomy, Standing, and Children's Rights*, 33 William Mitchell Law Review 809. "the improvement towards children's is justified" at pg 811.

<sup>3</sup> The Preamble to the U.N. Declaration of the Rights of the Child of 1924 put states under obligation to make sure children are under special protection.

in the declaration is the best interests of the child.<sup>4</sup> This is a standard across legal instruments on children's rights. Many principles were enshrined in the DRC which include children entitlement to a name and nationality, adequate nutrition, housing, recreation, and medical services; to an education, and, for the handicapped to special treatment, education and care, protection against neglect, cruelty and exploitation, trafficking, underage labor, and non-discrimination.<sup>5</sup>

From the above named principles, the researcher has covered one of the principles namely; non-discrimination on the ground of birth status. The focus is on discrimination in relation to inheritance. The focus was basically on implementation of international law obligations to non discrimination principle and the right to inheritance in Tanzania mainland by examining the Law of the Child Act<sup>6</sup> (LCA) especially looking at protection offered to children born out of wedlock when it comes to inheritance issues. The researcher further examined whether obligations put forward by international laws to states real can eliminate illegitimacy status facing children born out of wedlock. Challenges facing children born out of wedlock are the same worldwide, and this brings about concerns worldwide to protect and promote their rights<sup>7</sup>. These challenge seemed to emanates from cultural and traditional beliefs of different persons scatted all over the world and as result even implementation of enacted laws in complying with international convention is not well adhered. Other challenges emanating from religious belief and weakness of enforcement of the conventions have been revealed.

The researcher briefly provides an account of implementation of international law obligations to non-discrimination from international human rights instruments and some institutions dealing with implementation of international law obligations on

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<sup>4</sup>Principle 2 of the Declaration of the Right of the Child of 1924 which was adopted by G.A. Res. 1386 (XIV), 14 U.N. Doc. A / 4354. Web site, <http://www.unhchr.ch/html/menu3/b/25.htm> accessed on 12<sup>th</sup> of December 2016.

<sup>5</sup>Van Bueren,G. (1995). *The international law on the rights of the child 10-11*; Martinus Nijhoff Publishers: Boston-London.at pg 10. (The author was discussing principle 8 of the DRC).

<sup>6</sup> Law of the Child Act no 21 of 2009.

<sup>7</sup>Danny. S et al (2011). *Non- Discrimination in international law: A handbook for practitioners*: 2<sup>nd</sup> ed. at pg 3.

discrimination cases so as to eliminate discrimination against children born out of wedlock. As a result this research work is useful to lawyers, government, human rights activists as it provides strategies or alternatives on what has to be done to prevent discrimination against children born out of wedlock when it comes to inheritance issues.

## **1.2 Background to the problem**

Implementation of international law obligations to non discrimination against children is historical and modern advancement increased the acknowledgment, expansion, or regression of the rights of children around the world. It can be traced way back in the early part of the last century. The assistance to such movement was through the effort made by government organisations, advocacy groups, academics, lawyers, lawmakers, and judges to reshape the legal system and policies so that protection of children's rights can be enhanced<sup>8</sup>. In the late nineteenth century, children's rights' protection movement was advanced compared to early centuries where children were held and viewed as quasi-property and economic assets in different parts of the world. Further, it was perceived that children matters were regarded as family matters not to be easily interfered by states institutions<sup>9</sup>.

In the United States (US) for example, courts were reluctant to effect changes in protecting children rights and welfare reforms the reason being not to interfere in family matters. Courts were reluctant to effect changes as there was no legislations to provide for right to inheritance as far children born out of wedlock are concerned. In the case of **Metropolitan Life Insurance Company v. Thompson**<sup>10</sup> the court stated:-

*Perhaps the time will come when enlightened legislators will remove the bar sinister. Perhaps someday there will be a legislative recognition that none of this is the fault of the child, who did not even ask to be born illegitimate and to exist as the child of no one. But that day has not yet arrived...*

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<sup>8</sup> Sandra, F. (2011). *Discrimination law*. 2<sup>nd</sup> ed. Oxford University Press: London. at pg 19.

<sup>9</sup> Stephen, R. A. (2007). *Family law: autonomy, standing, and children's rights*, 33 William Mitchell Law Review 809 pg 17.

<sup>10</sup> 250 F. Supp. 476. 479 (E. D. Pa. 1966).

However, the US passed laws to regulate child labour and to provide for compulsory education. Awareness was also raised concerning establishment of a juvenile court system. Around 1960s and 1970 there was another movement for children's rights and this time around it was viewed by advocates that children were victims of discrimination and among the oppressed groups<sup>11</sup>. The context revealed that, in the international arena, the growth of children's rights in different international instruments has been identified as a striking change in the post-war legal landscape<sup>12</sup>.

The growth of children's rights as reflected in international law instruments has brought changes in the ideals and inward looking towards children rights among states and as a result to find a way of protecting children rights universally without discrimination of any kind. Way back the U.N. Declaration of the Rights of the Child adopted rights which were set forth in the League of Nations Declaration of 1924. The Preamble to that declaration revealed that children were in need of special safeguards and care, provided for in the legal system of states. Protection was to be exercised before as well as after birth. The Declaration pleaded that mankind owes to the child the best it has to give, and the specific calls was made upon the voluntary organizations and local authorities for implementation, promotion and observance of children's rights.<sup>13</sup>

United Nations adopted different conventions for purpose of avoiding discrimination and promoting their rights. State parties to those conventions are put under obligations to implement the same. States not fulfilling that requirement are liable if there legal breaches of those obligations. These legal breaches attract reporting complaints on cases involving discrimination by the state itself or agencies and individuals that act on its

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<sup>11</sup> Boltz, R. E. (1971). *Inherit the whirlwind: The illegitimate child and the need for statutory equal protection*. *New Dimensions in Legislation*. Pg 16 .

<sup>12</sup>Stephen R. A (2007). *Family law: autonomy, standing, and children's rights*, 33 William Mitchell Law Review 809 at pg 19.

<sup>13</sup>Van Bueren, G. (1995). *The international law on the rights of the child 10-11*; Martinus Nijhoff Publishers: Boston-London at pg 35.

behalf. International human rights bodies receiving complaints and state's report had greatly focused on this principle of discrimination<sup>14</sup>.

Accordingly, Tanzania among United Nations states ratified and made accession of different Conventions without any reservation to prove its intention of preventing among other things discrimination on the ground of birth status against children born out of wedlock. It is from this spirit Tanzania abolished illegitimacy status of children born out of wedlock by enacting The Law of the Child Act<sup>15</sup>. Section 5 of the Act provides for non-discrimination of which a person is prohibited to discriminate a child on the ground of birth, gender, race, age, religion, language, political opinion, disability, health, customs, ethnic origin, rural or urban background, socio- economic status, being a refugee or of other status. Thus under the Act children are as well entitled to various rights such as right to the estate of the father. In the case of **Elizabeth Mohamed v Adolf John Magesa**<sup>16</sup> the court ruled out that children born out of wedlock have a right to the estate of the father and ordered three children born out of wedlock to be included in the list of heirs. Hon. Judge considered the provision of Article 3 of the United Nations Convention on the Rights of the Child of which Tanzania is a signatory and Section 10 of the Law of the Child Act<sup>17</sup> which provides for rights to parental property.

Thus, by enacting the Law of the Child of 2009 one can notice that, Tanzania was trying to protect children rights by adhering to International standards which prevent discrimination against children basing on the ground of their birth status. The researcher examined what is transpiring on the ground after the concerns was put forward internationally, regionally and nationally to protect rights of children particularly inheritance rights of children born out of wedlock . Furthermore, the researcher examined sanctions put forward to state failed to implement conventions preventing discrimination

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<sup>14</sup>In its General Comment no1, the Human Right Committee stated that: Article 26 [of the International Covenant on Civil and Political Rights (ICCPR)] is... concerned with the obligation imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content not be discriminatory.

<sup>15</sup> The Law of the Child Act no 21 of 2009.

<sup>16</sup> Matrimonial appeal no 14 of 2011 High court of Tanzania at Mwanza (Unreported).

<sup>17</sup> The Law of the Child Act no 21 of 2009.

on the ground of birth against children born out of wedlock or is just fair for those states to protect their culture and traditional values.

Generally, children without considering their birth status, they have rights to live with parents, right to be reunited if separated from parents, rights to health and healthcare, right to social security, right to an adequate standard of living, right to education, right to play, right to leisure and participating in cultural life and the arts and civic rights and freedom, right to a name and nationality, right to access to information, right to freedom of expression, of thought, and association, right not to be subjected to torture, right not to be discriminated or other exploitation just to mention few<sup>18</sup>. Thus, under international arena, rights of children are recognised to the extent it is not a single state accomplishment but of world's concerns. However, having laws and conventions is one thing and implementation is something else. This is where problems and weakness of the law is seen especially when the implementation is purely based on the wishes and willingness of the state concerned.

Ratification or accession was made on different dates depending on its willingness to be bound by those conventions or treaties. Precisely, the accession of ICESCR and ICCPR was done on 11 of June 1976, ratification of the CRC was done on 10 of June 1991, ratification of ACHPR was done on 18 of February 1984 and ratification of ACRWC was done on 16 of March 2003<sup>19</sup>. Ratification and accession of the above legal instruments by the government without reservations signifies the willingness of the state to be bound by the provisions of such instruments<sup>20</sup>.

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<sup>18</sup> Reference is made from different provisions of the CRC of 1989.

<sup>19</sup> <http://www1.umn.edu/humanrts/research/ratification-tanzania.html> retrieved on 20<sup>th</sup> of may 2016.

<sup>20</sup> Mashamba J.C (2009). The Justice Review: Special Commentary on the Law of the Child Act 2009 vol.8 at pg 2.



### 1.3 Statement of the problem

The CRC<sup>21</sup>, among other things under Article 2 provides for non discrimination of which state parties to the Convention are under obligation to respect and ensure every right of each child within their jurisdiction is protected without any discrimination. Article 2(2) provides that “States parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members. This Article is to the effect that each state within its jurisdiction has to make sure each child is not discriminated among other things on account of “birth” or beliefs of the child’s parents, guardians or family members and it is regardless as to whether that child is a product of legal marriage or not. Tanzania in the process of implementing international law obligations to non discrimination enacted The Law of the Child Act (LCA)<sup>22</sup> which provides children’s rights. However, the same Act restricts children born out of wedlock to fully enjoy the right to inheritance, as it is subjecting such rights to the religious belief of the father. This is provided under section 36(4) which reads;

*where the court has made an order on a biological father, such biological father shall assume the responsibility to the child in the same manner as may be in respect of a child born in wedlock and the child shall, subject to religious belief of the biological father, have such other rights devolving from the parent including a right to be an heir.*

The foregoing provision contravenes with international law obligations in preventing discrimination as far as the right to inheritance is concerned. This is because no religion or customary belief in Tanzania that allows a child born out of wedlock to inherit. Subjection of inheritance right to a religious belief of the father contravenes with Article 2(2) of the Convention on the Right of the Child<sup>23</sup> which prohibits discrimination on the basis of the beliefs of the child’s parents. This impression has negative impacts to

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<sup>21</sup> 1990 which was adopted and opened for signature, ratification and accession by General Assembly resolution no 44/25 of 20 November 1989.

<sup>22</sup> The Law of the Child Act no 21 of 2009.

<sup>23</sup> Convention on the Right of the Child of 1989.

children born out of wedlock as they see themselves isolated and not product of the society.

This controversy motivated the researcher further to find if there is any reasonable justification for the state to restrict the right to inheritance of the children born out of wedlock or it is probably reasonable, fair and just to leave current situation as it is as states are at liberty to protect their traditional, culture, customs and beliefs of its people.

#### **1.4 Literature review**

Various authors and researchers have issued literatures and reports trying to grasp the problem facing children born out of wedlock and administration of estate generally. The researcher has gone through different writings to grasp the situation. Some literatures and reports have been of great assistance in establishing the knowledge as to what is known and what is not known and finally to establish the knowledge gap.

**Mwalusanya (1993)**<sup>24</sup> has written on many aspects relating to administration of estate generally. He is of the view that laws governing administration of estate have covered primary principles and thus once administered effectively, they can render justice to all. As far as customary law and religious belief the writer is of the view that religious belief particularly Islamic law are of paramount and thus improper to be interfered. He discussed further that, even if the law can be enacted to go against the customary rules and religious belief still it will be difficult since the society as executor of the orders made will continue to exercise what they believe to be proper.

The idea developed by the author alerted the researcher to know that protecting inheritance right of children born out of wedlock is unfinished business despite the

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<sup>24</sup>Mwalusanya, J. (1993). *Sheria ya Urithi: maswaali na majibu kuhusu haki za wajane*. Mkuki na nyota: Dar es salaam.

achievement made by the law internationally, regionally and at the national level. The societies as executor of the orders and laws may delay to accept changes in the enacted laws because of what they think it is proper according to their beliefs. This being the case therefore it was expected that the writer will propose ways of protecting illegitimate children since religious belief discriminate them when it comes to inheritance matters. This has been dealt with and proposition and recommendation as to what should be done to protect illegitimate children have been given. It has to be noted however that, the same writings contributed knowledge to the researcher that, doing away the issue of discrimination against children born of wedlock when it comes to inheritance is not an easy task because of religious belief and customary rules.

**Shabbir (1998)** <sup>25</sup>wrote on human rights in general perspective. Further the essence of good government has been discussed where he stated that government is primary countable to its own inhabitants and transparency is required first and foremost in the interest of its own inhabitants so that they can be able to claim and ask for enforcement of their rights. It follows that governance must be so structured as to obtain the optimal realization of human rights for all under the jurisdiction of the state following the requirement of international law obligations in implementing human rights against discrimination.

The principle of equality and non-discrimination based on the assumption that all inhabitant of the territory, irrespective of their race, sex, language, national or ethnic origin are treated equally was also covered. The author was trying to put more emphasis on the principle of equality and non-discrimination which have to be exercised by states as a means of implementing international law obligations. The author covered aspect of international forum which insists on every state to do away with discrimination of any kind. In the circumstance the researcher was made aware that discrimination is an international issue but implemented singularly by each state part to each convention preventing discrimination. At this juncture, it was expected that the author could cover

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<sup>25</sup> Shabbir, M. (1998). *Human rights in the 21<sup>st</sup> Century*. Rawat: Jaipur. at pg 117.

implementations of those conventions by state parties. Also some sanctions to failed state in promoting equality were importantly an issue to be covered. Since these aspects were not covered constituted a gap the researcher has covered. However, the researcher was assisted by the author to be aware that principle of equality and no discrimination are inseparable thus having laws promoting equality create an environment to prevent discrimination of any kind.

**Maina and Ibrahim (1998)**<sup>26</sup> clearly by editing the work of individual authors which emanated from the workshop on Fundamental Rights and freedoms and Public Order in Tanzania held in Dar es salaam from 3<sup>rd</sup> to 7<sup>th</sup> April, 1995 covered human rights aspects in the eyes not only of the citizens but also the government. These writings gave a true picture as far as human rights in Tanzania are concerned. The importance of human rights has been elaborated both at the international and domestic level that human Rights and Fundamental Freedoms allow human beings to develop and use fully human qualities, intelligence, conscience and talents to satisfy our spiritual and other needs. It goes without saying, therefore, that the denial of basic rights and freedoms is not only an individual and personal tragedy, but also creates conditions for social and political unrest, sowing seeds of discord, violence and conflicts within and between communities and nations.

Taking into account what was stated in page 7 of that book which will be quoted soon, Tanzania as a nation has to be alert on the danger of adopting ready made provisions which may be contrary to its customs, cultures and traditions.

*We should nevertheless be ever alert to the danger of importing ready-made menus and standards on human rights which are repugnant to our national values for adopting in our Constitutions. While recognizing the validity and universality of Human Rights, it is nevertheless true that the most effective methods of promoting and protecting these rights has to take into account the nation`s history, culture, traditions, social*

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<sup>26</sup> Peter, C. M., Ibrahim, H. M. (1998). *Fundamental rights and freedoms in Tanzania*. Mkuki na Nyota: Dar es Salaam.

*development and perhaps even economic development... in a developing country, right to development is one of the most vital rights. Indeed for persons who live in abject poverty, the right to food is by far the most important.*

In line with the quotation above, one can easily notice that Tanzania as a states may fear the danger of importing ready-made menus and standards (conventions and treats) on human rights which are repugnant to national values, history, culture, traditions and beliefs.

This being the case, the researcher has examined the response and implementations of some conventions preventing discrimination in relation to equality among children when it comes to inheritance matters as aspect not covered. Despite, everything, the researcher was assisted by the author to acknowledge the negative impacts which might be brought by the spirit of exercising discrimination among children.

**Sen (2001)**<sup>27</sup> has written on some aspect of human rights generally by mentioning and explaining several kinds of human rights and several instruments related to human rights. In addition human rights like excessive concentration of wealth and means of production and distribution have been covered. The importance of human right generally has been discussed in details. The author explained about right to property generally. The concern was put forward on accumulated wealth in the country to be enjoyed by all. In this sense even the property left by deceased person has to be enjoyed by all beneficiaries without discrimination. It is bad luck that, the author did not invest much in covering situations facing children born out of wedlock as far as distributions of estate is concerned as there some aspects which hinders that right to enjoyed by all beneficiaries. This aspect has been covered by the researcher when the principle of equality among children was discussed. Despite, the absence of inheritance aspect of children born out of wedlock for not being covered the author made the researcher to be aware of different rights to be enjoyed by all

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<sup>27</sup>Sen, A. N. (2008). *Human rights* 2<sup>nd</sup> ed. Oxford University Press: London. at pg 47.

people. Further, the researcher was able to know that inheritance right is among the economic and social rights to be enjoyed by all.

**Asbjorn and Opsahl (2001)**<sup>28</sup> have discussed the concept of equality before the law and non-discrimination as it is taken under international sphere. The presentation gave the history and development of the said principle and the scope of their relationship between the two. Furthermore, it was made clear that, during the 18<sup>th</sup> century narrow exercise of equality before the court was interpreted and applied vis-à-vis customary law, but customary laws were given priority. The executive seemed to have much power which sometimes was used arbitrarily hence delay to effect immediate changes in the community as far as prevention of discrimination and equality principle is concerned. However, this principle was slowly acceptable as time went on.

The period of economic liberalism during the 19<sup>th</sup> century where state was not expected to interfere with the private affairs, roughly coinciding with the domain regulated by private law was well discussed. Other aspects which were covered were Social or material in equality exercised equally under the protection of the laws. The initial focus was on equal protection regardless of race and other status. However, the authors to some extent failed to describe what was to be done in a complex situation which involve beliefs of people. However, with these writings, the researcher managed to be aware on the movement towards the prevention discrimination and the principle of equality towards the prevention of discrimination against children born out of wedlock.

**Mniwasa (2003)**<sup>29</sup> examines the drawbacks in the existing law by that time providing for maintenance of children born out wedlock in Tanzania. Briefly the researcher was

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<sup>28</sup>Asbjorn and Opsahl ( 2001) “Equality and None- Discrimination”, written communication presented in Proceedings of the 7th International Colloquy on the European Convention on Human Rights.

<sup>29</sup>Mniwasa, E.(2003) Maintenance of ‘illegitimate children’ in Tanzania: A right or rhetoric? A review of the Affiliation Ordinance Chapter 278. A long essay submitted in partial fulfillment for the Masters Degree in Women’s Law, Southern and Eastern African Regional Centre for Women’s Law Centre, University of Zimbabwe. Pg no 3.

looking at the Affiliation Ordinance of 1949. Several limitations towards the provision of maintenance of children born out of wedlock were sported out. The researcher pointed out some of the limitations to include the absence of government political will, religious belief and ineffectual operation of non-governmental organizations in advocating, promotion and protection of the rights of children. These factors mentioned above were taken as major factors to subordinate the position of children born out of wedlock. The researcher pointed out that provisions contained in the Affiliation Ordinance contravene international human rights laws of which Tanzania is part.

Through that report, it was recommended that, the government has to repeal the ordinance and this brings about the needs for enactment of a new legislation covering different rights for children regardless of their birth status. Again it was recommended that, courts have to be equipped with adequate resources to handle cases in a required standard so that orders in favour of the children born out of wedlock immediately can be executed. Non-governmental organizations and institutions were advised to promote, protect and push efforts in preventing discrimination against children born out of wedlock. This report is of vital importance in elaborating protection of rights of non-marital children but the researcher`s focus was in maintenance rights of children born out of wedlock. Inheritance right was not well covered, thus the researcher has covered that aspect. Besides, the same revealed to the researcher so far to what Tanzania has been doing to protect rights of children born out of wedlock as far as maintenance is concerned.

**Mashamba (2004)**<sup>30</sup> wrote on many aspects of child welfare, care, maintenance, custody and inheritance generally. In addition, some conventions relating to rights of children and regionally the Charter relating to protection of rights of children have been covered. Furthermore, some laws relating to maintenance, custody and inheritance in Tanzania main land has been covered. However, going through his work, it is noted that when touching children born out of wedlock what was covered is all about maintenance of

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<sup>30</sup>Mashamba, J. (2004) .*Using the law to protect children`s rights in Tanzania: AN unfinished business*: Mkuki na Nyota: Dar es Salaam. at pg 34.

those children when putative fathers are alive and the procedure to be taken by their mothers when applying for maintenance and custody of children in the court of law.

Through this literature, it is noticed that some efforts have been already taken to help children born out of wedlock to freely enjoy right to maintenance during the life time of the putative father. Coverage of inheritance right of those children nowhere is covered, it was expected that since the aim of the writer was to cover rights of the orphanage and vulnerable children in Tanzania, then non marital children could be covered too in the aspect of inheritance.

This is therefore submitted as the gaps which have been covered by the researcher. However, the researcher has gained from this writings as it has been revealed that maintenance to children born out of wedlock is not an issue for now though the same is not automatic enjoyed as there some procedures accrued before that right is enjoyed.

**Musoya (2008)**<sup>31</sup> when discussing inheritance right of children born out of wedlock stated that they are entitled to inherit their mother`s property and her kindred`s property and they are ranked equal with the mother`s legitimate children. The author further stated that, children born out of wedlock are capable of inheriting from their natural father who regards them as his children. He discussed further that, where the mother has not been married, the circumstance give rise to adoption of the child into her husband`s children or if known or the father has expressly recognizing the child has his that give right to inherit from his natural father<sup>32</sup>.

The author briefly explained the situation where children born out of wedlock are legitimated; they are deemed to have been born legitimate and can therefore take on intestacy in the same way as children begotten in the marriage. The author again, was trying to show that discrimination of children born out of wedlock on inheritance on the ground of marriage was not an issue any more in Kenya. His argument was based on the

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<sup>31</sup> Musoya, W. (2008). *Law of succession*. 2<sup>nd</sup> ed. Law Africa Publishing (K) Ltd Nairobi: Kenya. at pg 3 and 4.

<sup>32</sup> Ibid at pg 15.



decision given by Court of Appeal of Kenya in **Matheka and another v Matheka Nairobi**<sup>33</sup> where the court stated that, the fact that the mother was not married to the deceased is not a bar to the child inheriting his or her deceased father in intestacy. This situation developed knowledge on how court can well be used to protect inheritance rights of children born out of wedlock. Despite, all good contribution done by the author, there some aspects not covered which are taken to hinder the full enjoyment of inheritance right of children born out of wedlock like when the deceased father die leaving a will not covering non-marital children and religious belief of the deceased father. Thus, these are among the aspects taken to be gaps not covered. This writings however, have enabled the researcher to be aware of the step so far taken in protecting children born out of wedlock in Kenya and the role played by judiciary to effect changes.

**Mashamba (2009)**<sup>34</sup> has written on different aspects relating to parental responsibility, children of imprisoned mother, right to education, harmful cultural practices and early marriages just to mention few. The author was trying to put some concerns to vulnerable children who need much care from their parents and other authorities. It is clear that, cultural belief is among the reasons that hinder right to inheritance of children born out of wedlock to be not fully exercised and enjoyed. Though children born out of wedlock are among the vulnerable people, the author did not put emphasis on those children, thus the researcher has covered inheritance right of those children as part of things not covered by the author. The paper assisted the researcher to be aware that there harmful cultural practices which affect children and other people in Tanzania.

**Chaman (2011)**<sup>35</sup> has written on probate and administration of estate and inheritance generally. It has to be noted that, when writing this book 2011, the Law of the Child of 2009 was in place being applicable in protecting children rights. The writer has covered much more in Islamic law, customary law and substantive laws including the Law of the

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<sup>33</sup> [2005] 1 EA 251.

<sup>34</sup> Mashamba, J. C (2009). The Justice Review: Special Commentary on the Tanzanian Law of the Child Act 2009 vol.8 pg 2.

<sup>35</sup>Chaman .A.K. (2011). *Sheria ya mirathi nchini Tanzania: Haki za wajane na watoto 2011* 2<sup>nd</sup> ed. Tanzania Educational Publishers: Bukoba.

Child 2009. When discussing inheritance rights of children born out of wedlock, the discussion was based on the definition of a child which is a child below (18) eighteen years. Now the writer is of the view that if children born out of wedlock are below 18 years then according to section 10 of the Law of the Child<sup>36</sup> they can inherit the estate of their biological father but if the child is of age of majority then no inheritance right is entitled to that child. To the researcher, this was a critical argument which prompted the researcher to find out whether that is the position and to what extent that argument has logical assumption and if that is the case what has to be done to rescue the situation. Despite, the raised assumption put forward by author to remain unanswered the writings have contributed to the researcher to be aware of the step so far taken by the Tanzania as a state towards the implementation of international law obligation to non discrimination against children born out of wedlock.

**Viljoen, (2012)**<sup>37</sup> emphasizes on international human rights law in Africa and how the African Union's human rights architecture, in particular the legal instruments under the aegis of the Organization of African Union or African, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights and various organs mandated to protect and promote human rights on the continent. However, the author failed to examine the impact of international human rights law at the national level and its implementation bearing in mind that, implementation is based on the willingness of the state to comply. This has been termed to be one of the gaps the researcher covered. However, these explanations revealed how Africa as a continent willingly accepted to adhere to the requirement of conventions adopted under international sphere that avoid discrimination and adopted some treaties to that effect.

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<sup>36</sup>The Law of the Child Act no 21 of 2009.

<sup>37</sup> Viljoen, F. (2012). *International human rights law in Africa*. 2<sup>nd</sup>ed. University Press: Oxford at pg 77 and 79.

**Urrio and Janeth (2013)**<sup>38</sup> when discussing laws relating to administration of estate in Tanzania, they argued that the Law of the Child, 2009 (herein referred as LCA) consider all children to be equal before the law and maintains that the best interest of a child should be given a paramount consideration by all people and institutions. The consideration was given to section 10 of the LCA which is to the effect that, no person shall deprive a child of a reasonable enjoyment out of the estate of a parent of which the Act has defined a parent to include biological father or mother. Writers concluded by stating that depriving a child born out of wedlock a right to succession of his parents' estate is discrimination.

The author was trying to bring an idea in relation to non discrimination which in reality assisted the researcher to conclude that Tanzania is trying to adhere to the requirement put forward by international forum. However, it seems that some provisions in the LCA which protect beliefs of the father to be considered when the court is required to order whether a child born out of wedlock has to inherit or not were not considered by the authors. This is where the gap is seen in relation to this book since authors are silent on the subject of right to inheritance to the religious belief of the father.

Considering the literature referred above it has been noticed that authors have developed some concern towards the protection of children rights generally. Most authors have covered children rights generally without considering each right respectively. Others have covered right to maintenance and right to inheritance of children born out of wedlock in Tanzania, however they have discussed their rights without a critical eye towards their implementation. This has been the gap covered by the researcher and indicated that inheritance right of children born out of wedlock is unfinished business.

### **1.5 Justification of the study**

The nature of the research topic attracts many importance's not only in Tanzania but the world at large. The research topic carries a burning issue worldwide in relation to

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<sup>38</sup> Alphonse M. A.U., Janeth F. A.U (2013). *Probate and administration of estate law in Tanzania* 1<sup>st</sup>ed. Internal Printers Ltd: Moshi Tanzania. at pg 42.

implementation of international law obligations to non discrimination. The focus is on children born out of wedlock when it comes to inheritance issues. Using this research to identify the problem and the means to solve it create greater chances to reduce the challenges facing children born out of wedlock. Some students and researchers who are interested in this area of study may use the same as reference in resolving related issues. As the issue of right to inheritance for children born out of wedlock is still contradicting, fathers, parents and guardians will take a step of protecting this right of children born out of wedlock by leaving a will or offering them their properties before their demise.

It also advances researchers to know what this research is all about and what does our law provide in respect of some spotted problems under this research. The study can also help the coming scholars who will research in similar area to explore more data from where this ended. It can further assist to initiate stakeholders to rectify existing problems. This research may also be useful to the government as well as it can put priorities to the challenges facing children born out of wedlock on how to assist them and to raise awareness to the society so as to reduce those challenges.

## **1.6 Objectives of the study**

### **1.6.1 General objective**

- i. To analyse the implementation of international law obligations to non discrimination against children born out of wedlock by examining the Law of the Child Act no 21 of 2009.

### **1.6.2 Specific objectives**

- i. To examine sanctions put forward internationally to failed states to implement international law obligations to non discrimination.

- ii. To examine so far if the enactment of The Law of the Child Act 2009 has brought changes as far as inheritance right of children born out of wedlock are concerned.

### **1.7 Research hypotheses**

In conducting this research, the researcher was guided by the following hypotheses to determine what is on the ground concerning inheritance rights of children born out of wedlock.

- i. Religious beliefs hinder the process of avoiding discrimination on the ground of birth status against children born out of wedlock.
- ii. Contradictory legal provisions of laws on inheritance in Tanzania Mainland lead to irregular jurisprudence on inheritance relating to children born out of wedlock.
- iii. Reasonable justifications hinders the implementation of international law obligations to non discrimination against children born out of wedlock

### **1.8 Significance of the study**

This study has a number of significance for other students, researchers and government as well.

It is quite obvious that this research will assist some students and researchers who are interested in this area for their studies. It will advance researchers to know what this research is all about and what does our law provide in respect of some sported problems under this research. The study will help the coming scholars who will research in similar area to explore more data from where this ended.

It can further assist international forum to reexamine the sanctions put forward to failed states towards the implementations of treaties and conventions.

In addition, this research may be useful to the government as well; especially the legislative body and policy makers so that they can be in a position to enact laws and

have policies which will establish ways of protecting inheritance rights of children born out of wedlock.

It can help states to put reservation to treaty and conventions on some provisions which are impracticable within their jurisdiction.

This study will raise awareness to the society generally so that they can know that children born out of wedlock are product of the society, they need to be protected, cared and maintained and thus to stop discriminating them.

### **1.9 Research methodology and methods**

The researcher applied legal centralism which focuses on the enforcement of state laws of a particular state. These laws include domestic laws, institutions and conventions<sup>39</sup>. Under this application, examination was made to state laws and conventions relating to rights of children particularly and the efficacy thereto. Analysis of legal publications dealing with the subject was of relevant importance. The objective was to analyze what the law provides in relation to inheritance right of children born out of wedlock. Furthermore, field study was applied and different methods like interview and questionnaire for purpose of collecting data from relevant respondents.

#### **1.9.1 Research design**

The research designs used under this study is both empirical and doctrinal. The study aimed at collecting information from different respondents. The researcher employed both primary and secondary data. Primary data was obtained through questionnaire and interview, while secondary data was obtained through reviewing books, papers, and reports of various authors, dissertation and thesis done by different scholars, published and unpublished works as well as statutes and cases which was found necessary and relevant to the subject matter of this study.

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<sup>39</sup>Bentzon et al.1998:31.

### **1.9.2 Area of study**

This research is concerning protection of inheritance right of children born out of wedlock which is among the emerging issues under International law. This issue is covered under some international conventions which avoid discrimination basing on birth status due to the fact that the problem is in the entire world Tanzania inclusive. Now, concerning the area of study, it could be stationed anywhere in Tanzania since children born out of wedlock are scatted all over.

However the researcher was stationed at Kagera region particularly in Bukoba District and Mwanza region particularly Nyamagana District as sample to represent other places. The researcher consulted judges, magistrates and advocates who usually meet with concerned people and cases challenging inheritance rights of children born out of wedlock and experiences have been shared on the subject matter. Again the selected places have registries and libraries which helped the researcher to get relevant materials concerning the research title. Furthermore, the researcher managed to visit religious leaders and got comments and experiences have been shared on the research topic.

### **1.9.3. Study population and sampling techniques**

#### **1.9.3.1 Study population**

With regard to the nature of the research topic, population study involved people from different institutions and individuals. This research involved thirty people. This included six experienced advocates in succession matters, six religious leader of which three profess Christianity and the other three profess Muslim for long time, three senior judges, fifteen children of which ten was children born out of wedlock who are matured and thus conversant with the research topic and five were children born in wedlock.

### **1.9.3.2 Sampling technique**

Sampling techniques used in this research was purposive sampling, which is based on non-probability sample where the researcher chose the appropriate sample group. This specific sample helped the researcher in getting relevant answer from the respondents. The choice of the respondents was influenced by the nature of the research topic of this study. The expected sample size was fifty people who are well informed in the area of the research and the turn up respondents were thirty in number of those targeted variables. The groups category that make these data valid are presented in percentage as follows; judges and magistrates who were interviewed forms twenty five percent (25%) of the total sample, experienced advocates who responded to the questionnaires and those interviewed form thirty percent of the total sample population(30%), State Attorney and Law Officers who respond to the questionnaires and those interviewed were twenty in percentage (20%) of the total sample, while religious leaders (Muslims and Christians ) fifteen percent (15%) of the population, and mothers, fathers of children born out wedlock and children(born in and out of wedlock) form ten (10%) of the total population interviewed. These bring the total of one hundred percent (100%) of the total persons interviewed those responded to the questionnaires. In fact, qualitative data analysis method has played a great role towards the completion of research topic.

### **1.9.4 Methods of data collections**

Data have been collected through interview, questionnaire and documentary review as for the reasons stipulated in each method applied.

#### **1.9.4.1 Interview**

The Researcher conducted unstructured interview to different categories of people having knowledge concerning the subject matter of the research especially religious leaders, children especially who are victims (born out of wedlock), advocates, judges and some senior state attorney officers. The primary data were obtained and the researcher grasped



the situation and took out their views concerning inheritance rights of children born out wedlock. The reasons for using unstructured interview was to cope with the respondents answers that researcher was eager to know more especially for some detailed information that had not focused before but essential to be known.

#### **1.9.4.2 Questionnaire survey**

The researcher collected data from respondents through questionnaires, whereby open ended questions were distributed to respondents. The reasons of using this method was because some of the officers are hardly to be interviewed due to the nature of their work, but through questionnaires they were able to respond to the question on papers. Through this method the primary data were obtained where open ended questions enabled the respondent to be free to explain more on the research topic hence built up the strength of the research.

#### **1.9.4.3 Documentary review**

The review of documents was carried out by passing through various literatures written by different authors. Relevant laws and reports, books, journals, unpublished works, articles papers presented by professionals in the same field formed part of documentary review. Through documentary review the expected secondary data has been collected from different published and unpublished materials connected to this research topic and as a result the researcher has managed to grasp the challenges facing non marital children when it comes to inheritance issues.

### **1.9.5 Data collection instruments**

This sub part has covered instruments used during the collection of Data were mobile phone recorder, laptop, pen and papers, questionnaire papers were used. Data recording was appropriate in order to go along with the speed of the interviewees and taking notes of importance issues relating to research topic.

### **1.9.6 Method of data analysis and interpretation**

This sub part deals with evaluation, examining, sorting, categorizing, contemplating and reviewing recorded data. The discussion and analysis of the findings address the research questions and objectives of the study. The most appropriate methods of data analysis and interpretation are quantitative which deal with research concerning numbers and statistic data and qualitative which deal with quality of study in the text. For purpose of this research the qualitative approach of data analysis and interpretation was most appropriate. There many ways of conducting qualitative research including case study approach, theory based approaches, collaborative and participatory approaches just to mention few. The researcher applied case study, collaborative and participatory.

With these approaches the researcher gathered raw data of the relevant case study which dealt with prevention of discrimination towards children born out of wedlock on inheritance matters. The collaboration of different instruments, institutions and raw data relating to the research topic also served a great purpose towards the completion of the research. Participatory approach was made applicable during the interview session.

## **1.10 Scope of study and limitation of the study**

### **1.10.1 Scope of the study**

This research is concerning prevention of discrimination against children born out of wedlock especially on inheritance matters. This is among the emerging issues of which international forum through conventions tried to put an end to discrimination by requiring member states to implement and avoid it within their jurisdictions. Tanzania is among

those states, thus the analysis has been done to examine whether it has managed to eradicate discrimination among children basing on birth status and if otherwise, the possible solutions and suggestions as to what has to be done has been given .As far as age of children is concerned, the scope of the study went a long way to include even matured children than the age prescribed by different instruments.

### **1.10.1 Limitations of the study**

This research problem requires a lot of time so as be covered to the required standard. Thus the researcher has to run with time to cover it as the time scheduled by the university is not enough hence to create a heavy burden to the researcher. Again, this research demanded the use of money looking for relevant materials and the available fund for the research put the researcher under minimum search and required extra effort to conduct this research. Furthermore, lack enough relevant books, manuals, and journals were another limitation which required the researcher to use more time looking for relevant materials. Despite, all constrains the researcher has managed to run with the available resources and extra efforts has helped the researcher to present this worth report in its form.

### **1.11 Ethical and confidentiality**

During preparation, collection of data and at the stage of writing this reports all rules of research writing have been observed. The researcher was able be open to the respondents informing them the purpose of this research and that rules of confidentiality will be adhered in the sense that their names as agreed will not be exposed. This habit helped the researcher to get the respondents who are free to give their opinion without fair and as such this report contained the findings and recommendations of respondents who speak from their hearts. The researcher has acknowledged the author`s opinion in case of referring to their written works.

**CHAPTER TWO**

**CONCEPTUAL FRAME WORK ON IMPLEMENTATION OF  
INTERNATIONAL OBLIGATIONS TO NON DISCRIMINATION AND THE  
LAW RELATING TO RIGHT TO INHERITANCE**

**2.1 Introduction**

This part involves an overview of the implementation of international law obligations to non discrimination of which Tanzania as a state is part to the United Nations conventions which initiated the principles of non discrimination and equality which have to be implemented by state parties. Under this part also some important and relevant concepts of which knowing them will create knowledge and give a clear picture concerning this dissertation report are covered. These concepts are important as they are concerned and related with research variables. These include the concept of a child, children born out of

wedlock, the concept of right to inheritance, concept of the children rights, discrimination and equality as a basis of non discrimination under international law. The last part covers rights of children born out wedlock in Tanzania.

## **2.2 Conceptual frame work**

### **2.2.1 The concepts of a child**

The legal definition of child generally refers to as a minor otherwise known as a person younger than the age of majority.<sup>40</sup> It may also describe a relationship with a parent (such as sons and daughters of any age) or, metaphorically, an authority figure or signify group membership in a clan, tribe, or religion; it can also signify being strongly affected by a specific time, place, or circumstance, as in a child of nature or a child of the Sixties<sup>41</sup>

According to Article 1 of the CRC<sup>42</sup>, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. The Article thus grants individual countries the discretion to determine by law whether childhood ceases at earlier age if found appropriate.

Accordingly, The LCA provides that, a person below the age of eighteen years shall be known as a child<sup>43</sup>.

Basing on the above concepts, one can probably think that, these laws were not made to be applicable to inheritance matters since inheritance laws covers even matured children above eighteen years. Going with literal meaning of a child in line with inheritance right of children born out of wedlock, one may think children born out of wedlock who probably are entitled to inheritance are those below eighteen years as it is agued by

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<sup>40</sup> Oxford University Press retrieved on 5<sup>th</sup> January 2016.

<sup>41</sup> American Heritage Dictionary retrieved on 5<sup>th</sup> January 2016.

<sup>42</sup>The Convention on the Rights of the Child, with a Preamble and 54 articles, was adopted by the U.N. General Assembly on November 20, 1989, and entered into force on September 2, 1990. G.A. Res. 44/25.

<sup>43</sup> Section 4(1) of The Law of Child Act no 21 of 2009.

Chaman A. K in his book.<sup>44</sup> Thus, children born out of wedlock still face a lot of challenges emanating from the law itself.

It has to be noted that, when it comes to inheritance the concept of a child go far beyond the mentioned age in the conventions and other instruments. The aspect of inheritance just reveals the relationship between father and his children (daughters and sons regardless of the age). However, no any instrument covers the concept of child for purpose of inheritance right; the inference is drawn from the principle of equality which treats individuals without discrimination regardless of age.

### **2.2.2 The concept of children born out of wedlock**

Neither international conventions nor the Law of the child Act of 2009 has defined the concept of the children born out wedlock. Justices in different cases have tried to give out this concept. Edward Scruggs of the court of civil appeals of Alabama in the case of **Sate v Palmer**<sup>45</sup> used these words to describe a child born out of wedlock that is a child born out of wedlock, or may also be a child born in wedlock but sired by a man who was not the mother`s husband.

Justice Boyd in the case of **Kennelly v Davis**<sup>46</sup> stated children who are both conceived and born to mothers who are unmarried already have the status of illegitimacy at the time of birth.

Justice Myers in the case of **Martin v Martin**<sup>47</sup> stated that a child is termed born out of wedlock even if is born after the marriage of the mother to a man other than the father.

All legal instruments are silence on the concept of children born out of wedlock. Impliedly this may be because internationally all children are treated equally. It is from this circumstance, discrimination on the ground of birth against children is prohibited in

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<sup>44</sup>Chaman, A. K. (2011). *Sheria ya mirathi nchini Tanzania: haki za wajane na watoto*. 2<sup>nd</sup> ed. Tanzania Educational Publishers: Bukoba.

<sup>45</sup> 439 so.2d 174 of 1983.

<sup>46</sup> Supreme Court of Florida 221 so.2d 415 of 1969.

<sup>47</sup> District of Columbia Court of Appeal 240 a.2d 363 of 1968.

all legal instruments. Thus it suffices to say, a child is a child regardless whether that child was born in or out of wedlock.

### **2.2.3 The concept of children's rights**

The concept of children's right is not well enshrined in both international and local instruments. These instruments do provide for rights to be enjoyed by all children. Convention on the Rights of a Child (CRC) adopted for the purpose of providing for children's rights is viewed to have four substantive rights namely participation, protection, prevention and provision. With the aspect of participation, children are allowed in decisions making of matters affecting them.

Children deserve protection against discrimination and all forms of neglect and exploitation, with prevention children are to be prevented from harm and provision of assistance to children for their basic needs is of vital importance. Under the CRC they are entitled to the following rights; right to eat healthily food (Article 27), to go to school (Article 28), right to care when they are sick (Article 24), right to share their ideas ( Article 12 and 13) and right to play ( Article 31) just to mention few.

Archard (2003) has defined children's rights to mean the opportunity for children to participate in political and legal decisions that affect them; in a broad sense, the rights of children to live free from hunger, abuse, neglect, and other inhumane conditions<sup>48</sup>.

It has been noted that, having Laws providing for children rights is one thing and implementations of those rights is another thing. As such, self commitment and government assurance for their protection is needed.

### **2.2.4 The concept of right to inheritance**

The concept of right to inheritance is universal to all societies irrespective of their cultural or historical background, ideology, religion or legal system. This arises out of three basic philosophical considerations that, firstly, man needs to acquire some properties for his

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<sup>48</sup> Archard (2003) .*Children, family, and the state*. England :Burlington, Vt.: Ash-gate.at pg 11.

own sustenance to satisfy the desire for self-actualisation and in order to lead a good life generally. Inheritance is one of the means through which property is acquired. Secondly, the fact that man dies and leaves behind his property that should continue to be owned by those who are left behind, and lastly the fact that, man instinctively wants to have some control over his property even upon his demise<sup>49</sup>.

Musokya, defines inheritance to mean the same thing as transmission or devolution of property upon death.<sup>50</sup>

Thus, right to inheritance is the process which entitles a person to acquire goods or properties after the death of a person who possessed them<sup>51</sup>. That person is termed as an heir. The Black Law Dictionary defines inheritance right as the right of the deceased's survivor or heirs to inherit property, depending on the type of inheritance of the estate.<sup>52</sup> The key factors in inheritance rights are the death of the property owner and the devolution of property to the heirs and beneficiaries and the law of descendants and distributions.<sup>53</sup>

Even though right to inheritance is a universal concept among human beings, each society has come up with its own laws and guidelines, both formal and informal to regulate the devolution of property from a deceased person to his descendants. In most societies, the right of inheritance is predicated upon the relation between the inheritor and the deceased. In some societies, the immediate family members have right to inherit, to the exclusion of all other people. In most African societies, the property of a deceased person devolves to his family and the word family is widely construed in this context to include not only the immediate family members, but also distant relations and in some cases the clan.<sup>54</sup>

Yet in some societies particularly in the west, the property goes to the persons identified by the deceased in his will, regardless of the relationship between them and the deceased.

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<sup>49</sup> William, M. (2008). *Law of succession*. Law Africa Publishing (K) Ltd: Nairobi: at pg 3.

<sup>50</sup> Ibid at pg 3.

<sup>51</sup> Concise Law Dictionary 3<sup>rd</sup> edition pg 23 .

<sup>52</sup> Black Law Dictionary 4<sup>th</sup> edition pg 30.

<sup>53</sup> Black Law Dictionary 5<sup>th</sup> edition.

<sup>54</sup> William, M. (2008). *Law of succession*. Law Africa Publishing (K) Ltd: Nairobi. at pg 4.



It may include adopted children rather than lineal descendants. It can also include the fame or superiority of the deceased and extend to copyrights. Inheritance right is strictly guaranteed by statutory laws as a civil right. For example, in England, prior to 1938, the heirs of a deceased person were the persons he chose in his will<sup>55</sup>.

The roots of the modern concepts and principles governing right to inheritance can be traced way back in the eighteenth century where American human rights activists like Carolyn Egan (1823) and European human right activists like John Hughes (1926) championed the protection of the rights of children born out of wedlock upon the division and ownership of matrimonial properties to the deceased's children<sup>56</sup>. The law up to that time had focused on children born in wedlock and excluded children born out of wedlock. During that time Western societies were mostly influenced by church principles, which insisted that marriage rights included infants that were born after marriage but excluded other children. At common law children born out wedlock was termed a *fillius nullius* or a bastard child. As a result, they had few or no rights<sup>57</sup>.

### **2.2.5 The concept of discrimination**

Neither of the conventions gives the concept of the term “discrimination” nor prescribes what constitutes discrimination, only some conventions prescribe discrimination on specific grounds. For example The International Labor Organization (ILO) Convention No.111 Concerning Discrimination in Respect of Employment and Occupation (1958) states:

*For the purpose of the this Convention the term ‘discrimination’ includes: any distinction, exclusion or preference made on the bases of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or, occupation.*

Convention against Discrimination in Education (1966), states:-

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<sup>55</sup>Ibid at pg 4.

<sup>56</sup>Mashamba, C et al (2001). *Sheria ya mirathi na wosia*. Mkuki na Nyota: Dar es Salaam at Pg 10.

<sup>57</sup>Dr Muhoja (2005). *Child Widows silenced and unheard* at pg 23.

*For the purpose of this Convention the term 'discrimination' includes distinction, exclusion, limitation or preference which being based on race colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.*

The term discrimination should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.<sup>58</sup>

It is well known and accepted that equality and non-discrimination is positive and negative statements of the same principle. In other words, equality means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality<sup>59</sup>. Thus, importantly the concept of discrimination is well understood when the principle of equality is as well covered since equality means the absence of discrimination.

In the sense, there are two well known conceptual approaches describing equality and non-discrimination. These approaches can be traced from the provisions in both domestic and international law. They are known as formal or juridical equality and substantive equality. With Formal or 'juridical' equality refers to the basic idea that persons or individuals are to be treated alike if they are found in the same situation. This approach focuses on the similarity of appearance without considering how such treatment occurs.

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<sup>58</sup>This concept was given by the Human Rights Committee General Comment No. 18.

<sup>59</sup>Ann F. B. (1990). *The principle of equality or Non-discrimination in international Law*, 11 *Human Rights Quarterly*, pg. 5.

According to this approach, the aim is to avoid direct discrimination, and this brings about the process of having laws or practices which treat different persons or individual alike if they originate from similar situations. Formal equality ignores any obstacles, factors, prescriptions which in one way or the other may lead to different treatment of individual. This can be said that, this is a rigid approach which does not like to hear discrimination regardless the circumstances and reasonable ground whatsoever. Thus, differences between individuals are not taken into account. This approach has been criticized for not adhering to the broader sense and aim of equality<sup>60</sup>.

With substantive equality, individuals originating from the different situations as a matter of fact should be treated differently. It is broadly considering equality of result and equality of opportunity. With Equality of results when laws and practices are applied even though to different individuals the result must be equal. Under this approach, the effects as well as the purpose of a measure must be taken into account. As far as equality of opportunity is concerned individuals are to enjoy the same opportunities, if it is access to employment for example all individuals, there must an environment proving accessibility by all. However, much consideration of the origin or starting position brings about providing equal chances but not equal results<sup>61</sup>.

Reading between lines these approaches, one can notice that, under international instruments prohibiting and preventing discrimination, the formal or juridical concept of equality is the one used which treats individual in a like situations to be treated equally. Again, some aspects of equality of opportunity which suggests equal opportunity and chances to be enjoyed by all has been taken into consideration when drafting international instruments so as to prevent discrimination basing on these approaches.

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<sup>60</sup> Sandra, F. (2011). *Discrimination law*, 2<sup>nd</sup> ed. Oxford University Press: London. at pg 11 .

<sup>61</sup> Sandra, F. (2011). *Discrimination law*. 2<sup>nd</sup>edn. Oxford University Press: London. at pg 12 .

However, a classic statement on the principle of equality in international law was offered by Judge Tanaka in the **South West Africa** case<sup>62</sup> when he was giving dissenting opinion; he stated that;

*The principle of equality before the law does not mean...absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means...relative equality, namely the principle to treat equally what are equal and unequally what are unequal...To treat unequal matters differently according to their inequality is not only permitted but required.*

Accordingly, the above dissenting decision try to show that absolute equality to all cannot so easily be attained if concrete circumstances will be looked at. This sometimes may lead to relative equality which treats equally what are equal and unequally what are unequal. With this classic statement given, the remained question is who to define things or individuals who are equal or unequal so as to treat them differently or equally. For instance, when it comes to children, one can conclude that they are all equal and therefore to treat them equally, but another can treat them differently on the circumstance that there are those begotten in the legal marriage and those born out of wedlock and hence to treat them differently.

It has to be noted that, having different backgrounds, socio-religious differences and cultures brings about differences in treatment which are not prohibited under international laws of equality principles. If it is proven that there may be very good reasons for different treatment of individuals, such treatment is not prohibited. However, such treatment is allowed when it is satisfied that it is to pursue a legitimate aim. This means there must be reasonable justification just to allow unequal treatment of individuals. In other words, the difference in treatment made in order to achieve the legitimate aim must be appropriate, necessary and relevant to the aim sought to be achieved<sup>63</sup>.

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<sup>62</sup> ICJ report NO 1.

<sup>63</sup>Danny, S et al (2011). *Non- Discrimination in international law: A handbook for practitioners*: 2<sup>nd</sup> ed. interiGHts: London. at pg 3.

For example, in some jurisdictions, some legislation may create an environment accepting exception to a kind of persons to access certain jobs depending on the nature of the job pursued. Similarly, it can be said that, employers are at liberty to give prescriptions of the employees they are to employ basing on the nature of work a person has to perform. For example, the owner of the Muslim radio may require some employees to be Muslims as they are sometimes presenting agendas which require a professional Muslims and thus in such circumstances discrimination on religion occupational qualifications is not prohibited under international discrimination laws.<sup>64</sup>.

The Tanzanian Constitution defines the word “discriminate” which literally is the same to discrimination as

*means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex 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...*

At this juncture it is clear that, from the above explanation treating people basing on certain qualifications or characteristics is referred as discrimination. As stated earlier the presence equality absent discrimination. Thus, equality has to be practiced effectively in all areas of life.

### **2.3 Children born out of wedlock and the right to inheritance in Tanzania**

Children born out of wedlock in Tanzania are accorded all rights like other individuals. Rights stipulated in the Constitution of the United Republic of Tanzania are clearly rights which are to be enjoyed by all individuals in Tanzania. Tanzania among the other states members of United Nations has ratified several conventions providing for children rights which signify its application to all citizens of Tanzania.

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<sup>64</sup>Danny, S et al (2011). *Non- Discrimination in international law: A handbook for practitioners: 2<sup>nd</sup> ed.* interIGHts: London. at pg 3 and 4.

The Law of the Child Act<sup>65</sup> which is specifically enacted and designed for the children provides for rights of children. These includes rights to no-discrimination, right to name and nationality, right to grow with the parents, right to maintenance, right to life, dignity, respect, liberty, health, education and shelter from his parents. Others are right to participate in sports, right to play and leisure, right to parental property, right of opinion and right to protection from torture and degrading treatment<sup>66</sup>. Tanzania providing these rights is one step ahead to recognise children's right though sometimes implementation may read to different result.

Accordingly, these rights are to be enjoyed by all children. However, there are some rights which are not automatically enjoyed by all as they are accrued after some evidence to proof parentage or father ship to the children born out of wedlock. Rights to maintenance have to be enjoyed by the children born out of wedlock after proof of parentage in the court of law. Evidence to proof parentage is provided under section 35 of the Law of Child Act<sup>67</sup>.

Right to leisure and liberty are subjected to guidance and ability of a parent<sup>68</sup>. This proof that ability of the parent determines the percentage those rights are to be enjoyed. Contradictions becomes more worse when it comes to right to parental property as that right is subjected to religious belief of the father and for the moment no religious belief that allow inheritance right to children born out of wedlock.

## **2.4 Conclusion**

This part has covered relevant parts giving important concepts which gave out the general understanding related to research variables. As it has been stated the concept of discrimination gives a true picture how that aspect gave rise to the great importance concept of equality which is the core aspect to protection of human rights and prevention

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<sup>65</sup> The Law of the Child Act no 21 of 2009.

<sup>66</sup> Reference is made from section 5, 6, 7, 8, 9 and 11 respectively of The Law of the Child Act no 21 of 2009.

<sup>67</sup>The Law of the Child Act no 21 of 2009.

<sup>68</sup> Reference is made from section 9 (2) of The Law of the Child Act no 21 of 2009.

of discrimination. This aspect gives effect to lodging of complaints to some institutions for not preventing discrimination. This is the great aspect as far implementation of international law obligations is concerned. Finally rights of children born out of wedlock have been given and processes accrued to some rights to be enjoyed by children born out of wedlock. Some rights are not automatically enjoyed by children born out of wedlock; this is to say children born out of wedlock are not treated similarly and equally in some aspects.

## **CHAPTER THREE**

### **LEGAL BASIS ON IMPLEMENTATION OF INTERNATIONAL LAW OBLIGATIONS TO NON-DISCRIMINATION AND THE RIGHT TO INHERITANCE IN TANZANIA**

#### **3.1 Introduction**

This part describes some major international, regional and national instruments that aim to promote equality and prevent discrimination of any kind. Internationally, United Nations is the major unity which encourages protection of human rights generally and prevents discrimination against children born out of wedlock. Prevention of discrimination is among the principal activities of United Nations. Greatly UN through its Law Commission prepares provisions of Articles to be adopted by UN state parties so that they can create an environment of protecting human rights. In addition to this principal, the United Nation also provides practical assistance to states in their efforts to

protect human rights and prevent discrimination of any kind and informs the public about the rights to which it is entitled.

Internationally, many instruments have been established to prevent discrimination generally. Some conventions are not specifically preventing discrimination against children born out of wedlock on inheritance matters, rather they are preventing discrimination of any kind against individuals of which children born out of wedlock basing on their birth status are included. For the purpose of this research report some instruments covered under region sphere are those from Africa of which Tanzania is a signatory to those instruments.

### **3.2 Legal framework**

Under this part some legal instruments preventing discrimination generally has been covered. However, the major concerns have been put to those instruments protecting human rights and preventing discrimination on the ground of birth status against children. The discussion has been made on their strength and weaknesses and as such to be in a position to see if eradication of illegitimacy status is easily maintained or more efforts are still needed to protect right to inheritance of children born out wedlock. These instruments are categorised into three parts internationally, regionally specifically Africa region and domestic laws of Tanzania.

#### **3.2.1 International legal framework**

Under this part some international legal frame work has been covered. Internationally as stated earlier there several conventions and treaties promoting human rights and preventing discrimination generally of which discrimination on the ground of birth is included, but hereunder those selected are of great importance as they are related to the research topic.



### 3.2.1.1 Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights<sup>69</sup> gave a paramount way towards other many subsequent human rights instruments which deals with human rights generally at the universal level. These instruments are established under umbrella of UN and its agencies. This Declaration was adopted to create a non-binding agreement to state parties. However, the same has been proved to be of a great importance as it has been referred by international institutions and tribunals and national judicial organs when principle of equality and non discrimination are at issue. As far as children rights are concerned only two specific provisions are stipulated in this Declaration. These are Article 25 and 26. Article 25(2) states that motherhood and childhood are entitled to special care and assistance; All children whether born in or out of wedlock shall enjoy the same social protection. Article 26 provides for the right to education for all, and deals both with access to and the aims of education.

Although children are seldom mentioned in this text, it is nevertheless a significant document, and its impact on all human beings, including children, this is what makes the Declaration so important. In fact, children's rights are basically human rights. This Declaration proclaims that the human rights described therein are available to all human beings by preventing discrimination of any kind. Everyone is entitled to all rights and freedoms set forth in this 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<sup>70</sup>.

The term Declarations means statements of general principles and intent and do not carry with them any special obligations that are binding in law. The term **declaration** signifies parties to it do not intend to create binding obligations but merely want to declare certain obligations.

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<sup>69</sup>The Universal Declaration of Human Rights, which was adopted by the U.N. General Assembly on December 10, 1948. G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (Dec.10, 1948) also at <http://www.un.org/Overview/rights.html>.

<sup>70</sup>This is provided under Article 2 and 7 of the Universal Declaration of Human Rights of 1948.

The UDHR was adopted by the third General Assembly of the United Nations on 10 December 1948 in Paris. None of the 56 members of the United Nations by then voted against the text, except South Africa, Saudi Arabia and the Soviet Union abstained. This signifies that, in one side it was almost accepted by all member states, but on the other side it shows how state are at liberty either to be party or not and this proves sovereignty of state<sup>71</sup>.

The Declaration proclaims that upon violation of any rights provided therein there is access to redress. Article 8 provides that, everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by other laws. Beyond this declaration of legal implementations, this instrument of international law describes no further ways or means of enforcement of the principles described therein. Thus, the Declaration is a dependent documents which its application and enforcement of effective remedy may be ordered by a competent national tribunal for violation of fundamental rights granted by the constitution or other laws. Without incorporation of those rights in the national laws of the state the declaration miss the application and implementation.

### **3.2.1.2 The Convention on the Rights of the Child (CRC)**

The Convention on the Rights of the Child<sup>72</sup> (CRC) is specifically adopted for purpose of providing for children rights. It comprehends almost all rights pertaining to children in a single document. It is made to be applicable both in peace time and in conflicts situations. This treaty was legitimately almost adopted by all UN state members except USA, South Sudan and Somalia. It allows participation of children in decision making in all matters affecting them, also it prevents discrimination and all forms of neglect against children. It

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<sup>71</sup> Van Beuren, G. (1995). *The international law on the rights of the child 10-11*, MartinusNijhoff Publishers, Boston/London. at pg 17.

<sup>72</sup>The Convention on the Rights of the Child, with a Preamble and 54 articles, was adopted by the U.N. General Assembly on November 20, 1989, and entered into force on September 2, 1990. G.A. Res. 44/25.

is also important as it promotes and requires states to provide assistance for basic needs of the children<sup>73</sup>.

Discrimination under the CRC is strictly prohibited and it calls for the states not to discriminate children's right from enjoying rights enshrined in the CRC. It requires state parties to amend or review their legislations to effect changes and introduce mechanisms on how children has to enjoy all rights without suffering discrimination. In its essence the CRC depends on the wishes of state for its implementation. Further, the CRC enshrines new obligations to states to adopt measures to do away with traditional and customs practices which encourage discrimination and demoralize children rights to good health. Other practices which lead to abuse, neglect and exploitation strictly prohibited as provided for under Articles 28(3) and 39. It is from this convention states are required to do away with traditional and customs practices which promotes and encourages discrimination. Tanzania as a state in implementing this convention by enacting The Law of the Child Act<sup>74</sup> ought to meet this criteria of doing away with traditional and cultures which promote discrimination on the ground of birth status but nothing has changed as customary laws bears rules discriminating children born out of wedlock when it comes to inheritance matters.

The convention depends much to states to express desire to adopt its provisions and thus to be enforced by the state parties to it. If a state is not a party no matter how those provisions are relevant in protecting children rights, they cannot be invoked and be enforced. For example, United States of America (USA) participated fully in proposing the need to have the specific convention relating to protection of children rights. However, the same failed to ratify the convention after it was made available to all state to adopt. This signifies that, rights enshrined in the CRC cannot be enforced in the US. It was noticed that, US failed to ratify because of opposition emanated from political and

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<sup>73</sup>Van Beuren, G. (1995).*The international law on the rights of the child 10-11*, MartinusNijhoff Publishers: Boston/London. at pg 16 and 101.

<sup>74</sup>The Law of the Child Act no 21 of 2009.

religious conservatives.<sup>75</sup> As such, right to parental property cannot be enjoyed by children born out of wedlock due to religious belief hindrance.

Basing on some instruments discussed above, it is clear that, protection of children from discrimination is considered an important contemporary goal. This includes protecting children born out of wedlock from economic exploitation. It is not in dispute that, inheritance is covered under right to accumulate wealth. However, as it has been explained, these international instruments are weak when it comes to implementation, and this brings need to look for an alternative to protect children born out of wedlock on inheritance matters. This is what worthy the present report. Arguably, to deny this right to children born out of wedlock without other alternative to protect them is a serious sin which may lead to chaos, political unrest, conflicts and violence within the family and the national at large.

### **3.3. Regional legal framework**

This part covers some African instruments covering prevention of discrimination of any kind against individuals of which discrimination on the ground of birth is included. These instruments include the African Charter on the Rights and Welfare of the Child and African Charter on Human and People's Rights.

#### **3.3.1 African Charter on the Rights and Welfare of the Child 1990**

The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>76</sup> is a regional instrument specifically made applicable to African governments. It gave its concerns to adopt rights of children after the CRC which is UN instrument. Its basis emanated from the 1979 Declaration on the Rights and Welfare of the African Child. This charter is

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<sup>75</sup>Smolin, D. M. (2010). Overcoming religious objections to the convention on the rights of the child. Emory International Law Review, Vol. 20 at pg 83.

<sup>76</sup>The African Charter on the Rights and Welfare of the Child was adopted on July 11, 1990, and entered into force on November 29, 1999. For an online text, see the African Union Web site, [http://www.africaunion.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/A.%20C.%20O%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf](http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20O%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf) ( last visited on 10-february 2016 .

unique as it stipulates duties as provided for under Article 31 in conformity with the African Human Rights Charter<sup>77</sup>. The Preamble states that, the child occupies a unique and privileged position in the African society and requires legal protection as well as particular care with regard to health, physical, mental, moral and social development.

The ACRWC provides different rights to be enjoyed by all children including right to non-discrimination, right to life, right to a name and nationality as well as to freedom of expression, association and peaceful assembly; thought, religion, and conscience; privacy; education; and rest and leisure as per Articles 6 to 12. Article 13 and 14 ensures that children are to enjoy physical, mental, and spiritual health. Special cares are to be employed by states and other stake holders to provide for assistance to children in all circumstances. Children are also protected against all forms of economic exploitation and from performing works which are likely to be hazardous as required by Article 15. All forms of torture, maltreatment, abuse, harmful social and cultural practices which are not friendly to safeguard the wellbeing of the children as provided for under Article 16 and 21 are strictly prohibited.

It is clear that, the ACRWC prohibits all forms of discrimination against children including economic exploitation. Thus, protecting inheritance right of children born out of wedlock is not only prohibiting discrimination on the ground of birth status but also economic exploitation. The facts that children born out of wedlock are discriminated from inheriting their biological father's property due to cultural and religious belief is economic exploitation which need to be fought against by all states. It suffices to say that, African continent proved its intention to prevent discrimination of this nature by requiring state parties to ACRWC to make effective measures so as protect rights of children in general. However, problems occur when it is time to implement, it depends on the willingness of the state parties to effect changes to that effects. The Charter allows the practices of traditions and religion by all children but it is from this practices children

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<sup>77</sup> Geraldine V. B. ( 1995).*The international law on the rights of the child 10-11*, MartinusNijhoff Publishers: Boston/London. at 24-25 and 171.

born out of wedlock do suffer discrimination on inheritance issues. Something has to be done to protect this right of children born out of wedlock.

### **3.3.2. The African Charter on Human and Peoples' Rights of 1981**

The African Charter on Human and People's Rights (hereinafter ACHPR)<sup>78</sup> also known as the Banjul Charter encompasses civil and political rights which in essence prevent discrimination of any kind, and for purpose of children impliedly discrimination on the basis of birth status and religious belief are directly prevented. Economic, social, and cultural rights are also covered under this Charter.

The charter specifically under Article 2 gives effects to enjoyment of children rights without any discrimination such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. This Article gives an account that, discrimination is directly prohibited and the provision applies also to children born out of wedlock not to suffer discrimination on account of birth status and religion. Rights in the ACHPR are mentioned in connection with individual or every individual and this wording automatically applies to children generally.

The Charter requires member States to Organisation of African Unity (OAU) to recognise rights, duties and freedoms enshrined in the Charter and as a mandatory procedure each state member shall undertake to adopt legislative or other measures to give effect to them<sup>79</sup>. This signifies that, state member have to enact laws to effect the requirements of the Charter of which prevention of discrimination of the ground of birth is among the requirement. The State shall ensure the elimination of any kind of discrimination against children as stipulated in international Declarations and Conventions<sup>80</sup>. Thus, the Charter

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<sup>78</sup> The Banjul Charter with Preamble and 68 Articles was adopted June 27, 1981 and entered into force October 21, 1986.

<sup>79</sup> This is as per Article 1 of the African Charter on Human and Peoples' Rights of 1981.

<sup>80</sup> This is provided for under Article 18 (3) of the African Charter on Human and Peoples' Rights of 1981.

requires the state members to consider even rights provided other international Conventions and Declarations.

Generally, The African Charter is a regional human rights instrument designed to reflect the history, values, traditions, and development of Africa. The Charter combines African values with international norms by not only promoting internationally recognized individual rights, but also by proclaiming collective rights and individual duties<sup>81</sup>. That is to say the Charter preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society<sup>82</sup>. This altitude of preserving African cultures shows state supremacy over its value customs, traditions and customary law. However, it is from customs and traditions discrimination against children born out of wedlock over different issues including denying right to inheritance to them emanates. Thus, one can notice that, by preserving society's cultures and traditions proves the difficulties of preventing discrimination against children born out of wedlock specifically on inheritance matters.

### **3.4. Domestic legal framework**

Under this part only some laws of Tanzania protecting children's rights have been covered. The essence is to show the step taken by Tanzania as a state in protecting children's rights and prohibiting discrimination against children born out of wedlock. These include The Tanzanian Constitution and the Law of the Child Act.

#### **3.4.1 The Constitution of the United Republic of Tanzania of 1977**

The Constitution of the United Republic of Tanzania<sup>83</sup> provides for equality of human being and treatment of all persons equally before the law. Articles in the Constitution which prohibit discrimination are to the effect that, all human beings are born free, and

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<sup>81</sup> Reference is made from Pamphlet No. 6 of the UN Guide for Minorities.

<sup>82</sup> Article 29 (7) of the African Charter on Human and Peoples' Rights of 1981.

<sup>83</sup> The Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

are all equal before the law and are entitled, without any discrimination to protection of the law. It is stated further that, No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect<sup>84</sup>.

It is clear that, the Constitution is a top law of the land, other laws has to conform to its provisions. Any law contravening to it, can be declared void by the court of law. Thus, though the Constitution did not specifically address inheritance right of children born out of wedlock, but the presence of provisions prohibiting discrimination and treating all people equally before the law, generally include children born out of wedlock not to suffer any kind of discrimination. It suffices to say that, discriminating children born out of wedlock on the ground of birth status and religious beliefs obvious contravenes the Constitution of United Republic of Tanzania. Despite the presence of provisions promoting equality and prohibiting discrimination, still there Tanzania laws including the LCA which indirectly did not abolish inheritance discrimination of non marital children when it subjected that right to religious belief which provides for total denial.

### **3.4.2 The Law of the Child Act (LCA)**

Tanzania has enacted the Law of the Child Act<sup>85</sup> to ensure that rights of the children are protected. The opening phrase of the Act proves that it was enacted as a reflection to implement international conventions. It states as follows:-

*An Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.*

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<sup>84</sup> Reference is made from Article 12 and 13 of the Constitution of the United Republic of Tanzania as amended from time to time.

<sup>85</sup> The Law of the Child Act no 21 of 2009.



This wording therefore, proves the intention of the parliament of Tanzania to reform and consolidate laws relating to children and to stipulate rights of the child in a single document with a view to give effect to international and regional conventions on the rights of the child.

As far as inheritance right of children born out wedlock is concerned, it provides for right to parental property<sup>86</sup>. The section reads; a person shall not deprive a child of reasonable enjoyment out of the estate of the father. This is to say, all children without discrimination have the right to the estate of their parents. Section 5 of the same Act provides for non-discrimination in the sense that no person is allowed to discriminate a child on the ground of...religion, birth or other status.

Looking to the above provisions, one can notice that, by enacting the Law of the child Tanzania was trying to treat all children equally confirming to what is provided for in the Tanzanian Constitution, international and regional instruments. Doughty towards this improvement and intention of the government is seen in section 36 (4) which subject the right to be an heir to religious belief of the biological father while no religion protects inheritance right of children born out of wedlock. This is to say, this law contains contradictory provisions when it comes inheritance right of children born out of wedlock.

### **3.5 Conclusion**

The legal basis on the prevention of discrimination on birth status is a worldwide concern where its implementations are basically placed to state parties to the conventions. States are at liberty to ratify the same. Again, states in order to preserve its rules of culture, traditions and values cannot observe that obligation. As such, states are to avoid unreasonable justification in the umbrella of preserving its value so that equality for all can be obtained.

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<sup>86</sup> Section 10 of the Law of the Child Act no 21 of 2009.

**CHAPTER FOUR**

**INTERNATIONAL LAW OBLIGATIONS TO NON DISCRIMINATION AND  
THE ESTABLISHMENT OF LEGAL INSTITUTIONS FOR  
IMPLEMENTATIONS**

**4.1 Introduction**

Internationally, promotion, protection of human rights is the core activities which fall under United Nations (UN) sphere. This being the case, UN greatly has to fulfill and maintain this duty through different machinery set up from various treaties, convention and declarations. These machineries are responsible to monitor implementation, promote compliance and investigate violations of human rights. States have been beneficiaries of assistance from UN through these machineries when need arises on matters related to human rights protection by raising awareness to the public on the right they are entitled.

It is clear that, in a practical sense UN as a single unit can never be able to put an eye to every situation challenging human rights activities, hence the need for assistance from other institutions being established for that purpose under different UN conventions. Again for the same purpose UN has greatly depended on the assistance from regional sphere like Europe and Africa just to mention few in order to make this core activity move on. This brings the establishment of institutions at the regional level. Finally the assistance is derived from state government by making necessary measures to make sure issues of human rights are highly promoted and safeguarded within the state jurisdiction. This marks the establishment of different machinery at national level having the same goal. This proves that, human rights issues cut across to different states as a result there many institutions established international, regional and national wise for promotion and protection of those rights. These being the case therefore, this party covers some of these institutions promoting human rights and preventing discrimination of which each has a special role to play in the development of a universal culture of human rights.

#### **4.1.1 International institutions framework**

This party covers some international institutions dealing with protection of human rights as a means of implementing those rights which are to be enjoyed by all people. Implementations of conventions protecting human rights and prevention of discrimination of any kind cannot be mate without having machinery to enforce. Internationally, there several institutions, however some have been covered which have been taken to be relevant to research topic.

#### **4.1.2. Office of the United Nations High Commissioner for Human Rights (OHCHR)**

Office of the United Nations High Commissioner for Human Rights is among the international human rights institutions aiming at promoting human rights and preventing discrimination of any kind to individuals. The office was established by the Charter of the United Nations precisely under Articles 1, 13 and 55 and Vienna Declaration and

Programme of Action and General Assembly<sup>87</sup> of which the General Assembly established the post of United Nations High Commissioner for Human Rights having mandate to promote human rights and prevent discrimination.

It well known that, ratification of human rights instruments is the major step towards the promotion and implementation of human rights. However, the same activity need supports, the office of the OHCHR has been supporting this by making a follow-up to treaty implementation, encouraging legislative, policy and programmatic change at the national level and recommendations has been given to human rights treaty bodies in response to individual complaints.<sup>88</sup>

Furthermore, the Office has put much effort towards the development, movement of human rights institution by offering education and tactics on the functioning and structures of human rights bodies. Seminars have been conducted and at length exchanging experience and challenges has been learning experience of the OHCHR. The Office also has been offering assistance towards the establishment of institutions both at regional and national level and this has been done in collaboration with the United Nations Development Programme (UNDP). Corporation has been established with the UN agencies in the administration of justice on human rights issues. Technical training, legislative reforms, offering leadership skills have been done by the expertise in that area which helped the growth of human rights activities worldwide.<sup>89</sup>

The OHCHR has been responsible to empower individuals so that they can realize their rights, the assistance has been given towards implementation of the same as a result human rights have been promoted and protected in such ways. Thus, it is noticed that the OHCHR is among the important institution to promote human rights to all people and

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<sup>87</sup>Resolution no 48/141 of 20 December 1993 and In connection with the programme for reform of the United Nations (A/51/950, para. 79), the Office of the United Nations High Commissioner for Human Rights and the Centre for Human Rights were consolidated into a single Office of the United Nations High Commissioner for Human Rights on 15 September 1997.

<sup>88</sup>Available at <http://www.ohchr.org> accessed on 17<sup>th</sup> may 2016.

<sup>89</sup>Available at <http://www.ohchr.org> accessed on 17<sup>th</sup> may 2016 .

prevent discrimination. Though the prevention of discrimination is of general nature, it is clear, discrimination of children born out of wedlock in terms of inheritance on the ground of birth status and religious belief are also included. However, the same is not out of criticisms as children born out of wedlock still suffer discrimination on the ground of birth when it comes to right to parental property, the problem which emanates from the religious beliefs of their father.

#### **4.1.3. Human Rights Council**

Human Rights Council is an intergovernmental body with membership encompassing forty-seven states and a political body with a comprehensive human rights mandate but it is different institution from that of the OHCHR which educate individuals to realize their rights, offer leadership, conduct seminars and assist people know the steps to be taken upon violation of human rights. The Council is responsible to address human rights violations, to promote human rights, to review States' human rights records, to offer assistance in the prevention human rights abuses, responds to emergencies, and serves as an international forum for human rights dialogue<sup>90</sup>.

In order the Council to meet the desired goal of promoting human rights and preventing human rights violations worldwide, it has been reviewing periodic reports of almost 192 states UN members, providing advice on human rights matters, receives human rights violations complaints addressed to it either by individuals or some organizations. Upon reviewing and offering advice and recommendations the Council, has been vested with the mandate to report directly to the UN General Assembly, The council is used to identify, highlight and develop responses to today's human rights challenges, and acts as the principal focal point of human rights research, education, public information, and human rights advocacy activities in the United Nations system.

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<sup>90</sup> Available at <http://www.ohchr.org> accessed on 17<sup>th</sup> may 2016.

#### **4.1.4 Human Rights Committee**

The Human Rights Committee (herein referred as the committee) is established by the ICCPR<sup>91</sup>. Members to this committee must be nationals of the state parties to covenant. It is comprised of eighteen members. According to Article 28 of the Covenant qualifications of its members makes them to be called as experts. They must persons of high moral character and recognized competence in the field of human rights having legal experience or background, sometimes from judicial bench, legal practitioners (Lawyers) or in Academic avenues and they are nominated by their states in Academics Avenue.

The Committee acts as a supervisory entity to monitor the implementation of Covenant obligations by States parties. It gained supremacy and strength because of its acceptance from state members to covenant and this helped it to meet intended goal worldwide. For purpose of implementing its core function of monitoring and supervising it has managed to receive and examine reports presented to it by state members initially looking at the steps and initiatives taken by states to comply to the rights enshrined in the Covenant<sup>92</sup>. It has been responsible to give detailed comments to state parties on what has to be done procedurally and substantively on order to give effects to the provisions of the Covenant<sup>93</sup>.

Again, the Committee has been vested with power to receive and considers individual complaints, also known as communications. The Optional Protocol to the Covenant made it possible for individual to access the committee for purpose of presenting claims upon human rights violations<sup>94</sup>. The Committee has a mandate to consider states' complaints upon failure to comply with obligation under the covenant by another state

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<sup>91</sup>Under article 28 of the International Convention on Civil and Political Rights of 1966.

<sup>92</sup>This requirement is provided under Article 40 of the International Covenant on Civil and Political Rights of 1966.

<sup>93</sup>Available at <http://tbinternet.ohchr.org/layout/treatybodyexternal/TBSearch.aspx> accessed on 16<sup>th</sup> May 2016.

<sup>94</sup>Available at <http://www.ohchr.org/EN/HRBodies/TBPetitions/pages/HRTBPetitions.aspx> accessed on 16<sup>th</sup> May 2016.

party to Covenant. This communication can only be done after the complaining state making a declaration acknowledging the competence of the committee.<sup>95</sup>

The committee has power to appoint an ad hoc conciliation commission which is responsible to receive complaints referred to it by the committee after it has failed to resolve the conflict amicably. However, this procedure has to be adopted after the consent has been made by state parties to the said conflict<sup>96</sup>. The commission comprises of five members agreed by state parties to conflict, but not including their nationals among its members. After dealing with conflict to its end or otherwise it has to submit a report to the Chairperson of the Committee and parties in dispute, within 12 months. This procedure gives a room to meet amicable solutions towards the implementations different rights available in the covenant of right not to be discriminated is included and this touches even the affairs of children born out of wedlock.

This committee has once noted that states are obliged to act against any forms of discrimination as a result of promoting equality rights. It made reference to Article 2 and 26 of the Covenant when it was giving opinion in the admissibility decision of **Nahlik v Austria**<sup>97</sup> where it stated;

*Under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all Individuals within its territory and subject to its jurisdiction are free from discrimination, and Consequently the courts of the States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi– public sector ...*

The Committee performs through its monitoring and advisory functions, has managed to interpret the provisions of the Covenant before making general comments. In doing so, it seeks to give a full and generous interpretation to the meaning of the Covenant's provisions, consistent with its character as an instrument guaranteeing fundamental rights

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<sup>95</sup>This is provided under Article 41 of the International Covenant on Civil and Political Rights of 1966.

<sup>96</sup> This is according to Article 42 of the International Covenant on Civil and Political Rights of 1966.

<sup>97</sup>No.10/2013, International Covenant on Civil and Political Rights of 1966, paragraph .2).

and freedoms. Through receiving communication by individuals and states it managed to notice challenges towards implementations of human rights generally. The committee is responsible to submit to the General Assembly its annual report on the activities it has doing<sup>98</sup>.

Conclusively, it can be said that, the committee plays a vital role in monitoring the implementations of the ICCPR. This function if done effectively changes of many lives of people can be met. It is in this spirit the Committee will continue to make its work relevant and applicable to all States parties, and to strive for the enjoyment of all civil and political rights guaranteed by the Covenant, in full and without discrimination, by all people. However, the committee can be limited to exercise its power through jurisdiction procedures which allow only state which has made declaration to the competence of the committee and exhaustion of local remedies by an individual before making any communication to it is another impediment.

#### **4.1.5. Committee on the Rights of the Child**

The Committee on the Rights of the Child (CRC) (herein referred as the committee) is established by the Convention on the Rights of the Child for purpose of examining the progress made by state parties to the Convention in realization of rights found therein<sup>99</sup>. It also monitors the implementations of the two Optional Protocols to the CRC. The first protocol is related to involvement of children in armed conflict (OPAC) and the second is related to sale of children, child prostitution and child pornography (OPSC). Of recent, the UN General Assembly has approved a third Optional Protocol related to communications procedure (OPIC), which now allowed individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols<sup>100</sup>.

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<sup>98</sup> Article 45 of the International Covenant on Civil and Political Rights of 1966.

<sup>99</sup> Article 43 of the Convention on the Rights of the Child of 1989.

<sup>100</sup> The third optional protocol was approved on 19 December 2011 and entered into force on April 2014.



The committee has a mandate to establish its own rules and procedure on how to undertake its functions. Accordingly, state parties are under obligation to submit to it reports indicating measures which have been taken by states which give effects to the realization of children rights found in the Convention. Initial reports are to be submitted within two years after the state has acceded to the convention and there after submission can be made after five year<sup>101</sup>. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”<sup>102</sup>. For example on Friday, 4 October, 2013 the committee on the Rights of the Child gave concluding observations and recommendations on the reports of Sao Tome and Principe, Kuwait, Tuvalu, Lithuania, Paraguay, China, Luxembourg and Monaco, which were considered during the session. The Committee Experts raised issues concerning the coordination of efforts undertaken for the implementation of the convention. The committee gave directions to member state to the convention to make sure they avoid any kind of discrimination between legitimate children and illegitimate children<sup>103</sup>

From the direction of the committee it is clear that any kind of discrimination is prohibited of which state parties to the convention have to make genuine effort to prevent it so that human rights can be enjoyed by all children.

Accordingly Children who are below the age of majority which is 18 years may make submission, corporate with NGOs in preparing reports and sometimes they can make presentation in a video form or may participate in the pre-session as part of an NGO

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<sup>101</sup> The reference is made from Article 44 of the Convention on the Rights of the Child of 1989.

<sup>102</sup> This is provided for under Article 44 and 45 (d) of the Convention on the Rights of the Child of 1989. The Committee meets in Geneva and normally holds three sessions per year consisting of a three-week plenary and a one-week pre-sessional working group. In 2010, the Committee considered reports in two parallel chambers of 9 members each, "as an exceptional and temporary measure", in order to clear the backlog of reports.

<sup>103</sup> The recommendation was done before the committee closing its sixty-fourth session held at Geneva on Friday, 4th October 2013.

delegation or in children's meeting. This provides them with an opportunity to express their views directly to members of the Committee<sup>104</sup>.

Through this procedure children are directly involved in matters affecting their rights. This calls for the fulfillment of those matters which attract their participations in decision making. Normally, they are involved in pre-session which permits interactive dialogue between them and the committee members and sometimes separate meeting can be conducted in a friendly environment. Separate meeting is conducted in informal conversations which offer an opportunity to children to be free when discussing issues affecting them<sup>105</sup>.

The Committee after taking all the necessary procedures towards the reports presented to it or after receiving complaints upon violation of human rights normally gives a concluding observation to parties concerned (including states). These Concluding Observations point out the positive achievements and challenges faced in the implementation of the CRC by each State, as well as a list of recommendations about how the State can improve its compliance with the CRC. Indeed, the ideas in the convention and the three added protocols to promote children rights are of vital importance towards protection of children rights without discrimination. However, problems come when it is time of implementations. The committee only gives concluding observation which normally has no punitive action to the state in violation of the CRC Articles.

#### **4.2. Regional institutional framework**

This part has covered some African institutions which have mandate to promote human rights, prevent discrimination of any kind and deal with cases or communications of which in one way or the other human rights have been violated. These include African

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<sup>104</sup> Available at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/membership.aspx> accessed on 17th of May 2016.

<sup>105</sup> Available at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/membership.aspx> accessed on 17th of May 2016.

Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights.

#### **4.2.1. African Commission on Human and Peoples' Rights**

African Commission on Human and Peoples' Rights was established by the African Charter on Human and Peoples' Rights<sup>106</sup> for purpose of promoting human and peoples' rights and to ensure their protection in Africa. It was inaugurated in Addis Ababa Ethiopia<sup>107</sup>. Its members are persons of the highest reputation, morality, integrity and competence in matters of human and peoples' rights and consideration is given to persons having legal background and experience. They are nominated by state parties to the African Charter and later they are elected by way of ballot by the Assembly of Heads of state and government. Normally, they are 11 members.

The commission has a mandate to promote human and people's rights. In order to fulfill this requirement the commission can undertake researches and studies on the problems challenging human and people's rights conduct and organize seminars, disseminates, encourage and advice national institutions on matters related to human rights and sometimes give advice and recommendations to governments.

Again, the commission may lay down rules and principles which seem to be of great importance towards the fulfillment of its functions. Corporation with other international institution is also employed.<sup>108</sup>

Furthermore, the commission has been vested with power to interpret the provisions of the African Charter upon the request of the state party, an African institutions or organization duly recognized by the African OAU or an institution of the OAU. For purpose of protecting human and peoples' rights the commission may call for friendly communication procedures in order to settle disputes among parties to dispute. The

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<sup>106</sup> Under Article 30 of the African Charter on Human and Peoples Rights of 1981.

<sup>107</sup> On 2<sup>nd</sup> November, 1987 .

<sup>108</sup> Article 45 of the African Charter on Human and Peoples Rights of 1981.

commission is mandated to consider state reports by examining on the steps taken so far to protect human and peoples' rights. Accordingly, Article 62 of the African Charter as a matter of compulsory procedure, states must submit in every two years reports indicating the legislative steps or other measures taken to give effect to the provisions of the Charter. The Commission meets with the responsible states in public to discuss and analyses the reports submitted to it but the Commission does not publish detailed comments or observations on the reports. It is believed that Commission is trying to encourage States to participate in the process; otherwise State Parties may for reasons known to them ignore to submit genuine report to the commission<sup>109</sup>.

Individuals, group of individuals NGOs are allowed to access the commission, and it may deal with them after being satisfied that, all local remedies has been exhausted without success if they exist or that procedures to attain them may cause unduly delay or prolong remedies<sup>110</sup>. After all what the commission thought was proper it gives recommendations on what has to be done by parties to disputes. In order to prove its activities to the OAU, the Commission must presents its annual Activities Reports to the African Union Assembly containing information gathered from different reports of special mechanisms, indicating in summary positive developments and achievements so far attained and indicates areas of concern and challenges regarding human rights in Africa.

As far as the special mechanisms are concerned, they are responsible to submit reports to the commission summarizing the activities they have been carrying.<sup>111</sup>. There are several special mechanisms each having special tasks to attend to. In generality they pay visit to African state and governments to investigate how the enforcement has been carried on, to analyse what the laws provide within state jurisdictions on how they comply to

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<sup>109</sup> E. Ankumah, (1996). *The African Commission on Human and Peoples' Rights: Practice and Procedure* at Page 42.

<sup>110</sup> Article 50 of the African Charter on Human and Peoples Rights of 1981.

<sup>111</sup>As of October 2014, there are seven Working Groups, five Special Rapporteurships, two Committees, and one Advisory Committee. All of these special mechanisms gather and disseminate information on how different groups of people or specific human rights are being treated throughout the Member States. The special mechanisms use this information to provide States or the Commission with guidance toward effectively securing human rights in Africa.

international standard, to conduct promotion activities like arranging seminars, workshops, meetings to discuss issues relating to human rights and raising awareness.<sup>112</sup>

Basing on the above explanation, it clear Africa as a continent aims at promoting human rights to all people by adopting treaties and institutions to deal with communications that alleges the presence of violation of human rights. However, the same can fail to go further to examine discrimination of children born out of wedlock on inheritance matters and in case the problem is revealed enforcement becomes a challenge as states owe supremacy mandate. As far as Tanzania is concerned, real it has enacted the Law of the Child act of 2009 as a reflection to regional and international standards to protection of children rights but it seems none of these responsible institutions has noted the discriminatory challenge facing children born out of wedlock when inheritance rights are at issue.

#### **4.2.2. African Court on Human and Peoples' Rights**

The African Court on Human and Peoples' Rights (African Court) was established for purpose of making a binding and final decision to state parties to the Protocol on matters related to violation of human and peoples' rights. The Court was adopted in Burkina Faso in Ouagadougou precisely. It works as a complement protective mandate of the commission. It was established by the Protocol to the African Charter on Human and Peoples' Rights.<sup>113</sup>

States which have ratified the Protocol acknowledge the competence of the court and as result it assume jurisdiction over those states. Cases involving interpretation and application of the African Charter, treaties ratified by African state and government and court's protocol are entertained by this court. The Court's jurisdiction applies only to states that have ratified the Court's Protocol. The Court may also render advisory opinion on any matter within its jurisdiction upon the request of the AU members, organs of AU

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<sup>112</sup>At <http://www.achhpr.org/activity-reports/>retrieved on 17<sup>th</sup> May 2016.

<sup>113</sup>The Protocol was adopted on 9 June 1998 and entered into force on 25 January 2004.

or any organization recognised by the AU. The Court also has a mandate to settle dispute amicably of cases pending before it. The Court can also interpret its own judgment<sup>114</sup>.

African commission, state parties to the protocol, African Inter-governmental Organisations, NGOs with observer status before the Commission and individuals are eligible entities to submit their communications to the jurisdiction of the court. In respect of cases brought by NGOs and individuals, Articles 6 and 34(6) of the Protocol establishing the Court provides for admissibility requirements. Cases brought by direct individuals and NGOs are admissible only when the state against which the complaint is brought has made a declaration accepting the competence of the court to receive such complaints<sup>115</sup>.

African court has power to interpret provisions of the Charter including provisions providing for right to non discrimination. Thus it can be taken that, the court has jurisdiction over an act violating non discrimination right. So far no case from an individual has been taken to this court as far as discrimination is concerned though Tanzania has made a declaration on the competence of the court.

### **4.3 .Domestic institutional framework**

This part covers Tanzania institutions which are related in receiving complaints upon the violation of human rights and deal with it according to laws governing these institutions. These institutions include the High Court of Tanzania, other subordinate courts and Commission for Human Rights and Good Governance of Tanzania.

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<sup>114</sup> This is provided for under rule 26 of the Courts Rules.

<sup>115</sup>Reference is made from Article 5(3) of the Protocol to the African Charter on Human and Peoples' Rights.

### 4.3.1. The High Court of Tanzania

The High Court of Tanzania is among components of Judiciary empowered by the Constitution to dispense justice in Tanzania<sup>116</sup>. It is also the only Court with original jurisdiction as far as the enforcement of human rights enshrined in constitution of Tanzania is concerned. The High Court has been established under Article 108 of the Constitution of United Republic of Tanzania, its jurisdiction emanates from the same Constitution and Basic Rights and Duties Enforcement Act<sup>117</sup>. Section 8 (1) (b) provides that;

*High Court shall have and may exercise original jurisdiction to determine any question arising in the course of the trial of any case which is referred to it in pursuance of section 6, and may make such orders and give directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 12 to 29 of the constitution, to the protection of which the person concerned is entitled.*

Consequently, part three of this constitution contains basic rights to be enjoyed by all people without any kind of discrimination<sup>118</sup>. The above provision allows individuals whose rights have been violated to seek intervention of the High Court so that such rights can be protected.

As far as administration of estate is concerned, which is of great importance since inheritance rights always are governed by laws governing administration of estate in Tanzania. The High Court has mandate to hear and determine probate matters according to section 3 of the Probate and Administration of Estate<sup>119</sup>. The high court also has appellate jurisdiction on administration of estates matters emanating from subordinate

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<sup>116</sup> Article 107A (1) of the Constitution of United Republic of Tanzania of 1977 as amended from time to time.

<sup>117</sup> Basic Rights and Duties Enforcement Act no 3 R E 2002.

<sup>118</sup> As provided for in Article 12 and 13 of the Constitution of United Republic of Tanzania of 1977 as amended from time to time.

<sup>119</sup> Probate and Administration of Estate Cap 352 R E 2002.

courts. Through appellate jurisdiction this court has granted right to inheritance to children born out of wedlock in the case of **Elizabeth Mohamed v Adolf John Magesa**<sup>120</sup> the high court ruled out that children born out of wedlock have a right to the estate of the father and ordered three children born out of wedlock to be included in the list of heirs. Hon. Judge considered the provision of Article 3 of the United Nations Convention on the Rights of the Child of which Tanzania is a signatory and Section 10 of the Law of the Child Act<sup>121</sup> which provides for rights to parental property. Again the high court gave a remarkable decision as far as Islamic law is concerned on inheritance matters as far as children born out of wedlock are concerned in the case of **Amina Taratibu Monde v Suleiman Ahmed Mtalika**<sup>122</sup> the court stated that in Islamic a child born out of wedlock cannot inherit anything from his father`s estate even if the father will marry his mother. With effective awareness to public on inheritance rights to children born out of wedlock they can be able to challenge provisions of the laws which violate fully enjoyment of their rights. However, due to contradictory provisions on inheritance matters, this court has great chance of creating contradictory judgments, and this is not required.

#### **4.3.2. Other subordinate courts**

As far as children rights is concerned, the LCA defines court to mean a primary court, the District court, the Resident Magistrates Court or the High. These courts generally are mentioned because they are dealing with different rights pertaining to children. When it comes to inheritance the primary court is playing a great role since it determines probate cases where the deceased person professes customary or Islamic ways of life<sup>123</sup>. These courts may give different result in judgments since probate laws are not certain in inheritance matters as far as children born out are concerned hence it may lead to

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<sup>120</sup> Matrimonial Appeal No.14/2011 High court Mwanza (Unreported).

<sup>121</sup> The Law of the Child Act no 21 of 2009.

<sup>122</sup> [2000] TLR 56.

<sup>123</sup> The reference is made from section 18 of the Magistrates Courts Act cap 11 R E 2002 and the fifth schedule to the Act.



inconsistence jurisprudence especially when referring to the decisions of court of records in Tanzania (high court and court of appeal).

#### **4.3.3. The Commission for Human Rights and Good Governance (CHRAGG)**

The Commission for Human Rights and Good Governance (CHRAGG) is an independent government department established as the national focal point institution for the promotion and protection of human rights as well as being watchdog on the observance of The Principles of Good Governance in Tanzania. For purpose of observing how human rights are adhered by the government and every citizens of Tanzania, the commission was established. The Commission was established in 2001 and serves the dual role of a human rights commission and an ombudsman for the promotion and protection of human rights<sup>124</sup>.

The commission has been responsible for protecting human rights in Tanzania. In that process it has been able to receive complaints in relation to human rights violations. Upon receipt of such complaints it investigates and later decides on the measures to be taken. Sometimes it initiate proceedings on its own, handle that case on behalf of the complained individuals before the court of law. Public hearing have been conducted for the purpose of raising awareness and if possible resolve the disputes amicably and sometimes compensation may be ordered. Research has been carried out to know exactly the true picture in relation to human rights and good governance. Through this protective function, promotion of human rights has been taking place since its establishment.<sup>125</sup>

Of recent the CHRAGG has deployed a Short Messaging Services (SMS) platform enabling citizens to use their mobile phones to lodge human rights violations and complaints in a manner which is quicker, more accessible and increasingly cheaper than

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<sup>124</sup> The commission was established under Articles 129-131 of the 1977 Constitution of the United Republic of Tanzania and section 6(1) of Commission on Human Rights and Good Governance Act no 391 of 2001.

<sup>125</sup> This is according to transparency international report of 2003.

utilising postal services or physically visiting to CHRAGG offices<sup>126</sup>. However, the commission is facing challenges as its office are almost located in urban areas so not easy to attend to all matters affecting individuals including children born out of wedlock in rural areas. Using mobile phones can be termed as simple means but it has to be noted that not all people can afford to have mobile phones and running the same demands the use of money which might not be easy to every individual. Though the commission has been established since 2001, still challenges facing children born out of wedlock are still there and it is well known that enforcement of any right emanates from the law, then in the contradictions provisions of the laws relating to inheritance even the commission fall short in protecting such rights.

#### **4.4. Conclusion**

From a human rights perspective, it is believed that all people including children have claims to social, economic and right to non discrimination that secure them a life of freedom and dignity and protect them from deprivation and harm. Ensuring children's wellbeing is no longer a matter of charity or goodwill but an obligation and accountability. This is why some legal institutions framework was put forward internationally, regionally and at national level to help in the tangible implementation of human rights and to protect people at risk like children born out of wedlock form every calamity of discrimination.

## **CHAPTER FIVE**

### **DATA ANALYSIS AND FINDINGS**

#### **5.1 Introduction**

The chapter covers the general outcome and data presentation of the current study which is bases on presentation of data collected and analysis of the data thereto. The data collected focused on the current study on Implementation of international law obligations

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<sup>126</sup> From official website <http://www.chragg.go.tz/> accessed on 7<sup>th</sup> June 2016.

to non discrimination: Examining the Law of the Child Act 2009. The chapter carries the detailed explanations of the information gathered in relevant instruments and literatures, questionnaires and the interview conducted against different persons both experienced and non-experienced personnel. These include some judges of the High Court of Tanzania, stationed Mwanza and Bukoba, some advocates having knowledge on international law and those specialized in civil and probate law, children born out of wedlock, some mothers and fathers of children born out of wedlock, religious leaders and persons who prophecy Islamic and Christianity rites . A good number of state attorneys and academicians have contributed much towards achievement of these findings. These findings are responding to the research questions and research objectives.

## **5.2 State's willingness to implement international law obligations to non discrimination against children born out of wedlock**

Under the international law special obligations to prevent discrimination against children are put forward to state parties to conventions and treaties. It is from these instruments state parties are obliged to adhere and enforce the provisions of those instruments. State obligation in implementing international law obligations to non discrimination against children born out of wedlock depends on the willingness of the state to the concerned conventions. This is to say state concerned is not forced to be a party to those conventions or treaties, or it can enter reservation to some provisions of the conventions and sometimes the state may ratify the conventions.

To cement the argument, here are some responses of states towards conventions preventing discrimination against children born out of wedlock. Since 1948, USA started initiating the move towards promotion of special legal protections for children.<sup>127</sup> In the same year, USA played a vital role in the process drafting and adoption of the first United Nations document that recognized protective rights for children namely The Universal

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<sup>127</sup> Luisa Blanch field, Cong. Research serv., R40484, the United Nations Convention on the Rights of the Child: Background and Policy Issues 1 (2009), available at <http://fpc.state.gov/documents/> ( at pg 2, 17 (pointing out that the U.S. is an internationally leader on children's rights and that the "U.N. member states first collectively recognized the rights of children in the Universal Declaration of Human Rights, a non-binding resolution adopted by the U.N. General Assembly in 1948.).

Declaration of Human Rights (UDHR) of which Article 25(2), states, “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”.

The United States (US) heavily participated in drafting the CRC, for purpose of promoting and protecting children rights around the world. It is unfortunate that the same state failed to ratify the CRC. With such heavy involvement in the drafting of the Convention, it is unfortunate that the United States cannot participate in its continued implementation. The US government played an active role in the drafting of the Convention and signed it on 16 February 1995, but has not ratified. It has been claimed that American opposition to the Convention stems primarily from political and religious conservatives.<sup>128</sup>

As stated above, the CRC received opposition from political and religious conservatives as a result it cannot be implemented in the US, it means provisions that prohibits discrimination basing on religious belief contained in the CRC contradict the rules of religions and finally US failed to ratify the CRC till now. It suffice to say that, even inheritance right of children born out of wedlock cannot be protected hence implementation of the convention as far as discrimination against children born out of wedlock is an unfinished business.

This proves how international law is a weak law as it depends on the willingness of state concerned to be a party or not and no strong mechanisms so far to enforce international laws.

Another example is that of Saudi Arabia which ratified the CRC in 1996, with a reservation to all such Articles in conflict with the provisions of Islamic law<sup>129</sup>. Going with reservation put forward by Saud Arabia, prevention of discrimination against children born out of wedlock on the ground of birth status as provided in the CRC cannot

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<sup>128</sup> Smolin, D.M. (2010). *Overcoming religious objections to the convention on the rights of the child* :*Emory International Law Review*, Vol. 20 at pg 83.

<sup>129</sup> United Nations Treaty Collection; Convention on the Rights of the Child; Retrieved on 5<sup>th</sup> of December 2015.

be met because of Islamic religious belief. Under Muslim law, a child born outside the lawful wedlock is considered '*filius nullius*' (a son of nobody). Such a child owes no '*nasab*'. A child born out wedlock is subjected to total exclusion from inheritance. That child is not entitled to inherit either through the mother or father. Furthermore, the mother or the putative father or any relative are also not entitled to claim any right in the property left by the illegitimate child<sup>130</sup>.

Rules governing inheritance in Muslims are derived from the Quran. These rules are termed as rigid because they are not subject to amendments and can never be compromised. The power of the deceased to dispose of his property by will is limited; it is recognized but basically restricted to one-third of his net assets. The transmission of property by way of bequest, or in accordance with the wishes of the deceased is not given priority compared to those found in the Quran. Thus, the central core of the system of succession is formed by the compulsory rules of inheritance designed for the material benefit of the family group<sup>131</sup>.

Many states has ratified these international instruments preventing discrimination of any kind and thus to protect children born out of wedlock on inheritance matters but implementation can sometimes not be met in an expected standard.

This can be proved by what was stated by the Committee on the right of the Child to Nigeria as a state when the committee was discussing the report presented by the state of Nigeria that, the practice shows that this legislation is not successfully implemented. This is also recognized in the State Party Report to the Committee on the CRC of 2002, which states that, Despite the laws, in practice the girl child and in some areas the boy child, children born out of wedlock, disabled children, children out of outcast, children

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<sup>130</sup> Rumsey, A. (1880). *Muhammadan law of inheritance*. St. Paul: Minn at pg 171 -172.

<sup>131</sup> Abid, H. (1984). *Article on Islamic Laws of Inheritance* at pg76.

from the minority and children from other states often experience discrimination<sup>132</sup>.

With the above proposition it is clear that, total eradication of discrimination against children born out of wedlock on inheritance matters is not an easy thing particularly in Saudi Arabia and other states following Islamic rites. Though it is clear that, internationally states have the obligation to implement what are provided for in the conventions preventing discrimination against children born out of wedlock but that obligation depends on the consent and willingness of the state to comply. Some judges and advocates responding to questionnaires gave some explanation on enforcement of international instruments that even states trying to comply with conventions and treaties are just facing cultural and religious challenges towards its implementations<sup>133</sup>. Thus state's obligation fall short in helping children born out of wedlock because of culture and religious belief of its nationals.

### **5.3 International law obligations to non discrimination and protection of children born out of wedlock**

States parties to different conventions and treaties are obliged to respect, promote, and ensure the fulfillment of those rights enshrined in those conventions. States are to take necessary steps to adopt legislative measures to effect those rights provided for in the conventions in which they are parties.

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<sup>132</sup> Concluding Observations of the Committee on the Rights of the Child: Nigeria, CRC/C/15/Add.61, 30/10/96, § 34. Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.61.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.61.En?OpenDocument) . Accessed on 12<sup>th</sup> December,2016.

<sup>133</sup> These judges and advocates are based in Bukoba registry.

Legislative measures are important towards the implementation of different rights so that under domestic laws those rights are provided and protected. Most international human rights instruments require legislative measure to be employed so as to prove willingness of the state to effect changes to specific rights. This has once commented by the Human Rights Committee in its General Comment no 1 that; -

*Article 26 [of the International Covenant on Civil and Political Rights (ICCPR)] is... concerned with the obligation imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content not be discriminatory.*

Theodor Meron (1984)<sup>134</sup> has categorised obligations in two sphere namely obligation of means or conduct and obligation of results. These obligations can be traced also from International Law Commission's draft articles on state responsibility (ILC's draft articles). This obligation when not fulfilled by state concerned, it is taken as a breach to the requirement. The Article reads that; - there is a breach by a state of an international obligation requiring it to adopt a particular course of conduct when the conduct of that state is not in conformity with that required of it by that obligation.<sup>135</sup>

Obligation of result is sometimes referred as discretionary obligation which gives to states an opportunity to opt on the means necessary to fulfill the desired goal. This also is seen in the ICL's Draft Articles on State Responsibility. Article 21(1) and (2) which reads;-

*There is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does not achieve the result required of it by that obligation. When the conduct of the state has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of that state, there is a breach of the*

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<sup>134</sup>Theodor, M.(1984). *Human rights in international law: Legal and policy issues*. University Press: Oxford. at Pg.169.

<sup>135</sup> This is provided under Article 20 of the International Law Commission's draft articles on state responsibility.

*obligation only if the state also fails by its subsequent conduct to achieve the result required of it by that obligation.*

Implementation of international law obligations to non-discrimination is stressed to states, this puts states under obligation to fulfill the obligations laid down by international human rights treaties and they are liable if those legal obligations are breached. Some International instruments do provide for some international bodies to make a follow up on such requirements. These treaty bodies have dealt with cases involving discrimination in its general application. This means in case they encounter cases involving discrimination against children born out of wedlock by states itself or its agencies they will address that issue.

In order for states to make sure obligations provided for in the conventions are fulfilled, there are should be effective remedies towards any person whose rights have been violated. Rights without effective remedies have little value or have no value at all. This is why the International Convention on Economic, Social and Cultural Rights (ICESCR) requires states to ensure that effective and enforceable remedies are available to individuals who had suffered discrimination .The right to claim is to be determined by competent judicial, administrative or legislative authorities. However, neither the International Convention on Civil and Political Rights (ICCPR) nor the ICESCR in general provides what kinds of remedies are to be provided in respect of particular rights or in respect of violation of human rights. But the Human Rights Committee has once proposed offering compensation for many rights violations, including discrimination<sup>136</sup>.

It suffices to say that, a mere presence of rules, laws, guidelines do not ensure observance and implementation of them. Having laws protecting different rights is one thing and observance is another thing. It is very easy to identify particular rights than to provide effective mechanisms to enforce them. The UN High Commissioner for Human Rights

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<sup>136</sup> Danny, S et al (2011) *Non- Discrimination in International Law: A Handbook for Practitioners*: 2<sup>nd</sup> ed. interIGHts: London. at pg 39.



has once pointed out that eliminating discrimination is much more complex and difficult task than enacting laws which recognize equal rights to all<sup>137</sup>.

Basing on the above explanation, briefly it can be stated that international conventions for purpose of protecting human rights are general. Discrimination is prohibited generally not specifically for children born out of wedlock when it comes to inheritance matters. The CRC specifically prohibits discrimination against children on the basis among other things of birth and religious belief of the parents or guardian. Thus the state parties to the CRC have to ensure that there is no any discrimination of any kind against children.<sup>138</sup>

Generally, it can be said that, implementation of international law obligations to non discrimination against children born out of wedlock is of general concerns not specifically addressing inheritance right of children born out of wedlock. Conventions like the ICCPR and ICESCR just mentioned the award of remedies in violation of a right, but specifically does not state which remedy has to be offered and as it is well known, the responsible person to be ordered to pay remedies is the one breached a certain right. It is not clear who is responsible to pay compensation to children born out of wedlock whose right to inheritance has been violated. In a situation where the deceased father left a will not recognizing children born out of wedlock, no doubt they will suffer and it is not clear who has the duty to compensate.

#### **5.4 Enforcement and sanctions to failed states to implement conventions and treaties**

Under international law enforcement procedures suffer failures; this is because there are no formal procedures of enforcement and sanctions to states failed to comply the

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<sup>137</sup> At <http://www.aspeninst.org> retrieved on 8<sup>th</sup> February 2016.

<sup>138</sup> Reference is made from Article 2(1) (2) of the Convention on the Rights of the Child of 1989.

obligation enshrined under human rights instruments<sup>139</sup>. State parties to treaties assume an aspect of good faith, of which states' willingness to comply is seen once a state ratifies the said treaty. Beyond a formal report to the Committee concerned, there is no direct penalty or punishment or criticism of domestic law that comes into play<sup>140</sup>. Committees end up by giving recommendation to state concerned.

Those recommendations have no any sign of penalty, it can be adhered by the state concerned or not. This is taken to be weak procedure.

It was expected that, enforcement of the CRC which basically is a specific convention for children rights, would be easy as almost all states accepted it and adopted it. However, the case is opposite as enforcement and implementations mechanisms is only on state parties. So states not party to the CRC can never be interfered by the committee upon violation of children rights<sup>141</sup>. Furthermore, this committee ends up by giving recommendations upon violation of children's rights. It suffices to say that, the committee has toothless procedures which cannot effect changes. This committee was established by the CRC<sup>142</sup>. The CRC calls for other United Nations organs, such as the United Nations Children's Fund to submit reports that are relevant to children's rights issues.<sup>143</sup> And finally it ends up giving recommendations and comments of which non compliance attracts no penalties of punishment.

The CRC clearly provides for many rights of children, and it was believed that state parties to it would be responsible to take actions when implementing the same through its domestic laws. This assumption has affected the follow up towards the adherence of the same, as result it the committee emphasizes on education, facilitation, and cooperation

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<sup>139</sup>Cynthia P. C. (1998). *The jurisprudence of the committee on the rights of the child*, 5 GEO. J. On fighting poverty at pg 202.

<sup>140</sup> Ibid at pg 203.

<sup>141</sup> Cynthia P. C. (1998). *The jurisprudence of the committee on the rights of the child*, 5 Geo. J. On *Fighting Poverty* at pg 203.

<sup>142</sup>Convention on the Rights of the Child; G.A. Res. 44/25, 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/736, at Art 44 Nov. 20, 1989, available at <http://www.unhchr.ch/html> .

<sup>143</sup> Art 45 of the Convention on the Right of the Child of 1989.

rather than confrontation<sup>144</sup>. Of recent the CRC had allowed procedure for children to make individual claims of violations through its third protocol but the state has to accept the competence of the committee first. However, the CRC has no direct enforcement body that can influence domestic agendas through the watch of any ruling committee<sup>145</sup>.

All United Nations human rights treaties have similar implementation mechanisms. There are no courts, no formal enforcement procedures, and as previously stated, no sanctions for failing to meet the treaties' standards. The facts that, states ratify United Nations human rights treaties are presumed to prove its willingness to be bound by what the conventions provide. The presumption is based on the application of good faith principle. However, proof of good faith is just done only on the relevant periodic reports submitted by state parties to the responsible committees<sup>146</sup>. Actually, what normally are submitted to committees in formal reports is taken to be true and genuine reports.

Committees established under UN conventions and treaties have been vested with power to receive complaints normally termed as communications or submissions from individuals upon violation of human rights by states or others actors in its behalf. Upon receiving the communication the responsible committees do examine and review each communication and later it gives its recommendations and opinion to be adhered by state concerned. The committees have no power to enforce since they are not traditional courts of law with compulsory jurisdiction and lack the necessary powers to enforce compliance<sup>147</sup>.

Since Conventions fail to establish any concrete means of enforcement at the international level, it may be concluded that the Conventions are fundamentally weak documents which depends on individual Nation States to enforce the Conventions themselves. It could be easier if states could be guarding themselves upon violation of

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<sup>144</sup> Roger R. L. (1994). *International children's rights to grow Up: Implications for jurisprudence and domestic Policy* at pg 218.

<sup>145</sup> Ibid at pg 219.

<sup>146</sup> Danny, S. et al (2011). *Non- Discrimination in international law: A handbook for practitioners: 2<sup>nd</sup> edn.* interiGHts: London. pg 43.

<sup>147</sup> Ibid at pg 43 and 44.

human rights. This being the case therefore, international obligation in preventing discrimination against children born out of wedlock fall short in the means of prevention as it depends on the presumption of good faith of the state parties to conventions and proof of good faith is seen on periodic reports to the committees only which is a weak method to prove compliance.

### **5.5 Protection of children born out of wedlock and enforcement of international treaties**

Protection of children and prevention of any kind of discrimination is among the international concerns so that all people can be treated equally. This being the case therefore, UN adopted different instruments to prevent discrimination and enforcement mechanisms have been employed to promote equality. Both international and regional instruments emphasis on equality principle though when it comes to practical enforcement differences occur. Variations emanate from the instruments concerned depending on rules, scope and jurisdiction of each instrument. Again, variations arise from persons eligible to submit and present communications to enforcement machinery.

Among the UN human rights instruments there are two major ways of enforcement of human rights, that is periodic reporting and individual complaints. As far as **Periodic reporting** is concerned, most instruments direct the state parties regularly depending on the time frame in each instrument to submit reports to relevant committees to review and examine compliance. Most of reports are submitted by state parties to each instrument and sometimes from NGOs and at the end the concerned Committee give concluding remarks towards compliance.<sup>148</sup>

**With individual complaints;** individuals are allowed to submit their complaint to the relevant committees. Within the UN system, these mechanisms depend on the requirement of the Conventions. Some conventions through its additional protocol give the procedure of making individual complaints. Just to mention few there are; The

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<sup>148</sup>Danny, S. et al (2011). *Non- Discrimination in international law: A handbook for practitioners*: 2<sup>nd</sup> edn. interIGHts: London. at pg 13.

Human rights committee (HRC) established under the ICCPR. The committee monitors implementation of the ICCPR by state parties. The optional Protocol allows the HRC to consider individual communications<sup>149</sup>.

The committee on the Elimination of Racial Discrimination (CERD) established under the ICERD also has a mandate to consider individual complaints<sup>150</sup>.

The committee on the Rights of the Child is the monitoring body established under the CRC. It has power to receive submission well known as periodic reports of signatory states, examines country reports and later it publishes the concluding observations and recommendations normally referred to as concluding observations. The committee of recent has been offered a mandate to consider individual complaints through its third additional protocol<sup>151</sup>.

It has been noticed through this research that, the committees' jurisdiction to consider communications is not automatic mechanisms it depends on what conventions do provide. Some do not allow individual complaints. Later an additional protocol can allow individual to access the committees. For example, in the ICCPR and CRC individual complaint mechanisms were established under separate optional protocols. Each state to those protocols has to acknowledge or make declaration on the competence of the committee. However, it is not automatically that individuals can access the jurisdiction of the committee; rather it is provided that all domestic remedies must be exhausted and other admissibility criteria must be fulfilled. Another requirement, demands the individual to be a national of the state part to those protocols or conventions before accessing jurisdiction of the committee. Sometimes the requirement could be that such an individual must be a victim of such violation or an appointed representative on his behalf. The HRC for example, will accept submissions from a lawyer or a close relative whom

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<sup>149</sup> Ibid at 13 and 15.

<sup>150</sup> Article 1 (1) of the International Convention on the Elimination of Racial Discrimination of 1966.

<sup>151</sup> The third optional protocol was approved on 19 December 2011 and entered into force on April 2014.

the individual has appointed, but not from a member of a non-governmental organisation claiming an interest in the situation<sup>152</sup>.

It was noticed during interview session that, most individuals have no knowledge on the enforcement mechanisms; they are unaware of exhaustion of local remedies issues<sup>153</sup>. Exhaustion of local remedies for an individual to access the jurisdiction of the committee is a cumbersome procedure considering the level of understanding and education background of most of the affected individuals who suffer discrimination. For example in Tanzania, most of the interviewee who suffer inheritance discrimination in this case the children born out of wedlock, were those who have no background of attaining to school, and others know nothing about what the laws provide regarding their rights. Again, it was noticed that, most of them are facing economic and financial challenges, thus pursuing a case which spend a lot of time and money seem not to be friendly to them. Then, it is not easy at all to access the jurisdiction of committees which is outside the state, if even seeking justice in the local courts is somehow difficult. It has been viewed that, the procedure stipulated can create conflicts between an individual and the state concerned<sup>154</sup>.

All of the interviewee and persons who responded to the questionnaires regardless of their groups' category had similar view on issues of enforcement of international treat that enforcement basically depends on the principle of good faith among state parties to conventions or treaties. They were of the view that, even becoming a party to treaty depends on the consent and willingness of the state since states are sovereign they cannot be forced to be part to any convention. Citing USA as an example which is not a party to UNCRC proves sovereignty of the state<sup>155</sup>.

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<sup>152</sup>Danny, S. et al (2011). *Non- Discrimination in international law: A handbook for practitioners*: 2<sup>nd</sup> ed. interGHts: London. at pg 15 and16.

<sup>153</sup> Most of them are normal persons having no knowledge of law.

<sup>154</sup> The interviewees were children based in Bukoba and Kuleana Center Mwanza and some academicians studying law.

<sup>155</sup> Some explanations were extracted from questionnaire papers and others from senior advocates based in kagera region.

It was also noticed that, to present periodic report to the responsible committee, a state must be a party to the Conventions and protocol concerns. The U.S for example cannot present its compliance reports to the CRC committee as it is not a party to the CRC. Thus, neither the state nor individuals children born out of wedlock inclusive can access the jurisdiction of the committee to the CRC.

### **5.6 Children born out of wedlock and the right to inheritance in Tanzania**

Through this research, it has been put clear that, the Government of the United Republic of Tanzania has adopted several measures guaranteeing the rights of the child in the country including ratification of international human rights instruments that guarantee the rights of the child including inheritance rights to children born out of wedlock, notably the United Nations Convention on the Rights of the Child of 1989 and the African Charter on the Rights and Welfare of the Child of 1990 just to mention few. The country adopted the Child Development Policy since 1996 which *inter alia*, gives direction to how children's issues should be handled and given priority. In 2009 the government has enacted the Law of the Child Act<sup>156</sup> providing for the rights of the child that, *inter alia*, protect children from discrimination even on inheritance matters and impose duties on parents or guardians to provide the children with maintenance which confirmed to the Constitution of the United Republic of Tanzania of 1977<sup>157</sup>, which provide for equality before the law among other things.

It was argued by some interviewees<sup>158</sup> that, the Law of the Child Act seems to have intention to protect the right of children generally by having provision which grant inheritance right to children born out of wedlock. The challenge which face non-marital children to fully enjoyment of such right is based on the subjection of that right to religious belief of the biological father of which in the logical sense no any religion in

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<sup>156</sup> The Law of the Child Act no 21 of 2009.

<sup>157</sup> The Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

<sup>158</sup> These include advocates based in Mwanza and Bukoba.

Tanzania that allow inheritance right to the children born out of wedlock. Openly, this is discrimination on the ground of religious belief and birth status.

It has been noted further that, discrimination can take two forms, one being direct and the other being indirect. With direct discrimination the state fails to be a party to the conventions or enters reservation to provisions prohibiting discrimination for example Saudi Arabia which entered reservation to UNCRC to every provision which is contrary to Quran and USA which is not a party to UNCRC. With indirect discrimination the state is a party to the convention and enacts laws to give effect to the compliance of the convention but when it comes to implementations, the provisions bring different results to the proposed aim<sup>159</sup>. It seems Tanzania falls under indirect discrimination since provisions contained in the LCA on inheritance right of children born out of wedlock if implemented definitely will bring different results to what was intended by the convention. The LCA has provisions which allow children born out of wedlock to have right to parental property but other provision subject that right to religious belief of the biological father which if implemented may led to different result. It is not clear whether this controversy was an afterthought or intentional, this is controversial.

### **5.7 The rationale of subjection of inheritance right of children born out of wedlock**

It is provided under the LCA that when the court has made an order on a biological father, such father has to take responsibility to the child in the same manner as may be in respect of a child born in wedlock and the child shall, subject to the religious belief of the father have such other rights devolving from the parent including to be an heir<sup>160</sup>. From this provision, openly and clearly the subjection comes in and this is what brings about discrimination against children born out of wedlock when it comes to inheritance issues.

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<sup>159</sup> Reference was made from Danny, S. et al (2011). *Non-Discrimination in international law: A handbook for practitioners*: 2<sup>nd</sup> ed.. interiGHts: London. at pg 13 to 15 with added emphasis of examples of mentioned states.

<sup>160</sup>Reference is made from section 36 (4) of the Law of Child Act no 21 of 2009.



Discrimination against children born out of wedlock was described as one of the most deplorable hypocrisies in Family Law, whose pernicious effect was to punish children born out of wedlock for matters of which they were not in the slightest degree responsible just for safety of marriage institution<sup>161</sup>. Some of the respondent argued that legal recognition of children born out of wedlock undermines the legitimacy and stability of the marriage institution. Some married woman during the interview asserted that, allowing children born out of wedlock to fully enjoyment to maintenance, inheritance and custody if not well managed may lead to chaos, misunderstanding and marriage blockage which might not be the intention of legislature<sup>162</sup>.

On the other side, it was revealed that, allowing or acknowledging inheritance right of children born out of wedlock contravenes holly books (Quran and Bible). Under Islamic, children born out of wedlock are not accepted as children to inherit their biological deceased father estates<sup>163</sup>. In fact, both religions (Christian and Islamic) prohibit illegal relationships which end up with having children born out of wedlock as a product. It is believed that, an unmarried woman is being punished for breaching the “religious” rule, which states, Thou shalt not commit adultery. So she has to be responsible to maintain the child of the adulterous act and to leave legacy to her child if possible. This is discriminatory in nature, since adulterous act can never be committed by women without men.

Some respondents viewed that; Christianity accords to children born out of wedlock a lower status than children born in wedlock. They said that children begotten out of legal marriages are born of “illicit” sexual relation, and therefore incur loss by not inheriting their fathers’ property.<sup>164</sup> During one of the interviews one pastor<sup>165</sup> stated that it is not

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<sup>161</sup>Danny, S et al (2011) *Non- Discrimination in international law: A handbook for practitioners*: 2<sup>nd</sup> ed. interGHts: London. at pg 17.

<sup>162</sup> These were married women based in Kagera –Bukoba municipal.

<sup>163</sup>The statement was given by Sheikh ALhaji HarunaKichwabuta of Kagera Region during the interview.

<sup>164</sup> One of the pastors by the name of Felician Kanyoro quoted several verses in the Bible where discrimination against non-marital children can be inferred. For instance, Genesis 21: 9-14, Deuteronomy 23: 2, Judges 11:1-2 and Galatians 4:30.

their will to go against the laws made by the parliament but implementations of them sometimes go against the will of God and since they are servant of God they have to obey God's commandment and instructions. He stated further as an example that, Tanzanian law allows divorce of Christian monogamous marriage in the court of law and under that circumstance after divorce, the divorcees are allowed to contract another marriage legally known under the law, but pastors according to bible are not allowed to accept the same persons to contract the second marriage under Christian rites. The law is there but implementation according to Christianity beliefs is very difficult to be fully implemented. Basing on these arguments, one can notice that, the law is enacted for the people but those people have their beliefs which sometimes go contrary to legislative laws. This brings about different interest of those who are required to implement those laws. This is not easy at all since it touches faith of people and of interesting is that, faith is developed or emanates from holy books which can never change. Thus it is believed that, this situation happening for purpose of stabilizing the religious institutions.

At this juncture, it has been noticed that, applicability of some international treaties which allow universal treatment of individuals without considering culture, beliefs and historical background of the nationals of the state creates doubts in implementation. It has been noticed further that, not every unequal treatment of persons constitutes discrimination prohibited by human rights instruments. States are allowed to establish any reasonable ground in view of different situations and categorise groups of people for a legitimate purpose. Most established grounds of discrimination in international human rights law includes sex and gender, sexual orientation, race, colour, descent and ethnic origin, nationality, language, religion and belief, disability, age, political or other opinion and marital, parental and family status if that discrimination is to pursue a legitimate aim. Thus states have to consider some reasonable ground of treating individual differently rather than being a party to convention without reservation and at the end they fail to implement what they agreed.

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<sup>165</sup> Pastor Rugemeleza of KKKT Bukoba Diocese responded some question during the interview on 20<sup>th</sup> February 2016.

## **5.8 Negative impacts of subjecting inheritance rights of children born out of wedlock**

As it was stated by Peter, C.M and H.M Ibrahim<sup>166</sup> that the denial of basic rights and freedoms is not only an individual and personal tragedy, but also creates conditions for social and political unrest, sowing seeds of discord, violence and conflicts within and between communities and nations. There is no doubt that, equality before the law as provided for under the Constitution of the United Republic of Tanzania<sup>167</sup> is among the basic rights to be enjoyed by all people. Inheritance right is among the basic rights which have to be enjoyed by all children.

Thus, subjecting that right to religious belief of the biological father which denies that right to children born out of wedlock creates discrimination environment which affects the national at large. This situation may lead not only to violence but also to conflicts within the family and the communities at large. Children born out of wedlock may cause social and political unrest if not well handled. It is believed that, among the children living in vulnerable situation most of them are children born out of wedlock who are casually termed as street children who are normally affected by joining gang groups who plan to steal or rob.

However, it has been noted that, even inclusion of inheritance right of children born out of wedlock has to be carefully examined so that fraudulent environment can be avoided. Some interviewees<sup>168</sup> seemed to be scared with the danger of creating fraudulent environment in acquiring property. They reasoned out that if the law will totally allow non-marital children to inherit the estate of their biological fathers without making clear for some rules to be followed like legitimization processes, it is clear that, a child born out of wedlock may claim that right fraudulently seeking to acquire wealth even if the deceased is not his biological father. They viewed that, legitimization process has to take place first during the life time of the father so that a child born out of wedlock will be

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<sup>166</sup>Peter, C.M., Ibrahim, H.M. (1998). *Fundamental rights and freedoms in Tanzania*. Mkuki na Nyota: Dar es Salaam.

<sup>167</sup> Article 12 and 13 of the Constitution of United Republic of Tanzania Cap 2 R E 2002.

<sup>168</sup> These includes married woman who contracted monogamous marriage.

legally accepted otherwise that right will demise with the death of the biological father. They elaborated more that after death anything can happen particularly in the current situation where people demand to acquire wealth by any means without considering the suffering of others. They said things like this can happen if the deceased had a lot of property. It happens nowadays that people fraudulently formulate a will to be that of the deceased for purpose of accumulating wealth.

Some respondents<sup>169</sup> felt sympathy to what is happening to children born out but they were unable to contradict to what is provided in holly books. They know that children born out of wedlock are being rejected for the act they were not even in a slightest degree responsible. However, it is well known that sympathy does not change the situation if no law to effect changes.

### **5.9 Public knowledge on instruments relating to inheritance right**

It has been noticed during collection of data relating to this research that, most people have no knowledge of laws and international conventions preventing discrimination and seem to know nothing about inheritance right of non-marital children. They viewed that, they can hear someone talking about inheritance via a radio but they are unaware of the existence of conventions prohibiting discrimination against children born out of wedlock. As far as LCA is concerned which in a nut shell has tried to provide inheritance right of children born out of wedlock, some interviewees were not aware of the existence of LCA<sup>170</sup>

Some who responded through questionnaire, who had some knowledge of law, viewed that, inheritance matters needs to be taken with special care so as to avoid conflicts among the heirs. They insisted that, in order to some extent to avoid conflicts and misunderstanding the deceased person has to leave a will indicating the heirs. However, it was noticed that most people do not know how to draw up a will that could be honored in a court of law because they are not aware of the legal requirements of drawing a will.

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<sup>169</sup> These include religious leaders.

<sup>170</sup> Some children, women and men interviewed seem to know nothing on laws pertaining children rights.

Again, it was elaborated that, most people in Tanzania believe that drawing up a will is an invitation to premature death as a result they die intestate. Thus, they way to protect children born out of wedlock in inheritance matters is by way of leaving a will since laws does not fully guarantee that right to them, as some contradictory provisions continue even after the adoptions of different conventions and enactment of LCA.

#### **5.10 State's reasonable justifications for non- observance of international obligations**

As it has been noticed in the process of gathering information related to this research that implementation of international law obligations to non discrimination is primary addressed to states parties to conventions preventing discrimination. This requirement is met when a state ratify the conventions and enact laws to that effect. However, discrimination can be justified just by having reasonable justification stated by the state concerned. States are at liberty to protect its traditions, culture, beliefs of its people and values. In this umbrella of reasonable justification, states may avoid implementation of international law obligations contained in several conventions and treaties. This situation has to be exercised with care when it comes to issues of great importance to the society and the nation as whole. International law is believed to be a weak law as it depends on the willingness of the state to enforce or to enter reservation. It suffices to say, implementation of international law obligations non discrimination against children born out is an unfinished business since it touches beliefs of people.

#### **5.11 Conclusion**

Protection of children from discrimination is considered an important contemporary goal. Children are to be protected from economic exploitation. It is not in dispute that, inheritance is covered under right to accumulate wealth. Arguably, to deny this right to children born out of wedlock without other alternative to protect them is a serious challenge which may lead to chaos. The manner in which religious beliefs treat children born out of wedlock on inheritance issues is of rigid nature, alternative way has to be adopted. Islamic inheritance is prescribed by the law in rigid and uncompromising terms.

The power of the deceased to dispose of his property by will is recognized but basically restricted to one-third of his net assets. The transmission of property by way of bequest, or in accordance with the wishes of the deceased is of secondary importance. With this proposition it is clear that, total eradication of discrimination against children born out of wedlock on inheritance matters is not an easy thing.

## **CHAPTER SIX**

### **GENERAL CONCLUSION AND RECOMMENDATIONS**

#### **6.1 Conclusion**

As it has been seen in the previous chapters of this dissertation, implementation of international law obligations to non discrimination of any kind against children generally is vested to states. States has a free will to exercise the affairs of its country. One way of preventing discrimination under international arena is by becoming a party to conventions prohibiting discrimination. This obligation assume an aspect of good faith, once a state has ratified the treaty it is presumed that, the state is willingly to effect changes to domestic laws to give effect to the requirement of the convention. It is bad luck that beyond a formal report to the responsible and established Committees, there are no direct penalties or punishment or criticism to domestic laws that come into play. Moreover, the established committees operates by giving recommendations to state parties presenting reports, the question as to whether those comments has given effect is mystery and if they will notice failure towards their comments still they are toothless since they lack enforcement mechanisms.

The Convention on the Rights of the Child (CRC) is a multilateral treaty designed to promote the protection of children rights worldwide. As of today, only three countries in the world have yet to ratify the CRC: Somalia, the new nation of South Sudan, and the

United States<sup>171</sup>. Failure to ratify the same which prohibits discrimination basing on the beliefs of the father as per Article 2(2) of the CRC impliedly gives the impletion that inheritance right of children born out of wedlock cannot be implemented in those states. Generally, under international sphere, the obligation to prevent discrimination against children born out wedlock lacks enforceable mechanisms, thus it suffice to say international law is a weak law.

As far as Tanzania is concerned, there several regimes applicable to succession matters namely statutory laws, customary laws and religious laws (Islamic and Hindu). It has been noticed in the process of preparing this research that; these laws apply after the court has satisfied itself on the mode of life of the deceased. It is bad luck that, those laws when it comes to inheritance right of non-marital children contradictions occurs. With statutory laws (except LCA which it is not well known whether forms part to statutory laws of succession) the putative father is required to leave a will to protect inheritance right of non-marital children. With religious laws only leaving a will by the deceased can protect inheritance right of children born out of wedlock, otherwise that right cannot be exercised. With customary laws children born out of wedlock can inherit after being legitimized or by leaving a will<sup>172</sup>. With the enactment of the LCA which provides for rights of children the same problem has not been eradicated as that right is subjected to religious belief of the biological father and none of those beliefs recognise inheritance right of non-marital children.

Going through findings, it is clear that inheritance right of children born out of wedlock is a contradictory issue. Human rights activists accept that right has to be exercised without any discrimination but others do think it is proper to leave the situation as it is so that legitimization should take place first. It is contended that, the problem facing non marital children cannot be eradicated by enacting laws alone; there is a need of having a national

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<sup>171</sup> *Convention on the Rights of the Child*, U.N. TREATY COLLECTION viewed on 22<sup>nd</sup> January 2016 at 14:00 hrs at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>172</sup> Rules no 41,42,43 collectively of G.N. No.436 of 1963,2<sup>nd</sup> Schedule: Rules of Inheritance; 3<sup>rd</sup> Schedule; Rules on Wills.

forum discussing how to have a permanent solution. Considering the economic status of many families in Tanzania which is of low standard, parents (for this matter some biological fathers) leave nothing to their children upon their demise, thus there is a need for nation as a whole to work together to help children facing challenges (children born out of wedlock inclusive.)

## **6.2 Recommendation**

### **6.2.1 Enforcement of international treaties**

The legal principles of equality and non-discrimination are at the core aspect of international human rights treaties and declarations. The presence of international instruments preventing discrimination signifies the intention of protecting children rights. However, the development so far achieved in the movement of international instruments against discrimination does not mean that the system as a whole is now fully satisfactory. The advancement of standards prohibiting discrimination of persons belonging to various vulnerable groups including children born out of wedlock is uneven. In some cases the prohibition is established by conventions, in others by non-binding declarations. The effectiveness and implementation of even the most advanced protective structures, based on international conventions, is diminished by the fact that they are not ratified by all states, and that upon ratification or accession many states parties have stipulated reservations that in many cases significantly limit the scope of the convention. Many more countries have ratified the conventions but have not put in place any enforcement mechanisms at the national level. In light of these limitations a call for further development of anti-discriminatory law and agreement is inevitable and justified. In case implementation of some provisions to favour vulnerable group is



impossible amicable alternative has to be adopted. It is important for states to implement their international law obligations by not adopting legislative measures only but also make sure when implementing them may not lead to controversy or different result. In case of reasonable justification which is allowed under international regime, states through discussions have to give other means to protect vulnerable group including children born out of wedlock. If subjection of inheritance right of children born out of wedlock to the religious belief of the biological father is among reasonable justification as it has been in the provision of LCA<sup>173</sup>, then the state has to provide for alternative means caring children born out of wedlock like sponsoring their education, offering them piece of land to reshape their life and sometimes to offer them loan and entrepreneurship skill so that they can be able care for their being.

Generally, a big step forward in eliminating discrimination can only be achieved if a collective effort is made both at the international level and by governments of different states. Children born out wedlock may not necessary be fulfilled by parents alone as experience shows others are living in an abject poverty and thus feeding their children is a big problem. It is unfair to leave this innocent children unprotected, discriminated for the thing which they are not responsible and beyond their control. Thus, states which fail to enforce international treaties should be required to give the other means of helping children born out of wedlock.

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<sup>173</sup> Section 36(4) of the Law of the Child Act no 21 of 2009.

### **6.2.2 The need for mass education on the instruments preventing discrimination**

It is proven that most citizens do not have enough knowledge concerning the law preventing discrimination, particularly those regarding inheritance rights. Therefore both government and private sectors should provide mass education about basic rights and legal procedures pertaining to children's rights. If the government has decided to combat discrimination effectively and efficiently, it must not only legislate laws promoting and providing for equal rights to all children and discourages all forms of discrimination, but it must ensure that these laws are implemented and enforced. It must allocate enough and sufficient fund and resources to promote public human rights awareness aimed at challenging prejudices and discrimination against disadvantaged groups, including children born out of wedlock. Promotion of mass education can be conducted through radio or television programs, public meetings and distribution of simplified publications to the society generally.

Educational measures have to be carried out to address bad attitudes, traditions, customs and behavior practices which emphasizes and encourage discrimination against children. The government has to encourage open discussion against discrimination, promote public information programs involving the engagement of media and civil society, awareness campaigns which aim to combat negative societal attitudes and practices which condone or encourage discrimination. The discussion can be initiated and implemented by both State and civil society actors under the responsibility of the State or by just creating an environment supporting private actors to raise awareness.

Again, the society has to be educated on the issue of leaving a will. Under this aspect, leaving a will can protect inheritance right of children born out of wedlock. The problems of most Tanzanians they are unaware on the legal requirement to draw an acceptable will. Basing on the experience I have as a magistrate I normally encounter several wills which cannot be termed as a will since they do not conform to legal requirements. If people will be educated on how to love their children and be educated on the problems which may

occur after their demise, most likely they can leave a will to avoid conflicts between the heirs.

Children also have to be educated that, they should not real put much of their efforts waiting to be heirs, rather they have to accumulate their own property and in case they inherit their father`s property that will be added advantages. It may happen that a child can live for many years in the family, in the home, and yet, at the end of the day, the parent, for reasons best known to him or her, perhaps due to temporary quarrels, decide to cut off the child out of the will. Thus in that circumstance, a child would be the loser. Inheritance is not something to solely rely on, since other parents have nothing of worthy to leave for the heirs.

### **6.2.3 The need for coordination among stakeholders, families and other actors.**

It is clear that, under the international law special obligations to prevent discrimination against children is put forward to state parties to conventions, but states alone cannot meet the required standard as violations of human rights involves both state and other actors. Corporation and coordination is among the methods to promote equality among children. Discrimination of non marital children on inheritance matters is not a simple task to be eliminated since it touches different beliefs of people, thus corporation; discussion among the stakeholders can create a way on how to protect their rights. States parties through conventions, laws and policies preventing discrimination has positive and active obligation to support and assist parents and other caregivers to secure, within their abilities and financial capacities.

It has to be noted that, both mothers and fathers play a big role in their child`s life no matter if the child was born out of wedlock or in marriage. To discriminate them in any way it does not embarrass children alone but the whole society. It is from such situations the society is witnessing street children who later turn to be harmful to society by becoming thieves or armed robbers. It is very bad to create a generation which is not educated and as a result economic gains diminish. Thus to avoid such situations

stakeholders, families and other actors like religious institutions and non governmental institutions have to unity and push economic and educational growth of non marital children together and at the end no one will be blamed rather those children can be of great use to the nation as whole in future.

#### **6.2.4 Establishment of effective international fund to care for vulnerable children**

As it was seen in previous chapters implementation of international law obligations to non discrimination is based on the willingness of the state parties to convention, it means failure to comply has effects which seems to be weak to failed states. Sometimes it is not the wishes of the state to deny compliance or implementation but the nature of their people force them to do so since they have different beliefs. It is clear that under international arena there international fund to take care for those children under vulnerable environment but funds are not sufficient to cover every challenge facing these children. States have to make a binding agreement to support the funding to children born out of wedlock worldwide so that challenges facing them can be reduced if not to be eliminated. My experience as a magistrate I have noticed that, there are fathers who even to feed their family is a challenging issue when it comes to maintenance. They do not deny being the biological father of the children but they are facing economic and financial problems, even if the court will make an order for maintenance, the order cannot be implemented because of the economic challenges the father has. Thus in such circumstances it is hard to belief the same person can have something of value to leave as a legacy to his heirs as a result the society is facing a lot of children living in unpleasant environment. It is recommended that, Tanzania has a nation should think on a way of creating National Children Fund and the government should create budgetary command to this fund to help children born out of wedlock. Also there should be national campaign to ask for support from other people and organizations as the government through its actors has been doing so to cover other aspects which it has failed to fully cover like that of donating for schools desks and building dispensaries.

It is understood that, the aim of preventing discrimination under international arena is to improve the living standard for all, then if that desire is genuine it is better to establish an effective international fund with full of support from different actors to curter for education and health purpose of non marital children. Improving living standard and offering education to non marital children is of great importance than forcing them to be acknowledged to their biological father and waiting for legacy. As stated earlier, there some fathers who cannot leave something of value to their children, but if they can be sponsored to good education they can fight for better living on their own in future.

No one denies that the children born out of wedlock are not responsible for the circumstances of their birth, and if anything could be done to improve their status without prejudice to the other competing interests, let it be done. It is also clear that, religious belief can never change as it emanates from Holy Books which strictly can never change and this brings what is termed as just and fair to leave the situation as it is. Thus, protecting religious interest is a nice and recommendable thing but the government has to think on other circumstances to help children born out of wedlock which may not lead to chaos and conflicts instead of peace in the family and to the society generally.

## REFERENCES

### Books

- Alphonse M. A.U., Janeth F. A. U. (2013). *Probate and administration of estate Law in Tanzania*. (1<sup>st</sup>ed). Internal Printers Ltd: Moshi Tanzania.
- Bainham, A. (1996). *Children: The modern law*. Jordan Publishing: Bristol.
- Bentzon, A.W. et al. (1998). *Pursuing grounded theory in law: South-North experiences in developing women's law*. Tano Aschehoug: Oslo.
- Bevan, H.K. (1989). *Child law*. Butterworths: London.

- Chaman .A.K. (2011). *Sheria ya mirathi nchini Tanzania: Haki za wajane na watoto*. (2<sup>nd</sup>ed). Tanzania Educational Publishers: Bukoba.
- Danny, S. at el (2011). *Non –discrimination in international Law: A handbook for Practitioners*. (2<sup>nd</sup>ed). interIGHts: London
- John, M. (2003). *Children's rights and power: Charging up for a new century*. New York: Jessica Kingsley.
- Mashamba, C et al (2001). *Sheria ya mirathi na wosia*. Mkuki na Nyota: Dar es Salaam.
- Mower, A.G. (1997). *The convention on the rights of the child: International law support for children*. Greenwood Press: London.
- Mugwanya, G.W. (2003). *Human rights in Africa: Enhancing human rights through the African regional human rights system*. Ardsley: Transnational.
- Murray, R. (2000). *The african commission on human and peoples' rights and international Law*. Hart Publishing: Oxford.
- Murray, R. (2007). *The role of national human rights institutions at the international and regional Levels: The experience of Africa*; Hart Publishing: Oxford.
- Musoya, W. (2008). *Law of succession*: Law Africa Publishing (K) Ltd Nairobi: Kenya.
- Mwalusanya, J. (1993). *Sheria ya urithi: maswaali na majibu kuhusu haki za wajane*. Mkuki na nyota: Dar es salaam.
- Ott, D.H. (1987). *Public international law in the modern world*: The Bath Press: Avon.
- Peter, C.M., Ibrahim,H. M. (1998). *Fundamental rights and freedoms in Tanzania*: Mkuki na Nyota: Dar es Salaam.
- Reif, L. (2004). *The ombudsman, good governance and the international human rights system*; Martinus Nijhoff Publishers: New Dely.

- Rumsey, A. (1880). *Muhammadan law of inheritance*: (2d ed.). St. Paul: Minn.
- Sandra, F. (2011). *Discrimination law*. ( 2<sup>nd</sup>ed.). Oxford University Press: London.
- Sen, A. N. (2008). *Human rights*. Oxford University Press: London.
- Shabbir, M. (1998). *Human rights in the 21<sup>st</sup> century*. Rawat: Jaipur.
- Van Bueren, G. (1995). *The international law on the rights of the Child 10-11*. Martinus Nijhoff Publishers: Boston-London.
- Van, B. G. (1998). *The international law on the rights of the child*. Kluwer Law: The Hague.
- Viljoen, F. (2012). *International human rights law in Africa*. University Press: Oxford.
- Wallance, M. M. R .(1997). *International law*. University Press: Oxford.

### **Commentaries**

- Detrick, S. A. (1999) *Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International: The Hague.
- Mashamba, J. C (2004). *Using the Law to Protect Children`s Rights in Tanzania: AN Unfinished Business*.
- Mashamba, J. C.(2009). *The Justice Review: Special Commentary on the Tanzanian Law of the Child Act 2009 vol.8* .

Roger J.R. (1994). International Children's Rights grow up: Implications for Jurisprudence and Domestic Policy.

Smolin, David M (2009) Overcoming Religious Objections to the Convention on the Rights of the Child" Emory International Law Review, Vol.20

### **Dissertation**

Mniwasa, E. (2003) Maintenance of 'illegitimate children' in Tanzania: A right or rhetoric? A review of the Affiliation Ordinance Chapter 278; A long essay submitted in partial fulfillment for the Masters Degree in Women's Law, Southern and Eastern African Regional Centre for Women's Law Centre, University of Zimbabwe .

### **Reports**

Report of the Commission on the Law Relating to Children in Tanzania (1996) Government Printer, Dar es Salaam.

Report of the seminar on the promotion and development of children's legal rights (1999) unpublished, Dar es Salaam.

Report on the implementation of the Convention on the Rights of the Child by Nigeria (2005) January .38<sup>th</sup> Session – Geneva.

### **Journal**

Revocati, K. (2012). Journal of the Tanzania Women Judges Association vol. 1 of 2012

### **Dictionaries**

American Heritage Dictionary (2011) 5<sup>th</sup> ed. Houghton Mifflin: Harcourt

Anthony, B. (1989) *Oxford University press dictionary* 2<sup>nd</sup> ed. (1989) Oxford University Press: London

Bryan, G. (1951) *Black law dictionary* 4<sup>th</sup> ed. St. Paul: West



Rutherford, S. B. (1947) *Concise law dictionary* 3<sup>rd</sup> ed. (1947) University College:  
London.

## **APPENDICIES**

### **APPENDIX 1**

#### **QUESTIONNAIRES**

**QUESTIONNAIRES FOR JUDICIAL OFFICERS, LEGAL PRACTITIONERS  
(advocates and state attorneys) ACADEMICIANS, CHILDREN AND RELIGIOUS  
LEADERS**

#### **INTRODUCTION:**

Dear Respondent, I am **JohanithaProject** LL.M candidate of Mzumbe University pursuing Master Degree in Laws (LL.M- **INTERNATIONAL LAW**) for the year of study 2014-2016. My research title is “**implementation of International law obligations to non discrimination: Examining the Law of the Child Act of 2009.**”The accomplishment of this research depends much in your assistance. I request for your valuable and limited time to respond to these questions to the best of your knowledge.

I hereby assure you that, the information shall be used for academic purposes only and they will neither be revealed nor communicated to any other any manner as against your interest, save for academic reasons.

**PART A: GENERAL INFORMATION**

Gender: .....

Age: ..... years

Occupation: .....e.g. Judge/Registrar/Advocate, state attorney  
Academician, etc.

Working experience.....years

Institution..... (e.g., judiciary, Private Advocate etc)

**The following questions demands a YES or NO answers from the respondent by just putting a ticking on the appropriate corresponding box.**

1. Do we have effective enforcement mechanisms of treaties under international laws?  
Yes ( ) No ( )
2. Is Tanzania a party to the Convention on the Rights of the Child? Yes ( ) No ( )
3. Do we have sufficient laws governing succession matters in Tanzania? Yes ( )  
No ( )
4. Do we have laws preventing discrimination against children born out of wedlock in Tanzania? Yes ( ) No ( )
5. Is the Law of the Child among the Succession Laws of Tanzania? Yes ( ) No ( )
6. Is the legislators aware of the contradictory provisions on the inheritance right of children born out of wedlock? Yes ( ) No ( )

**PART B: QUESTIONS: Please Give Details on the following Answers**

1. Do you think children born out of wedlock have a right to inherit from the estate of their biological father? YES ( ) NO ( ) tick in appropriate box

If the above answer is YES or NO give detailed information to support your answer.

.....  
.....  
.....

2. Is there any sanctions to failed states to implement the convention as agreed?

Yes ( ) NO ( ) If the answer is yes please mention them

.....  
.....  
.....

3. Are you aware that Tanzania enacted the LCA to give effect to International Conventions preventing discrimination, is it possible for this law to be implemented?

YES ( ) NO ( ) If YES why and if NO why?

.....  
.....  
.....

4. Is it possible for children born out of wedlock to inherit the estate of their biological father without being legitimized? YES ( ) NO ( ) If Yes under what circumstances?

.....  
.....  
.....  
.....

5. What should be done to protect inheritance right of children born out of wedlock

(i).....

(ii).....

(iii).....

6. Do religions acknowledge inheritance right of children born out of wedlock?

Yes ( ) No ( )

If your answer is NO are there any genuine reasons to that effect? Please elaborate

.....  
.....  
.....

7. What do you think are the challenges facing children born out of wedlock?

.....  
.....  
.....

## APPENDIX 2

### INTERVIEW GUIDE QUESTIONS

This part has covered some interview guide questions which the researcher asked during interview with different people. In unstructured interview there out going questions during the sessions, however as a researcher I prepared some interview guide questions. These guide questions includes;

- Do children born out of wedlock accorded the same rights as children born in wedlock?

- Are rights accorded to children born out of wedlock automatically enjoyed?
- Are these rights provided for in the domestic laws of Tanzania?
- Do international instruments provide for rights of children born out of wedlock?
- Is there any sanction provided under international law instruments to failed states to prevent discrimination against children born out of wedlock?
- Does inheritance right of children born out of wedlock fully enjoyed by them? If yes why and if no give reasons.
- Are there genuine reasons hindering the exercise of right to inheritance of children born out of wedlock?
- What has to be done to prevent discrimination against children born out of wedlock?