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Foreword

Dear Esteemed Readers,

With a great pleasure, I would like to introduce the **Issue No. 2** of the *Rwanda Law Journal* hosted by the Institute of Legal Practice and Development (ILPD). This second issue consists of 5 articles authored by Rwandan authors; namely Dr. Tite Niyibizi, Mrs. Odette Uwineza, Dr. Yves Sezirahiga, Dr. Jean Damascene Munderere and Mr. Cyridion Nsengumuremyi to whom I am immensely grateful.

This is another big stone in the long-term project of building the culture of writing and publication in the legal sector in Rwanda. I wish to once again encourage and invite the Rwandan legal community as well as other legal communities to write and publish with this journal and to have the spirit of keeping the journal alive. For that to be materialized at a remarkable level, national, regional and international institutions that employ jurists are urged to play an enabling role in the process to sustain this journal through investing in that endeavour in any way whatsoever. There is a need of everyone's contribution in her/his capacity. This means that we need writers, reviewers, and means of any kind related to the process. The future of the Journal is in the hands of every stakeholder.

This being said; however, it is worth noting that writing and publishing is not a mystery; and it is not a terrain limited to the Academicians alone. Much as academicians have a lot to share that may be needed by practitioners in their works, practitioners have gotten also very much to share, that academicians may need to use in their teachings and research as well. That is why co-authorship from both angles (academic and practice) is highly encouraged. That would serve another purpose which is the strengthening of partnership between stakeholders within the legal area with the aim to enhance legal education in Rwanda. I strongly and passionately believe that the said legal education needs the role of everyone to be bettered and sustained.

At this occasion of the publication of the 2nd issue, I wish to recognise that the process to have the issue published during a challenging situation caused by the pandemic is successful thanks to a number of individuals, boards and institutions:

I wish to first thank the prominent reviewers in various areas of Law from their respective institutions/universities who have passionately accepted to review all the articles submitted. Without their role, this process would not have reached this stage. May the Editorial and advisory Boards also find my gratitude for their significant role in making the process successful.

Gratitude also goes to NUFFIC through the Project on "Justice for All through University and Professional Sustainable Service Delivery, Teaching and Training (JUST)" which supports ILPD and the UR School of Law for its financial support in the process and the production of this second issue.

Finally, special thanks go to my university: the University of Rwanda and its School of Law for having allowed me to lead this process with the Institute of Legal Practice and Development.

With the engagement of the aforementioned stakeholders, there are all reasons to believe that together we can sustain this national forum to discuss legal issues affecting Rwanda through legal research that creates knowledge and disseminates it.

Dr. Etienne Ruvebana, Chief Editor,

Senior Lecturer/School of Law

University of Rwanda

Preface

When the Editor in Chief of the Rwandan Law Journal invited me to write this preface, many ideas came to mind. My first thought was to reflect on the journey that led to the creation of this Journal and especially this new issue which I doubt whether I should call first or second. The first issue was published under the USAID project, "Rwanda capacity Building Project." This project supervised almost every step of this issue. This second issue is the first issue under the complete leadership of Dr. Etienne Ruvebana as chief editor and his editorial board. It is, therefore, an important milestone and a sign that the Journal has not only taken off but has already reached its cruising altitude.

I opted, however, not to write about the background of this Journal. The short time frame I had could not help me use the best methodology to reflect the contribution of everyone and every institution that from far or near had, until now, made this journey possible. So, I settled on a topic I believe I could better control. I wanted to reflect on why legal scholarship matters in general and in Rwanda in particular.

There are three kinds of legal scholarships: Doctrinal, normative, and reformist. The first interprets which actions justice requires or prohibits. The second aims to influence judges, lawyers, legislators, or regulators to reform, interpret, or preserve existing law to make the society more just. The last one is concerned with rendering the law more just by arguing for proposed legal reforms.[1] Whatever kind of legal scholarship a law journal publishes, its value is measured on how it serves as a web that connects or addresses the issues of concern for the legislator, prosecutors, judges, members of the bar association, and law school academicians.

It is no secret that most law review articles are produced by law professors. The question of why law professors dominate the field of legal scholarship is well known. They have more time to spend on research, but also it is part of their job description. Most academic institutions expect their professors to fulfill these three missions: teaching, scholarship, and service to the university and the community-at-large. Most academicians publish articles and books so that they can get tenure, get promoted, or satisfy their academic curiosity. This is true for law professors as it is in other academic institutions.

In countries like the United States, law schools have a dual identity as academic institutions and members of the legal profession and practice. In these countries, legal scholarships thrive to reflect this dual mission: be academic in the sense of meeting rigorous research and analysis standards, on the one hand, and seek to address specific issues resulting from the legal profession and practice, on the other. However, in countries where law schools (Faculty of Law) are about teaching legal theory and doctrine, leaving legal practice and skills to institutes of legal practice or magistrate schools, there is a disconnect between academic scholarships and issues resulting from law practice. In these countries, legal scholars seek first and foremost to impress and serve the needs of their colleague

[1] Robin West and Danielle Citron, On Legal Scholarship, https://www.aals.org/current-issues-in-legal-education/legal-scholarship/

academicians. As a result, the more theoretical and abstract a legal scholarship is, the more it is likely to be accepted for publication. Unfortunately, most legal scholarship produced through this process often ends on law library shelves with no specific use for judges, prosecutors, and practicing lawyers.

The Rwandan society is in transition from an intellectualism that focuses on academic abstracts and degrees to a more problem-solving and practical mentality. Law schools and legal scholarships need to follow this new trend. They need to move away from the abstract academic discourse that for long dominated the civil law system inherited from colonialism to a legal system that identifies, analyses, and address the real legal problems of the Rwandan society. This means that academic legal education and scholarships need to start not from abstract questions and principles but from actual problems reflected in facts and issues parties bring to courts. Law professors need to incorporate cases and case analysis in their course materials. They need to engage and help students identify facts and issues in those cases because this is the actual window through which they can identify and understand the genuine legal problems that dominate Rwandan society. They should also engage and help students analyse these issues and challenge them to find legal solutions by assessing the extent to which positive law is or ought to be in addressing them. This facts-based and issues-driven approach should also be at the foundation of legal research and scholarship in Rwanda.

It is, therefore, my hope that as this law journal grows and becomes popular, it does not fall victim to weaknesses that have affected some law journals. It should avoid being the bastion of law professors interested in talking to themselves through abstract academic publications to satisfy their promotion requirements or personal egos. The success of this Journal will depend on how its articles meet rigorous academic research standards and analysis but remain focused on solving legal problems as identified in court cases or other conflict resolution settings in Rwanda, including Alternative dispute resolution forums.

Prof. Jean Marie Kamatali,

Ohio Nothern University, USA

Expanding The Close-in-Age Defence to Criminal Charges for Consensual Sexual Activity between Adolescents in Rwanda

Tite NIYIBIZI*

ABSTRACT

This paper interrogates the criminalization of adolescents with a difference of, at most, three years in age who had a consensual sexual relationship vis-a-vis the protection of the best interests of the child and victim. It argues that punishing an 18-, 19-, or 20-year-old who has been in a consensual sexual relationship with a partner who is three years younger (15, 16, 17, respectively) cannot be justified as necessary to protect that young juvenile from the harm and risks of sexual relationship and cause harm to suspect, victim and child born in that relationship. It argues that the close-in-age defence should entail that Rwandan law avoids criminalizing consensual sexual activity between young persons with a gap between them of, at most, three years. To ascertain what should be done to improve the situation, it employs a doctrinal approach and a comparative study to find out how other countries have dealt with the issue at hand.

1. INTRODUCTION

Over the past 20 years, Rwanda's criminal justice system has effected a major transformation to sexual offences, including sexual violence against children. More recently, there have been several developments concerning provisions in the law relating to sexual offences involving children. Child defilement is a crime and an outright violation of a child's rights. It is a multidimensional problem with far-reaching consequences. It inflicts trauma and pain to innocent children who in return, even with future investments, will be affected and have health, educational, economic, and social negative implications.[1] Child defilement is a serious problem in Rwandan society. The National Public Prosecution Authority reported that the child defilement cases have increased from 1,819 cases in 2013 up to 3,793 cases in June 2020.[2]

*Tite Niyibizi is a PhD holder in law from Erasmus University Rotterdam. He is a National Prosecutor at the National Public Prosecution Authority where he pleads cases before the High Court, Court of appeal, and Supreme Court of Rwanda. He is also a Visiting Lecturer at the Institute of Legal Practice and Development (ILPD). [E-mail:niyibity2007@yahoo.fr].

[1] X, Voice - My rights against sexual abuse, available athttps://rwanda.unfpa.org/en/news/my-voice-my-rights-against-sexual-abuse, accessed on 30 March 2021.

[2] NPPA, National public prosecution authority annual report 2019 - 2020, p. 23.

Articles 33 of the law nº 27/2001 of 2001 relating to rights and protection of child[3] against violence defines rape as any sexual relations with a child, whatever the means or methods used. Article 34 of the same law indicates that anybody who rapes a child who is between fourteen years and eighteen years of age shall be sentenced to imprisonment between twenty years and twenty-five years and be fined between one hundred thousand and five hundred thousand francs. The age of consent[4] in Rwanda is eighteen years old.[5] A child under the age of eighteen years old cannot have consensual sexual intercourse.

Contrary to the child law of 2001, which uses "child rape", the 2012 Penal code used "child defilement" and increased the punishment for child defilement. Article 191 of the 2012 Penal Code indicates that any person who commits child defilement shall be liable to life imprisonment with special provisions.[6] That code did not give any special considerations when child defilement is committed between children aged at least fourteen years without violence or threats. It was not easy to determine who is the victim and the perpetrator in case children had consensual sexual intercourse.

To remedy the situation, the law nº 68/2018 of 30/08/2018 determining offences and penalties decriminalizes consensual sex among juveniles.[7] This legislation decriminalized underage consensual sexual activity between persons aged fourteen and eighteen years old. This law aims at the protection of young persons from predatory sex with adults but inadvertently does not consider the consensual sexual activity between young persons where one partner is aged eighteen years and in close age with the victim especially when their relationship

[3] Law No. 27/2001 of 2001 Relating to Rights and Protection of the Child Against Violence, Official Gazette 25/06/2012.

[4] The age of consent is the minimum age at which an individual is considered legally old enough to consent to participation in sexual activity.

[5] Article 2,8oof the law nº68/2018 of 30/08/2018 determining offences and penalties in general, defines child as a person under the age of eighteen (18).

[6] Article 4 of the Organic Law Relating to the Abolition of the death penalty 31/2007 of 25 July 2007, Official Gazette nº Special of 25 July 2007 defines life imprisonment with special provisions to mean '(1) a sentenced person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he or she has served at least twenty (20) years of imprisonment; (2) a sentenced person is kept in prison in an individual cell …' reserved for people convicted of serious crimes such as genocide and crimes against humanity.

[7] Article 133 al.6 of the law nº68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette no. Special of 27/09/2018. This law has been amended by the Law nº 69/2019 of 08/11/2019 amending law nº 68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette n° Special of 29/11/2019.

started while both were under the age of eighteen years.

This paper interrogates the criminalization of adolescents with a difference of, at most, three years in age who had a consensual sexual relationship vis-a-vis the protection of the best interests of the child and the victim. It examines the consequences of punishment of an 18-, 19-, or 20-year-old who has been in a consensual sexual relationship with a partner who is three years younger (15, 16, 17, respectively) to suspect, victim, and child born in their relationship.

The paper intends to propose that the Rwandan criminal justice system provides a solution that balances the protection of juveniles against the sexual abuse of the old adult and protects the young adult who had consensual sexual intercourse with a juvenile at a close age. This paper is structured into three sections. After the introduction, the first section discusses the decriminalization of consensual sexual activity between adolescent in Rwanda, while the second highlight the issues related to child defilement sentences. The third section focuses on close-in-age defense in child defilement from some foreign jurisdictions. The paper ends with a conclusion made of a summary and key recommendations.

2. DECRIMINALIZATION OF CONSENSUAL SEXUAL ACTIVITY BETWEEN JUVENILES IN RWANDA

The Rwandan Penal Code decriminalizes consensual sexual activity among juveniles.[8] Article 133 of that code indicates that "*if child defilement is committed between children aged at least fourteen years without violence or threats, no penalty is pronounced* ".[9] This means that it is no longer a criminal offence for a juvenile to engage in consensual sexual activity with other juveniles when both are aged between fourteen and eighteen years. The decriminalization of consensual sexual activity between juveniles aged at least fourteen years means that consensual sexual activity between a fourteen-year-old young girl for example with a seventeen-year-old young boy is not punishable at all because those juveniles are in the same range of age. This decriminalization of consensual sexual activity between

[8] Law nº68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette no. Special of 27/09/2018.

[9] Article 4 al.7 of law nº 69/2019 of 08/11/2019 amending law nº 68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette n° Special of 29/11/2019 indicated that" If a child aged at least fourteen (14) years commits child defilement on a child aged at least fourteen (14) years by use of force, threats, trickery or who does so on grounds of vulnerability of the victim, he/she is punished in accordance with the provisions of Article 54 of this Law."

juveniles in Rwanda is in line with the recommendations of the Committee on the Rights of the Child (CRC). The CRC clearly stated that "States parties should take into account the need to balance protection and evolving capacities and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity."[10]

However, the Rwandan penal code does not consider the age gaps or close-in-age provisions to protect an adult who engages in consensual sexual activity with a juvenile, although the age difference is the same as those prescribed between juveniles. A fourteen-year-old young girl and a fifteen-year-old young boy can have consensual sexual activities for three years without being prosecuted and punished before one partner turns eighteen. Once one of these partners turns eighteen, he or she can be prosecuted and punished for at least twenty years of imprisonment for defiling a child he has been having consensual sexual acts for the last three years. The 3-years maximum difference in age that has been considered in decriminalizing the child defilement between children aged at least fourteen has not been expanded to include consensual sexual activity between young persons who are in the same range of age when the targeted person for prosecution is eighteen years or older.

As a general principle, a juvenile offender aged between fourteen (14) years and eighteen (18) years can be prosecuted for the alleged offenses.[11] The lawmaker has found no victim and no offender between adolescents aged between 14 and 18 years old in case they had a consensual sexual activity. The complete defence in child defilement in case of consensual sexual activity between juveniles is an exception in the Rwandan Criminal law.

However, once someone is 18 years old, under the Rwandan criminal law, she/he has become an adult who should rather take care of those underage. It is argued that you cannot become an adult and continue to behave as if you are a child. That is why the current law nº 68/2018 of 30/08/2018 determining offences and penalties, in general, does not take into account the previous relationship and

[10] Paragraph 40 of General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, UN Committee on the Rights of the Child (CRC), 6 December 2016.

[11] Article 148 of the law nº 027/2019 of 19/09/2019 relating to the criminal procedure, Official Gazette n° Special of 08/11/2019.

close in age between victim and suspect in child defilement in case there is a consensual sexual activity between adult and juvenile.

3. CHILD DEFILEMENT PENALTIES IN RWANDA

While a sexual relationship between a fourteen-year-old and a person below eighteen years of age carries no criminal sanction, if the couple continues their relationship until the older of the two turns eighteen, this relationship would be considered a criminal offence, resulting in the suspect being liable to a sentence of imprisonment for a term of not less than twenty (20) years and not more than twenty-five (25) years upon conviction. A hypothetical example of two students at secondary school who are friends can illustrate the issue. In 2018, Ms. Yvonne was a fourteen-year-old girl and Patrick was a sixteen-year-old boy, they were known to be lovers and sometimes have consensual sexual intercourse during that year. The Rwandan penal code does not punish any of them for sexual activity as they were in the age zone and the difference in age was covered by the defence provided for under Article 133 of the Penal Code.

Nevertheless, this year 2021, Ms. Yvonne turned seventeen and Patrick nineteen. Both continue to enjoy the consensual sexual activity and don't cohabitate as wife and husband. Patrick is subject to prosecution for child defilement. Upon conviction, Patrick is liable to imprisonment for a term of not less than twenty (20) years and not more than twenty-five (25) years.[12]

This provision ignores the range of age between the victim and the suspect when a suspect is aged over eighteen. The provision ignores the fact that many young persons voluntarily engage in sexual activity before the age of consent with others with whom they are in the same range of age.[13] It is worth indicating that these young persons will not know the exact time when their consensual sexual activity that was decriminalized turns criminal that may render one of them to be sentenced to at least twenty years imprisonment.

Since the beginning of the twentieth century, the general assumption about decision-making by children and early adolescents regarding the intent to offend

[12] Article 133 al4 of law n°68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette no. Special of 27/09/2018.

[13] Brittany Logino Smith & Glen A. Kercher, adolescent sexual behavior and the law 7 (2011), available at http://www.crimevictimsinstitute.org /documents/Adolescent_Behavior_3.1.11.pdf.

has been that they lack the maturity to fully understand the consequences of their harmful acts. In other words, the youth typically have been viewed as impulsive, inexperienced, emotionally volatile or vulnerable, and more easily influenced by negative family members, peers, negative cultural values, and poverty than older adolescents and young adults.[14]

It is submitted that as adolescents become sexually active, they should be protected from predatory adults who might take advantage of their vulnerability.[15] Criminal law intends to protect adolescents from sexual predation, discourage early sexual debut between adolescents, and protect them from the risks and harms of sexual intercourse including sexually transmitted infections (STIs) and teenage pregnancies.

Nevertheless, an unintended consequence of the Rwandan criminal law is the punishment of young people in sexual relationships because the law does not distinguish between predatory adults and infatuated young persons. It is argued that ignoring the reality of consensual sex among close-in-age adolescents and adopting an overly formalistic approach to the crime can result in an unnecessarily punitive regime.

Sex among peers is a reality of adolescent sexuality.[16] This reality also applies to Rwandan adolescents.[17] The sexual desire of adolescents must be recognized and validated as part of normative development.[18] Sexual desire in adolescents, and sexual experimentation, are a normal part of their development.[19] It is

[14] Raymond R. Corrado, & others, should deterrence be a sentencing principle under the *youth criminal justice act*? La Revue Du Barreau Canadian, [Vol.85, 2006], p. 548.

[15] Godfrey Dalitso Kangaude and Ann Skelton, (De) Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, Reproductive Health in Sub-Saharan Africa-Original Research, SAGE Open October-December 2018, p.8.

[16] Crockett, Lisa J.; Raffaelli, Marcela; and Moilanen, Kristin L., "Adolescent Sexuality: Behavior and Meaning" (2003). Faculty Publications, Department of Psychology. 245., https://digitalcommons.unl.edu/psychfacpub/245.

[17] Kristien Michielsen, Pieter Remes, John Rugabo, Ronan Van Rossem & Marleen Temmerman (2014) Rwandan young people's perceptions on sexuality and relationships: Results from a qualitative study using the 'mailbox technique', SAHARA-J:, 11:1, 51-60, , available at https://www.tandfonline.com/doi/pdf/10.1080/17290376.2014.927950?needAccess=true

[18] Godfrey Dalitso Kangaude and Ann Skelton, (De)Criminalizing Adolescent Sex:
A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, Reproductive Health in Sub-Saharan Africa-Original Research, SAGE Open October-December 2018: 1–12, P.8.

[19] Sujita Kumar Kar, Ananya Choudhury,1 and Abhishek Pratap Singh1 Understanding normal development of adolescent sexuality: A bumpy ride, J Hum Reprod Sci. 2015 Apr-Jun; 8(2): 70–74.

not proportionate to punish a nineteen-year-old boy with twenty-five years of imprisonment for having consensual sexual activity with a young girl of seventeen as part of their relationship.

A. Juvenile consensual sexual activity and cohabitation as husband and wife

Child defilement followed by cohabitation as husband and wife is punishable with life imprisonment that cannot be mitigated by any circumstances.[20] As a general principle, from 18 years old, the person has become an adult who is completely responsible.

However, the punishment of an adult who has a consensual sexual activity with a juvenile at close age does not deem the three-years age gap granted in the decriminalization of child defilement committed between children aged between 14 and 18 years old. It does not consider whether the adult and juvenile in close age have built their strong relationship during the teenagers. That provision does not consider the social context of the victim and offender where adolescent relationships often begin during high school, for instance, where the ages of teens vary by 3 to 4 years.[21]

The situation of youths in the same range of age between the perpetrator and the victim, where one of the partners has been sentenced to life imprisonment despite having consensual sexual activity is a reality in the Rwandan criminal justice system. For instance, the judgment RP 00062/2019/TGI/HYE that was rendered on 18/02/2019 by the Intermediate Court of Huye,[22] whereby the Prosecution accused Barakagwira Gilbert of nineteen years of age of the offence of defiling a child of sixteen years old and impregnated her, and they mutually decided to cohabit as husband and wife, nevertheless, the girl's parents went and brought her back after spending there one night. In that particular case, the accused pleaded guilty and revealed that he is in a relationship with the impregnated girl, in the same way, the girl confessed that she was in love with the person

[20] Article 133, paragraph 5, of law nº68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette no. Special of 27/09/2018.

[21] Z Essack, Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa, S Afr J Bioethics Law 2018;11(2):85-88. DOI:10.7196/SAJBL. 2018.v11i2.657, p. 1.

[22] RP 00062/2019/TGI/HYE, Prosecution v Barakagwira Gilbert rendered by the Intermediate Court of Huye on 18/02/2019.

who impregnated her and that they consented to cohabit after impregnating her. The court convicted Barakagwira Gilbert of the offence of child defilement and sentenced him to life imprisonment, given that after defiling her, they cohabited as husband and wife for one day as the defendant admitted.

The supreme court decided in Re. KABASINGA,[23] that article 133 particularly paragraph five of the Law Nº68/2018 of 30/08/2018 determining offences and penalties in general, which states that: "if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances" is inconsistent with article 29 and 151 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.[24] Based on that decision, the High court has reduced the sentence Barakagwira Gilbert (on appeal) from life imprisonment to 20 years of imprisonment.[25]

If the child defilement is followed by cohabitation as husband and wife, after Re. KABASINGA, the judge applies the penalties provided for in article 133, para 2 that indicated that upon conviction, he/she is liable to imprisonment for a term of not less than twenty (20) years and not more than twenty-five (25) years.

In the Barakagwira Gilbert case, it is obvious that both adolescents had a consensual sexual activity and there is a child born from that relationship. Despite the consensual sexual activity between adolescents and the close age between the perpetrator and the victim, the perpetrator has been sentenced to life imprisonment that has been reduced to twenty years of imprisonment at the appeal level. Although intercourse cannot be called consensual if the victim was under 18, the close in age between the victim and the suspect should be taken into consideration while assessing whether the sexual relationship between adult and juvenile took place without the use of force, threats, trickery, or on grounds of the vulnerability of the victim, especially when the relationship between the suspect and the victim has started when both were juvenile.

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[23] RS/INCONST/SPEC 00003/2019/SC, Re. KABASINGA, Supreme Court, RLR - V.2 - 2020.

[24] Article 29 & 151 of the Constitution of the republic of Rwanda of 2003 revised in 2015 provides that the right to due process of law and the principles of the judicial system.

[25] Prosecution v BARAKAGWIRA Gilbert, RPA 00216/2019/HC/NYZ, 31/01/2020, para13.

As it has been highlighted by the Committee on the Rights of the Child, mandatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of last resort and for the shortest appropriate period. Courts sentencing children should start with a clean slate; even discretionary minimum sentence regimes impede the proper application of international standards.[26]

B. The consequences of ignoring the proximity in age between victim and suspect

The Rwandan criminal law gives no special consideration for the child defilement resulting from consensual sexual activity with close age adolescents when one partner is 18-year-old or above. Sentencing the older adolescent who has a consensual activity for at least twenty years of imprisonment or life imprisonment if their consensual sexual activity followed by cohabitation as a husband and wife causes more harm than good.

In some cases, the victim asks the prosecutor and judge for releasing the child defilement suspect. As some victims alleged that they had a consensual sexual activity resulted from their romantic relationship. In one of the Rwandan courts, the victim left her kids to court premises claiming the release of her husband, who has been detained due to child defilement. But the victim has been forced to take her children and went back to his family and her husband has been sentenced to life imprisonment. Both victim and suspect had cohabited for almost three years and had two kids together. Rwanda Investigation Bureau arrested and detained her husband after the discovery that they had cohabited when the wife had 17 and a husband had 19. According to the victim, the suspect is his lover, husband, and the father of her children.[27] In that scenario, the husband has been sentenced to life imprisonment and the victim is taking care of two kids and visits her husband regularly in prison.[28]

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[26] Paragraph 78 of General comment No. 24 (2019) on children's rights in the child justice system, Committee on the Rights of the Child, CRC/C/GC/24, and 18 September 2019.

[27] F.T., President of intermediate court of Rusizi, 06 May 2021.

[28] Ibid.

It is worth indicating that a father who is incarcerated, and who emerges from prison with a criminal record, is not likely to be in a position to make a substantial financial contribution to the child's support. Thus, neither the mother nor the baby is necessarily benefited by punishments for this category of the perpetrator.

It seems that justice for child defilement victims, in general, has become synonymous with punitive state punishment. Taking child defilement seriously is equated with increasing convictions and prison sentences. However, some victims are not satisfied with that approach; they want their voices to be heard in prosecuting the offender especially when there is no use of force, threats, trickery, or who does so on grounds of the vulnerability of the victim.[29]

Bearing in mind that any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing – (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences.[30] Punishing the older adolescent who is in the same range of age as the victim in case they had consensual sexual activity does not protect the victim. The victim will suffer for the loss of her lover who will spend at least twenty years of his life in prison due to consensual sexual activity they had as lovers. This twenty years of imprisonment of her lover will remain a psychological shock to the victim. In case their consensual sexual activity resulted in a child, the victim will bear the burden of raising a child alone for life and that will affect the victim's future and her child's future.

The care of both parents plays an important role in children's development.[31] Legal frameworks also have promised children a full enjoyment of their rights.[32] As one of the parents, the adult in close age of the victim will spend twenty years

[29] Ibid.

[30] Andrew Ashworth, sentencing and criminal justice, fifth edition, 2012, Cambridge, p.78.

[31] Eleanor E. Maccoby, parenting and its effects on children: on reading and misreading behavior genetics, Annu. Rev. Psychol. 2000.51:1-27, p, 4.

[32] Iyakaremye, I., Mukamana, L., Umutoni, J., Paternity denial and consequences on children in patriarchal society: Situation in consensual couples in Rwanda, Children and Youth Services Review, Volume 118, November 2020.

of his life in prison, the child will be deprived of the right of being raised by both parents. Punishing an adult for long sentences of imprisonment who had a consensual sexual activity with a juvenile in the same range of age has negative consequences on children's life born in that relationship especially in countries like Rwanda where there is limited social and economic support to those kids.

To consider the victim's voice and interest, one might argue that the victim should be given even more control over the prosecution of their consensual sexual partners and that no prosecution should move forward without their assent.[33] In some cases, the prosecution of offense is initiated only upon complaint of the offended victim. The prosecution of adultery is initiated only upon the complaint of the offended spouse.[34] Similarly, the prosecution of the offence of concubinage and desertion of the marital home is initiated only upon complaint of the offended spouse.[35] The offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint. Similarly, the sexual relationship between an adult and a juvenile at close age should be prosecuted upon complaint of the offending juvenile or his/her representatives. The offended juvenile or her /his representative in case of consensual sexual activity with adult in close age with the victim may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint.

The non-consideration of close age as defense is contrary to the best-interests principle and has the effect of harming the adolescents they are intended to protect. The best interests of the child principle are the main principle that governs the justice system regarding matters that affect children nationally and globally. Even though there is no standard definition of "best interests of the child", the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child with the child's ultimate safety and well-being the paramount concern.[36]

[33] Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 1-1-2000, 48 Buffalo Law Review, 48 Buff. L. Rev. 2000, p. 779.

[34] Article 136 of law n°68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette no. Special of 27/09/2018.

35 Article 140 law n°68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette no. Special of 27/09/2018.

[36] Child Welfare Information Gateway, determining the best interests of the child, p. 2, available

It is worth indicating that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.[37] While prosecuting the child defilement suspect, the voice of child victims of consensual sexual activity of the older adolescent in the same range of years is not heard and considered. The interest of a child born in that consensual sexual activity is not considered while determining the punishment of the adult. This principle provides that in all procedures and justice systems affecting children "the best interests of the child shall be a primary consideration".[38] Though in case of child defilement between adult and juvenile in close age the juvenile victim is not the offender, the decision of punishing his lovers especially when they had a child together may affect the interest of child victim. That is why the best interests of the child shall be a primary consideration. His interest should be considered by listening to her/his in-child defilement cases especially in case the victim and suspect are of close age.

Additionally, Rwandan law provides for heavy punishment for child defilement offenders. It does not protect young adults as they move from their teenage. Sex for an adolescent is somewhat experimental, it is important to acknowledge that mistakes will occur.[39] Hence less serious first offenders in close age with the victim should be offered a chance either of being given a short time for imprisonment or a suspended sentence. The voice of the victims on the prosecution and punishment of child defilement in case of consensual sex between young adults and juveniles in close age should be heard and considered. Most of older adolescents in close age with the victim who had a consensual activity are not conscient that they are committing offenses. As it has been noted by the legal aid forum, "*Yet literacy levels in relation to laws remain very low. (...) in Rwanda (2017), on average, only 4% of the respondents rate their understanding of the law as high, an overwhelming percentage of 83% were not aware that there are any rights during pre-trial detention, and only 29% knew where*

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2016/interim/160930_fcsc_01d_DetermBestInterestsChild.pdf, accessed on 02/04/2021.

[37] Article 3 Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49, ratified by Rwanda 24 January 1991.

[38] Eva Manco, Protecting the Child's Right to Participate in Criminal Justice Proceedings, Amsterdam Law Forum, Vol 8:1 Spring Issue, 2016., p.56.

[39] Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 Buff. L. Rev. 776 (2000). Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol48/iss3/4

they could find books and official gazettes containing laws used in Rwanda. Without doubt, the statistics could be even higher among vulnerable groups specifically, women, children, youth, persons in detention, persons with disabilities, historically marginalized groups.[40] Due to a lack of awareness and enforcement of legal provisions related to the punishment of the child defilement offense, some older adolescents while having a consensual sexual activity with a juvenile at close age they are not aware that they are committing an offence.

C. The need to balance deterrence and rehabilitation for young adult child defilement offenders

The increase of punishment in Rwanda for defilers has been motivated by the deterrence function. Punitive approaches have been justified as necessary to curb harms to adolescents resulting from sexual conduct, including teenage pregnancies and sexual abuse.[41] Therefore, the only justification for increasing the imprisonment sentence for a perpetrator of child defilement is to deter other men from engaging in intercourse with children.

Furthermore, child defilement is generally committed by youths. The National Commission for Human Rights highlighted that child defilement is generally committed by the people aged between 18 and 30 years, 77.3 %, and people aged between 31 and 40 years, 22.7%.[42] The youths in Rwanda are the most offenders in child defilement. With the current criminal provision, upon conviction, the child defilement offender is liable to imprisonment for a term of not less than twenty (20) years and not more than twenty-five (25) years. This punishment focuses only on deterrence; it does not consider rehabilitation of the offender.

The increase of penalties of child defilement offenders alone does not prevent teenager pregnancy and child defilement cases. Even though heavy imprisonments

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[40] Law And Policy Literacy, available at https://cerular.org/programs/law-and-policy-literacy/, accessed on 07/07/2021.

[41] Godfrey Dalitso Kangaude and Ann Skelton, (De) Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, Reproductive Health in Sub-Saharan Africa-Original Research, SAGE Open October-December 2018: 1–12, P.8.

[42] National Commission for Human Rights, GBV especially the defilement increased in Rwanda, available at http://www.cndp.org.rw/index.php?id=187&tx_news_pi1%5Bnews%5D=8&tx_news_pi1%5Bday%5D=26&tx_news_pi1%5Bmonth%5D=5&tx_news_pi1%5Byear%5D=2016&cHash=04c6f967dd2b0f583b9c74750e2bdae4, accessed on 30/03/2021.

are designed to deter and reduce recidivism, custodial sentences do not reduce recidivism any more than non-custodial approaches, which are cheaper and have fewer consequences for offenders' families. Diverting offenders before they enter the system is likely to produce less offending. Harsh prison regimes such as boot camps are not effective.[43] There is a need to balance both deterrence and rehabilitation while considering also the non-custodial sentences for youth sex offenders in Rwanda.

4. CLOSE AGE AS A DEFENSE IN SOME FOREIGN JURISDICTIONS

The law aiming to protect children against child defilement may cause the prosecution of an adolescent who engages in consensual sexual activity when both partners are significantly close in age to each other, and one partner is below the age of consent.[44] The issue of criminalization of consensual sexual conduct between adolescents in the same range of age has arisen in several countries. To overcome this conflict, some countries have introduced a close in age exemption into their legal framework in addition to the legally defined minimum age for consent to participation in sexual activity. As an example, this paper analyses close in age defense as it has been established in two countries. This paper compares Rwandan legal provisions on the punishment of an adult who had a consensual sexual activity with a juvenile whom they are in close age with the ones of South Africa and Botswana. Both countries have introduced into their legal system the close age defense and belong to one continent with Rwanda. Comparing each of those country's close age defense in child defilement will help to identify the best practices for dealing with an adult who had a consensual sexual activity with a juvenile in close age and, hopefully, provide a basis for improvement of the Rwandan legal system.

a. South Africa

The close-in-age exemption has been recognized in South Africa. The South African Constitutional Court decided that it is unconstitutional to criminalize

[43] Campbell collaboration, Campbell Policy Brief No.4 November 2017, the effects of sentencing policy on re-offending a summary of evidence from 12 Campbell systematic review, available at https://www.campbellcollaboration.org/media/k2/attachments/Campbell_Policy_Brief_4_Sentencing_EN.pdf, accessed on 07/04/2021.

[44] Nuray Kanbur, Close-in-age exemption laws: focusing on the best interests of children and adolescents, International Journal of Adolescent Medicine and Health, 2019, p.1., available at https://www.degruyter.com/document/doi/10.1515/ijamh-2018-0143/html, accessed on 04/04/2021.

consensual sexual conduct between adolescents in the age group twelve to sixteen years. In Teddy Bear Clinic v. Minister of Justice and Constitutional Development,[45] the issue before the Constitutional Court of South Africa was whether Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of South Africa were unconstitutional for criminalizing consensual sexual conduct between adolescents in the age group twelve to sixteen years. The Court held that imposing criminal liability on adolescent sexual conduct that is otherwise normative has the effect of harming the adolescents they intend to protect, in a manner that constitutes a deep encroachment into the rights of the child, including, dignity and privacy, and is against the best interests of the child principle. The Court found the law to be unconstitutional and directed Parliament to decriminalize consensual sexual activity between adolescents. The law was amended and subsequently passed in 2015.[46]

In response to the Teddy Bear Clinic Court Case and Constitutional Court ruling, sexual offences legislation related to underage consensual sex was amended. In this regard, the legislation now decriminalizes underage consensual sexual activity between adolescent peers aged twelve - fifteen-year-olds. Besides, the law provides broader definitions for consensual sexual activity, including decriminalizing consensual sexual activity between older adolescents (above the age of consent for sex, i.e., 16 - 17-year-olds) and younger adolescents (below the age of consent for sex, i.e., 12 - 15-year-olds), granted that there is no more than a two-year age gap between them.[47] Sexual acts among adolescents are decriminalized as long as the age difference is not more than two years.

It is argued that the rationale of the age gap provisions relies on the premise that sexual activity between similarly aged peers is more likely to be consensual than predatory.[48] Age differences may arguably be used as a proxy to indicate

[45] Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and another (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013), available at http://www.saflii.org/za/cases/ZACC/2013/35media.pdf, accessed on 03/04/2021.

[46] Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act No. 5 of 2015 (South Africa).

[47] Z Essack, Op.cit, p.1.

[48] Cocca C. Jailbait: The politics of statutory rape laws in the United States. Albany: SUNY Press, 2004. Koon-Magnin SL. Adolescent sexual activity and statutory rape: A multi-method investigation. MA thesis. Pennsylvania: Pennsylvania State University, 2008.

power differentials between older and younger partners, with smaller differences indicative of more balanced power dynamics.[49] Also, adolescent sexual experimentation is considered developmentally normative,[50] and fairly common. Many adolescents, including in South African, may have sex before age sixteen.[51] The task of legislators, therefore, is to protect adolescents from adult sexual predators, while ensuring adolescents' right to autonomy to participate in self-determined sexual activity.[52] Age-gap provisions transfer criminal sanctions from the moral dilemma of underage sex *per se* to a focus on the ages of the parties involved – capturing the sentiment that adolescent sexual experimentation is not fundamentally wrong.[53] From the above-mentioned case law and provisions, the age of consent in South Africa is sixteen years old.[54] The South African legislation decriminalizes underage consensual sexual activity between adolescent peers aged twelve- fifteen-year-olds. Similarly, Rwandan law decriminalizes consensual sexual activity between adolescent's underage, aged at least fourteen. However, contrary to Rwanda that criminalizes consensual sexual activity between older juveniles and adults in close age, i.e., 17 - 19-year-olds), South Africa law decriminalizes consensual sexual activity between juvenile and adult (above the age of consent for sex, i.e., 16 - 17-year-olds), granted that there is no more than a 2-year age gap between them.[55] In South Africa, consensual sexual acts among adolescents are decriminalized as long as the age difference is not more than two years.

b. Botswana

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[49] Raiford JL, Wingood GM, DiClemente RJ. Prevalence, incidence, and predictors of dating violence: A longitudinal study of African American female adolescents, Journal of Women's Health · July 2007, available at https://www.researchgate.net/publication/6161818_Prevalence_Incidence_and_Predictors_of_Dating_Violence_A_Longitudinal_Study_of_African_American_Female_Adolescents/link/54aadbfc0cf2bce6aa1d7433/download, accessed on 01/04/2021.

[50] Gevers A, Mathews C, Cupp P, Russell M, Jewkes R. Illegal yet developmentally normative: A descriptive analysis of young, urban adolescents' dating and sexual behaviour in Cape Town, South Africa. BMC Int Health Hum Rights 2013; 13(1):31. https://doi.org/10.1186/1472-698X-13-31

[51] Shisana O, Rehle T, Simbayi LC, et al. South African National HIV Prevalence, Incidence and Behaviour Survey, 2012. Cape Town: HSRC Press, 2014.

[52] Graupner H. Sexuality and human rights in Europe. J Homosexuality 2005; 48(3- 4):107-139. https://doi.org/10.1300/J082v48n03_07.

[53] Fischel JJ. Per se or power – age and sexual consent. *Yale J Law Feminism 2010*; 22(2):279-341.

[54] South Africa. Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act No. 5 of 2015.

[55] Z Essack, op.cit, p. 1.

In Botswana, the age of consent and close age exemption is regulated under the Botswana Penal Code.[56] That code was amended in 2018 and has raised the age of consent from sixteen to eighteen. Thus, having sex, including consensual sex, with a person under the age of eighteen is an offense.

The Penal Code makes provision for two exceptions. Consensual sexual activity is not an offence if:

- It takes place between persons who are both under the age of 18; or

- It takes place between a person who is not more than two years older than the other, e.g., a 17- year-old and a 19-year-old.[57] Thus, consensual sexual acts among adolescents in Botswana even if one partner is beyond eighteen years old are decriminalized as long as the age difference between the victim and defendants is not more than two years.

What is similar to Rwanda is that the age of consent is eighteen years as well. Also, in both countries, having sexual activity with a person below the age of eighteen, with that person's consent or not, is an offence. Both countries decriminalize child defilement in case there a consensual sexual activity between children aged below the age of consent.

However, contrary to Rwanda that does not recognize the close age defense, Botswana recognizes the close age defense and it indicates that consensual sexual activity is not an offence if it takes place between a person who is not more than two years older than the other, e.g., a 17- year-old and a 19-year-old.[58]

5. CONCLUSION

A brief analysis made in this work has shown that Rwandan legislation does not recognise the close-in-age defence in child defilement cases when the adult is involved. The non-consideration of the close age of victim and perpetrator who

[56] Amendement of the section 146 of the act in penal code (amendment) act, 2018, available at https://botswanalaws.com/Botswana2018Pdf/21of2018.pdf,

[57] UNFPA, criminalization of consensual sexual acts among adolescents in east and southern Africa, available at https://esaro.unfpa.org/sites/default/files/pub-pdf/technical_brief_criminalization_0.pdf, accessed on 01 April 2021.

[58] Ibid.

had consensual sexual activity impacts negatively on the rights of adolescents' suspect, the victim, and the child born in that relationship.

The comparative analysis of the foreign legislation and practices demonstrated that there are some jurisdictions that adopted the close age defense in case of consensual sexual activity between adolescents even if one partner is older than the age of consent. By introducing the close age defense in their legislations, they distinguish between (*i*) predatory adults who engage in sexual activity with adolescents below the age of consent, and (*ii*) adolescents (above the age of consent) who engage in consensual sexual activity with adolescents below the age of consent.[59] Those jurisdictions have considered a close in age as a defense in child defilement cases. These are the best practices on how to protect adolescents who had consensual sexual activity. These best practices may be useful to Rwanda.

Finally, the overall recommendation has been that Rwandan legislation should differentiate between consensual sexual conduct between adolescents, and adults seeking to engage in sexual activity with juveniles. Criminalization should be targeted at the latter only. It is recommended that a close-in-age defence should be introduced under Rwandan law. The consensual sexual activity between adolescents at close age as long as the partner with the adolescent below the age of consent is less than three years older should be decriminalized. This consideration will avoid the criminalization of adults of close age with the victim who had consensual sexual activity.

6. REFERENCES

LEGAL TEXTS AND REGULATIONS

1. The Constitution of the Republic of Rwanda of 2003 revised in 2015, *Official Gazette n° Special of 24/12/2015.*
2. law nº 69/2019 of 08/11/2019 amending law nº 68/2018 of 30/08/2018 determining offences and penalties in general, Official Gazette n° Special of 29/11/2019
3. Law nº68/2018 of 30/08/2018 determining offences and penalties in general, *Official Gazette nº. Special of 27/09/2018.*

[59] Z Essack, op.cit, p.2.

4. Law nº. 27/2001 of 2001 relating to Rights and Protection of the Child against Violence, *Official Gazette 25/06/2012.*
5. Organic Law n° 01/2012/ol of 02/05/2012 instituting the penal code, *Official Gazette nº Special of 14 June 2012.*
6. Organic Law *nº. 31/2007 of 2007* Relating to the abolition of the death penalty 31/2007 of 25 July 2007, *Official Gazette nº Special of 25 July 2007*
7. Convention on the Rights of the Child adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.
8. Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act Nº. 5 of 2015 (South Africa).

ARTICLE, REPORT, BOOKS, AND PUBLICATIONS

1. Asaph Glosser, Karen Gardiner, Mike Fishman, Statutory Rape: A Guide to State Laws and Reporting Requirements, https://aspe.hhs.gov/system/files/pdf/75531/report.pdf, accessed on 01/04/2021.
2. ASPE, statutory rape: a guide to state laws and reporting requirements. Sexual intercourse with minors, available at https://aspe.hhs.gov/report/statutory-rape-guide-state-laws-and-reporting-requirements-summary-current-state-laws/sexual-intercourse-minors, accessed on 05 04/2021.
3. Brittany Logino Smith & Glen A. Kercher, Adolescent Sexual Behavior and the Law 7 (2011), available at http://www.crimevictimsinstitute.org / documents/Adolescent_Behavior_3.1.11.pdf, accessed on 03/04/2021.
4. Campbell collaboration, Campbell Policy Brief Nº.4 November 2017, the effects of sentencing policy on re-offending a summary of evidence from 12 Campbell systematic reviews, available at https://www.campbellcollaboration.org/media/k2/attachments/Campbell_Policy_Brief_4_Sentencing_EN.pdf, accessed on 07/04/2021.
5. Child Welfare Information Gateway, determining the best interests of the child, p. 2, available https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2016/interim/160930_fcsc_01d_DetermBestInterestsChild.pdf, accessed on 02/04/2021.
6. Cocca C. Jailbait: The politics of statutory rape laws in the United States. Albany: SUNY Press, 2004.
7. Crockett, Lisa J.; Raffaelli, Marcela; and Moilanen, Kristin L., "Adolescent

Sexuality: Behavior and Meaning" (2003). Faculty Publications, Department of Psychology. 245, https://digitalcommons.unl.edu/psychfacpub/245.

8. David NS, Twombly J, State legislators 'handbook for statutory rape issues, Washington American Bar Association Center on children and law 2000, available at https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/infores/statutoryrape/handbook/statrape.pdf, accessed on 02 /04/2021.
9. Eleanor E. Maccoby, parenting and its effects on children: on reading and misreading behavior genetics, Annu. Rev. Psychol. 2000.51:1-27.
10. Fairgrieve, D., State Liability in Tort: A Comparative Law Study, Oxford University Press, 2003, p.
11. Fischel JJ. Per se or power – age and sexual consent. Yale J Law Feminism 2010; 22(2):279-341.
12. General comment N°. 24 (2019) on children's rights in the child justice system, Committee on the Rights of the Child, CRC/C/GC/24, 18 September 2019.
13. Gevers A, Mathews C, Cupp P, Russell M, Jewkes R. Illegal yet developmentally normative: A descriptive analysis of young, urban adolescents' dating and sexual behaviour in Cape Town, South Africa. BMC Int Health Hum Rights 2013; 13(1):31. https://doi.org/10.1186/1472-698X-13-31.
14. Godfrey Dalitso Kangaude and Ann Skelton, (De) Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, *Reproductive Health in Sub-Saharan Africa-Original Research*, SAGE Open October-December 2018: 1–12.
15. Graupner H. Sexuality and human rights in Europe. J Homosexuality 2005; 48(3- 4):107-139. https://doi.org/10.1300/J082v48n03_07.
16. Iyakaremye, I., Mukamana, L., Umutoni, J., Paternity denial and consequences on children in a patriarchal society: Situation in consensual couples in Rwanda, Children and Youth Services Review, Volume 118, November 2020.
17. Kern, Jana L. (2013) "Trends in Teen Sex Are Changing, but Are Minnesota's Romeo and Juliet Laws," *William Mitchell Law Review*: Vol. 39: Iss. 5, Article 18. Available at: http://open.wmitchell.edu/wmlr/vol39/iss5/18.
18. Koon-Magnin SL. Adolescent sexual activity and statutory rape: A multi-method investigation. MA thesis. Pennsylvania: Pennsylvania State University, 2008.

19. Kristien Michielsen, Pieter Remes, John Rugabo, Ronan Van Rossem & Marleen Temmerman (2014) Rwandan young people's perceptions on sexuality and relationships: Results from a qualitative study using the 'mailbox technique', SAHARA-J: 11:1, 51-60, available at https://www.tandfonline.com/doi/pdf/10.1080/17290376.2014.927950?needAccess=true, accessed on 30/03/2021.
20. Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 1-1-2000, 48 *Buffalo Law Review*, 48 Buff. L. Rev. 2000.
21. National Commission for Human Rights, GBV especially the defilement increased in Rwanda, available at http://www.cndp.org.rw/index.php?id=187&tx_news_pi1%5Bnews%5D=8&tx_news_pi1%5Bday%5D=26&tx_news_pi1%5Bmonth%5D=5&tx_news_pi1%5Byear%5D=2016&cHash=04c6f967dd2b0f583b9c74750e2bdae4, accessed on 30/03/2021.
22. Noy S. Davis & Jennifer Twombly, the handbook for statutory rape issues 2 (2000), available at http://www.mincava.umn.edu /documents/stateleg/stateleg.pdf.
23. NPPA, *National public prosecution authority annual report 2019 - 2020.*
24. Nuray Kanbur, Close-in-age exemption laws: focusing on the best interests of children and adolescents, International Journal of Adolescent Medicine and Health, 2019. Available at https://www.degruyter.com/document/doi/10.1515/ijamh-2018-0143/html, accessed on 04/04/2021.
25. Peters, A. & Schwenke, H., "comparative law beyond post modernism", International and Comparative Law' Quarterly [Vol. 49, October 2000] 800, p.831.
26. Raiford JL, Wingood GM, DiClemente RJ. Prevalence, incidence, and predictors of dating violence: A longitudinal study of African American female adolescents, Journal of Women's Health · July 2007, available at https://www.researchgate.net/publication/6161818_Prevalence_Incidence_and_Predictors_of_Dating_Violence_A_Longitudinal_Study_of_African_American_Female_Adolescents/link/54aadbfc0cf2bce6aa1d7433/download, accessed on 01/04/2021.
27. Raymond R. Corrado, & others, should deterrence be a sentencing principle under the youth criminal justice act? *La Revue Du Barreau Canadien*, [Vol.85, 2006].

28. Shisana O, Rehle T, Simbayi LC, et al. South African National HIV Prevalence, Incidence, and Behaviour Survey, 2012. Cape Town: HSRC Press, 2014.
29. Sujita Kumar Kar, Ananya Choudhury, and Abhishek Pratap Singh, Understanding normal development of adolescent sexuality: A bumpy ride, J Hum Reprod Sci. 2015 Apr-Jun; 8(2): 70–74.
30. UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, available at https://www.refworld.org/docid/589dad3d4.html [accessed 31 March 2021].
31. UNFPA, criminalization of consensual sexual acts among adolescents in east and southern Africa, available at https://esaro.unfpa.org/sites/default/files/pub-pdf/technical_brief_criminalization_0.pdf, accessed on 01 April 2021.
32. X, Voice - My rights against sexual abuse, available at https://rwanda.unfpa.org/en/news/my-voice-my-rights-against-sexual-abuse, accessed on 30 March 2021.
33. Z Essack, Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa, *S Afr J Bioethics Law 2018;11(2):85-88. DOI:10.7196/SAJBL.2018.v11i2.657.*

CASE LAWS

1. RP 00062/2019/TGI/HYE, Prosecution v Barakagwira Gilbert rendered by the Intermediate Court of Huye on 18/02/2019.
2. RP 00499/2018/TGI/MUS, Prosecution v Ntahorutaba Wellars rendered by the Intermediate Court of Musanze.
3. RS/INCONST/SPEC 00003/2019/SC, Re. Kabasinga, Supreme Court, *RLR - V.2 - 2020*.
4. Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013), available at http://www.saflii.org/za/cases/ZACC/2013/35media.pdf, accessed on 03/04/2021.

Consideration of the Best Interest of the Child in Divorce Proceedings under Rwandan Family Law: Case Law Analysis

Odette Uwineza*

Abstract

This paper explores unpredictability and inconsistencies of divorce case laws with regard to the implementation of the child best interest. The best interest of the child is a legal standard which remains unspecified despite the fact that it is recognized in International and domestic laws. Decision-makers including judges are required to give a paramount consideration to the best interest of the child in their decision-making process. Practically, judges use their discretion to determine what is in the child's best interest in the child's custody, support, and visitation right arrangements in divorce cases given that no guidelines were set up to ease their task. This paper outlines international conventions and domestic laws providing the best interest of the child as a legal norm and analyses case law in order to materialize the reality of the issue in relation to courts' practices in interpreting the best interest of the child. Most of case laws explored are characterized by lack of motivation of facts; unfairness in determination of child support, lack of determination of conditions and modalities of visitation right. This explains unpredictability of Courts' decisions with regard to child best interest. Thus, clear and fair guiding factors need to be established in order to promote individual child welfare balanced with interest of others in the family.

Key words: best interest, child, divorce, family law, case law.

1. INTRODUCTION

The family is considered as natural foundation of the Rwandan society and it is protected by the State.[1] The Constitution of Rwanda clearly recognizes only

* Odette Uwineza is an Assistant Lecturer at the School of Law of the University of Rwanda.

[1] Article 18 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, Official Gazette nº Special of 24/12/2015.
The concept of family has gradually grown over time to denote traditionally, a nuclear family linked to a marriage and composed of a father, a mother and their respective children. Today's realities in different societies reflect other nature of families including unmarried couples in *de facto* unions, mono parental father or mother, single father or single mother to mention a few. Thus, the significance of the concept of the family is limited by the wording of article 17 of the Constitution which seems to associate the right to marry with that of founding a family where it states that "The right to marry and to found a family is guaranteed by the law.
A civil and monogamous marriage between a man and a woman is the only recognized marital union (...)" Consequently, other varieties of families are stigmatized.

marital unions resulting from a civil monogamous marriage.[2] Ordinarily, spouses embark on marriage hoping to find an emotional stability and pleasant life.[3] Nowadays' reality shows that sometimes, spouses are found in a conflicting situation which may culminate into the breakdown of their marriage. The dissolution of a marriage by divorce undoubtedly results in the disturbance of the life style of all family members. No one can ignore that a child is the most vulnerable family member to be affected by the marriage breakdown.[4]

Thus, a special attention needs to be paid to the child's welfare during and after divorce proceedings in order to mitigate adverse consequences of divorce on a child. Generally, the principle of best interest of the child is a legal standard which was incorporated in International Conventions[5] and State members were requested to accord a primary consideration to the best interest of the child in taking any decision or action either by public institutions including executive, judiciary and parliament or private relevant institutions.[6] Unfortunately this legal norm is criticized for being vague while its interpretation is left to the perception and discretion of decision-makers with regard to what would be in the best interest of the child.[7] In matters of divorce, judges used to recourse to their discretion and values of the community in order to weigh what should be in

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[2] Article 17 of the Constitution of the Republic of Rwanda, supra note 1.

[3] William P. Statsky, *Family Law, the Essentials*, second edition, New York, THOMSON DELMAR LEARNING, 2004, at 6.

[4] Article 18 of the Law nº 001/2020 of 20/02/2020 amending the law 32/2016 of 28/8/2016 governing persons and family, Official Gazette nº 06/17/2/2020 puts emphasis on the best interest of the child with regard to the determination of the child custody, modalities of child visit, and child support. For example: the child who used to live together with both parents is going to live with the custodial parent after the divorce of his/her parents.

[5] Article 4 of the UN Convention on the rights of the child of 20 November 1989 ratified by the Presidential Order nº 773/16 of 19 September 1991. The best interest of the child is a guiding and leading principle in elaborations of legal texts and policies wherever the interest of the child is concerned; as examples: the Law nº 71/2018 of 31/08/2018 relating to the protection of the child, Official Gazette nº 37 *bis* of 10/9/2018, article 18 of the Law nº 001/2020 of 20/2/2020 amending the law 32/2016 of 28/8/2016 governing persons and family, Official Gazette nº 06 of 17/02/2020.
Article 4 (b) of the UN Convention on Rights of Persons with Disabilities; article 23 (2) of the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption of 29/05/1993 ratified by the Presidential Order nº 24/01 of 7/05/2010; article 4 of African Charter on the rights and welfare of the child of 11/06/1990 ratified by the Presidential Order nº 11/01 of 30/05/2001.

[6] Article 3, 1 of the UN Convention on Protection of Rights of Child, *supra* note 5.

[7] Nadia D., "Best Interest of the Child Principle in the Context of Parent Separation or Divorce as Conceptualized by the Community", Edith Cowan University, 2014, at 20, http://ro.ecu.edu.au./theses/1463, accessed on 28/10/2019.

the best interest of the child.[8] Consequently, this could result in inconsistencies in case laws and limit predictability, fairness in decision-making due to absence of clear guidelines on this matter. It is in this line that the researcher undertook this research entitled *Consideration of the Best Interest of the Child in Divorce Proceedings under Rwandan Family Law: Case Law Analysis.*

This paper aims to raise the awareness among law-makers and decision-makers about the gaps arising in the laws relating to protection of the child rights and welfare in respect of child best interest. It intends then to explore how judges interpret and apply the best interest of the child as indefinite legal standard. It furthermore aims to elaborate on the impact of absence of guidance in relation to factors to consider when judges apply the principle of the child best interest in their ruling on divorce cases in light of child custody, support and visitation right. In order to meet the aforementioned goals, the research attempts to answer the following questions: what is the legal framework for the application of the best interest of a child in Rwanda? What are guiding factors to consider when applying the principles of the best interest of the child during divorce proceedings in the light of comparative perspective? What are Rwandan courts' practices in determination of best interests of the child in divorce proceedings? What needs to be improved to ensure effective consideration of the child best interest in divorce proceedings in Rwanda?

The focus of this paper is to analyze case laws rendered by Rwandan courts to explore how the principle of best interest of the child is understood and applied by Rwandan judges in divorce cases. However, to get knowledge on the principle of the child best interest, international and national legal instruments in relation to this subject are referred to. In addition, a comparative approach is used to learn good practices from foreign jurisdictions with respect to factors to take into account in divorce cases.

After an introduction, the paper has two main parts. The first part provides an overview on the principle of best interest of the child in the context of divorce. It explains the principle of the best interest of the child, the concept of divorce and its procedure. The second part of the paper discusses factors that are considered

[8] *Ibidem.*

by judges in determination of child custody, child support and visitation through case law analysis. The paper ends with a conclusion containing findings and recommendations.

2. UNDERSTANDING THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD IN THE CONTEXT OF DIVORCE

This section attempts to clarify the concepts of the child and the best interest of the child. It additionally, discusses the standard of the best interests of the child from the international and Rwandan domestic law perspectives. It further explores the concept of divorce under the Rwandan legal framework.

2.1. DEFINITION OF THE CHILD AND BEST INTEREST OF THE CHILD

The notion of child is referred to under article 19 of the 2003 Constitution of the Republic of Rwanda revised in 2015 where it recognizes general protection of children's rights. This article states that "Every child has right to specific mechanisms of protection by his or her family, other Rwandans and State depending on his/her age and living conditions as provided for by national and international laws." A child is any person under eighteen years of age.[9] This definition embraces the wording of article 1 of the Convention on the Rights of the Child[10] and that of article 2 of African Charter on Rights and Welfare of the Child. It is worth to note that the Rwandan family law provisions on childhood are not far from the logic of international and regional legal instruments on rights of the child[11] where it recognizes *a contrario* the childhood as a state of a child between birth and eighteen years of age, unless a child has been emancipated.[12] A child needs a special protection in the perspective to limit authority of adults including professionals, parents, and teachers over children.[13] In fact, adults are in a position to take decisions on behalf of children because they lack experience and judgment.[14] Consequently, for the protection of a child, any action or decision

[9] Article 3, 6° of the Law n° 71/2018 of 31/8/2018 relating to the Protection of the Child, *supra* note 5.

[10] Articles 1 of the Convention on the Rights of the Child, 1989, *supra* note 5.

[11] Convention on the Rights of the Child and African Charter on Human and People Rights.

[12] Article 113 of the Law n° 32/2016 of 28/8/2016 governing persons and family, Official Gazette, n° 37 of 12/9/2016.

[13] Jean Zermatten, "Best Interest of the Child, Literal Analysis, Function and Implementation, *Working Report, 2010*, at 6." https://www.childsrights.org/documents/publications/wr/wr_best-interest-child2009.pdf

[14] Nadia D./, "Best Interest of the Child Principle in the Context of Parent Separation or Divorce as

to be taken on his/her behalf must be done considering his/her best interest.
The Convention on the Rights of the Child refers to the concept of best interest of the child but it does not provide its definition. In her article, Mélanie Chatenoud affirms that there is no precise definition of the concept of best interest of the child. She goes further to specify that the idea behind this concept gives attention to the protection of the child, the safeguard of the child's welfare and the guarantee to the child's physical and mental health in a favorable environment.[15] The focus on child's protection appears also in the wording of article 2, 10° of the law n° 32/2016 of 28/8/2016 governing persons and family which defines the best interest of the child as "factors to be considered to prevent any prejudice to the child rights especially with respect to his/her care, education, culture, property, and others towards the child protection." Due to the fact that those factors are not specified, decision-makers tend to use subjective and discretional test to assess all surrounding circumstances that may affect the child welfare and interests.[16] This may justify why some scholars consider it as vague and ideal and it differs in time and space.[17] Thus, this legal concept must be clarified in practice. It is evident that under the Rwandan family law, the best interest of the child is a standard that decision-makers are required to refer to in all cases relating to the child alimony, custody, visitation, adoption, guardianship among others[18] in accordance with different international legal instruments which Rwanda ratified.[19] We consider that it cannot be hoped that decision-makers are acting in the best interest of the child while no guidelines were set up in this regard. More importantly, a thorough assessment of interpretation and implementation of this standard is needed for the improvement of the child welfare.

Conceptualized by the Community", Edith Cowan University, 2014, at 20, http://ro.ecu.edu.au./theses/1463

[15] Mélanie Chatenoud, "Best Interest of the Child", https://www.humanium.org/en/the-childs-best-interest/, accessed on20/10/2020.

[16] X. "Best Interest of the Child Law and Legal Definition", https://definitions.uslegal.com/b/best-interest-of-the-child/, accessed on 23/10/2020

[17] Nadia D./, "Best interest of the child principle in the context of parent separation or divorce as conceptualized by the community", Edith Cowan University, 2014, at 20, http://ro.ecu.edu.au./theses/1463. Every child is unique because he/she has grown or grows up in specific circumstances surrounding his/her living environment. The best interests of the child vary from child to another, during a given time and space. Thus it is not easier to provide a definition of the concept.

[18] Article 18 of the law n° 001/2020 of 2/2/2020, *supra* note 4.
See articles 137, 225, 234, 292, 295, 299, 324 of the Law n°32/2016 of 28/8/2016, *supra* note 12.

[19] See *supra* note 5, *infra* note 21.

2.2. RECOGNITION OF THE PRINCIPLE OF BEST INTEREST OF THE CHILD UNDER INTERNATIONAL AND RWANDAN DOMESTIC LEGAL INSTRUMENTS

The principle of the best interest of the child along with rights of children were recognized as legal norms worldwide and has been incorporated in both international and national legal instruments. Conventions and domestic laws repeatedly provide that decision-makers must give an important consideration to the best interest of the child in their decision-making process.

In this vein, United Nations Convention on the Rights of the Child specifically dedicated on the rights of the child provides, under its article 3, that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies, the best interest of the child shall be a primary consideration." This Convention obligates State members to consider the child's best interest in family matters for any decision intending to separate children from one or both parents, parents' responsibilities, deprivation of family environment and adoption.[20] Moreover, the African Charter on Rights and Welfare of a Child has expressly reproduced the wording of the UN Convention on Rights of the Child in relation to the best interest; where it stresses that "in all actions concerning the child undertaken by any person or authority, the best interest of the child shall be a primary consideration."[21]

Under the Rwandan context, the protection and recognition of child's rights have been given a great importance. In this respect, the Constitution of the Republic of Rwanda impliedly recognizes principles of international human rights instruments which are meant for protections of children's rights and to be incorporated in Rwandan laws for better protection of children's rights even though there is no express provision on the best interest of the child.[22]

Despite that the 2018 law relating to the protection of child does not define the

[20] Articles 9, 18, 20, 21 of the United Convention on the Rights of the Child, *supra* note 5.

[21] Articles 2&7 of African Charter on Rights and Welfare of a Child of 11/06/1990 ratified by the Presidential Order n° 11/01 of 30/05/2001.

[22] Article 19 of the Constitution of 2003 as revised in 2015, *supra* note 1. "Every child has the right to specific mechanisms of protection by his or her family, other Rwandans and the State, depending on his or her age and living conditions, as provided for by national and international laws."

concept of best interest of the child, it contains significantly special rights of the child as well as modalities of the child's protection. In addition, it provides offenses against a child and their respective penalties. Thus, this law expresses specifically the consideration of the best interest of the child throughout its provisions.

As pointed out above, the Rwandan family law expressly refers to the best interest of the child in different matters in relation to child custody, guardianship, adoption last but not least.[23]

2.3. CONCEPT OF DIVORCE

2.3.1. Notion

Divorce is a judicial process which is meant for ending up marital relationship.[24] The Rwandan family law provides a fault-based divorce and non-fault-based divorce. The grounds for fault-based divorce are spelt out under article 218 of the law n° 32/2016 of 28/8/2016. They include: adultery, desertion for a period of at least 12 consecutive months, conviction for an offence severely tainting the honor, refusal to provide for household needs, excess and abuse, serious insults by one towards another, gender-based violence, *de facto* separation for a period of at least 2 years,[25] and non-cohabitation for more than 12 consecutive months from the day of celebration of marriage. For the fault-based divorce, the judge considers only grounds provided under this article 218 and the plaintiff should produce convincing evidence. In case of lack of evidence, the courts do not grant divorce as it happened in the case N° RC 00082/TB/NYARGA of 13/11/2015. In this case, Masengo filed a claim before the Primary Court of Nyarugunga, requesting for fault-based divorce against his wife *Munezero*. He alleged that he was a victim of excess and abuse of his wife, and that his wife committed adultery. The court denied divorce to *Masengo* because he did not provide evidence of the specific acts of misconduct to prove the alleged faults of the wife. The court's motivation was based on article 3 of the law n° 15/2004 of 19/7/2004 relating to evidence and its reproduction according to which the plaintiff must demonstrate the truth of

[23] Article 18 of the Law n° 001/2020 of 20/2/2020 amending the law n° 32/2016 of 28/8/2016, *supra* note 4; also see *supra* note 18.

[24] William P. Statsky, *Family Law, the Essentials*, *supra note 3*, at 85.

[25] *De facto* separation might not be a result of any mistreatment according to article 218 *in fine*. n° 32/2016 of 28/8/2016, *supra* note 4.

what he or she is claiming. *Masengo* failed to provide convincing evidences of the faults of his wife and that made him loose the case of divorce.

As pointed out above, the Rwandan family law recognizes also a non-fault breakdown of marriage where it provides for a divorce by mutual agreement under its article 224. For such a type of divorce, no one can blame the other for the failure to marital obligations, given that spouses are not obliged to reveal the underlying causes of the dissolution of their marriage. Unlike the fault-based divorce, divorce by mutual agreement is not expensive and time consuming.[26] It is important to mention that Rwandan case laws developed another type of divorce which should be compared to "Irretrievable breakdown" of the marriage. For such a case, there is no agreement between spouses to divorce nor can each spouse prove the fault of the either spouse as provided under article 218 mentioned above.

However, apparently it is practically impossible for the spouse to live together because of intolerability of spouses. Sometimes, incompatibility of personality of spouses can make it impossible for spouses to live or to continue to live together in normal marital relationship. Nevertheless, pretty quarrels or minor bickering cannot be justifiable ground for the non-fault breakdown of marital relationship.[27] The severability of incompatibility and intolerability or discord must be considered.[28] To these, Rwandan judges were required to relate this with the fault provided under article 218. This breakdown of marriage is called *divorce remède*.[29] The latter does not need to be related to the fault. Otherwise, it would be a fault-based divorce. Still in this context, *Masengo*'s case remains relevant because, being unsatisfied with the decision of the Primary Court of Nyarugunga in the case N° RC 00082/TB/NYARGA of 13/11/2015, he lodged an appeal before the Intermediate Court of Nyarugenge in the case N° RCA O266/15/

[26] After the expiry of three months period of conciliation and as far as spouses comply with conditions required for divorce by mutual consent the judge grants divorce.

[27] WIlliam P. S tatsky, *Family Law, the Essentials*, *supra* note 3, at 91.

[28] The non-fault divorce which is considered here should be based on irreconcilable differences and irremediable breakdown. The judge must check if it makes sense for spouses to continue marital relationships. For example if it is established that there is any expectation that reconciliation is possible, the marriage was completely destroyed and there is no reasonable likelihood that the marriage should be preserved because of unsuportability, to mention a few. William P. Statsky, *Family Law, The Essentials*, *supra* note 3, at 92.

[29] Conclusions of Rubavu Retreat held at Rubavu, from 30/11/2016 to3/12/2016.

TGI/NYGE of 22/04/2016. He argued that in the first instance, the Primary Court of Nyarugunga did not examine the evidence he presented to prove the excess and abuse and adultery of his wife.

The appellant Court reaffirmed that allegations of the husband were not founded because of lack of evidence. Nevertheless, as on one hand, the husband firmly affirmed that even though the Court did not accord divorce, he would not live together with his wife because he did not have affection to her "*naramuzinutswe*" to mean he no longer loved her. On the other hand, the husband lived apart for one year. The judge found these grounds enough to justify the decision of granting divorce given that the husband could not be forced to live together with his wife. Alain Duelz affirmed that in granting a *divorce remède* the judge is not required to establish the failure of one of the spouses to marital duties. Rather, he or she must consider that the community of life is practically impossible in case one of the spouses openly affirms that he or she does not have affection to the other spouse.[30] No one can ignore that divorce is a source of emotional and unpleasant consequences on welfare of the family even of the society[31]. The major reason is that the family is considered by the Rwandan Constitution as a foundation of the Rwandan society.[32] In fact, the breakdown of marriage has adverse repercussions on the property of the household, couple and children. The welfare of all family members is at risk.[33] Given that the dissolution of marriage constitutes a stress inducing experience for the couple, children are the most victims of the breakdown of the marriage of their parents.[34] Most of the time, disputes in relation to child custody, child support, and child visit arise during divorce proceedings.

2.3.2. Divorce process and best interest of the child

Divorce follows necessarily a judicial procedure which complies with rules governing civil proceedings. Divorce process comprises of contested petitions

[30] *Le juge n'est plus amené à rechercher la violation par l'un des époux d'une obligation essentielle du mariage* (Alain Duelz, *Le droit du divorce*, 3eme édition, Paris, 2002, at 349). "*La désunion est irrémédiable dès qu'il apparait que l'un des conjoints a perdu toute affection et qu'il renonce irrévocablement toute communauté de vie.*

[31] Mary Welstead & Suzan Edouards, *Family Law*, Oxford, 2007, at 118.

[32] Article. 18 of the Constitution of 2003 as revised in 2015, *supra* note 1. The family which is referred to here is that resulting from a lawful marriage composed of father, mother and their legitimate children

[33] Mary Welstead&Suzan Edwards, *Family Law*, *supra* note 31, at 119.

[34] *Idem*, at 118.

and non-contested petitions.[35] In fault-based divorce and *divorce remède*, the competent court takes decision for divorce[36] and judicial proceedings are started by the grateful stage held in camera where the judge attempts to conciliate the couple by showing them legal consequences of divorce on the family, the property and their respective children. Where the outcome is not successful, it is followed by full hearing of the petitioner's claims and arguments of defense of the defender afterwards a judge takes decisions on divorce.[37]

For divorce by mutual agreement, the stage of conciliation is also required. Spouses are bound to submit required notarized documents in relation to the settlement of all issues relating to liquidation of matrimonial regime, children's custody and support, residence of each spouse etc.[38] In case the judge finds that all is in order after both spouses personally present their respective wishes to divorce, he/she accords divorce.[39] Petition for divorce by mutual agreement is subject to an appeal on the condition that a petition is lodged jointly by both spouses.[40]

One may wonder the place of the child's voice in divorce process in light of the child best interest. Normally, the rationale behind the consideration of the child's best interest is to safeguard and protect the child's rights and welfare. In this line, divorce entails dissolution of marriage, and children are negatively affected by divorce of their parents with respect to the child custody and other rights provided for by the law.[41] Then it would be to the children's benefit to provide for their views in the decisions that would affect their rights and welfare. Traditionally, children's views and interests used not to be taken into consideration in case of decision-making on the matters concerning them because they were supposed to be seen and not to be heard. These entrenched

[35] This refers to fault -based divorce and non-fault -based divorce. For details see discussions, *supra*: 2.3. Concept of divorce.

[36] Article 236 of the law nº 32/2016 of 28/8/2016, *supra* note 12. The stage of conciliation binds the judge and spouses for any court's decision concerning the dissolution of marriage.

[37] Divorce proceedings follow the rules governing civil procedures as provided for by the Law nº 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedures, Official Gazette nº Special of 29/04/2018.

[38] Article 231 of the law nº 32/2016 of 28/8/2016, *supra* note 12.

[39] Articles 233-234 of the Law nº 32/2016 of 28/8/2016, *supra* note 12.

[40] Article 235 of the law nº 32/2016 of 28/8/2016, *supra* note 12.

[41] Article 242 of the law nº 32/2016 of 28/8/2016, *supra* note 12.

beliefs on the position and the place of the children in our society left them in vulnerable position.[42]

As mentioned above, the Constitution of 2003 as revised in 2015 recognizes that a child needs special protection.[43] Furthermore, article 12 of the United Nations Convention on the Rights of the Child requests member States to provide for the child who is capable the opportunity to form and express freely his/her views in all matters affecting him or her. However, the consideration of the child's views depends on his/her age and maturity. More importantly, the Convention recognizes the right of the child to be heard in administrative and judicial proceedings affecting him/her, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law".[44]

To align with article 12 of the UN Convention on the Rights of the Child, which recognizes the right of the child to be given the opportunity to provide his/her opinion in all matters affecting him/her, be it judicial or administrative procedure; the 2018 law on protection of the child rights accords to the child the right to attend and give his/her views either directly or through a representative recognized by the law in any proceeding that aims at separating him/her from his/her family or guardian.

However, the consideration of the opinion will take into account the child's age and maturity with respect to the subject which he/she is heard."[45] Thus the Rwandan law recognizes the right of the child to participate in a decision that affects him/her. Even, a participation of a child in divorce case cannot be left out. However, the child's participation in divorce proceedings depends on the appreciation of the judge.[46]

2.3.3 Provisional measures in favor of the child during divorce proceedings under Rwandan family law

It is evident that divorce entails dissolution of a legal marriage. However, it

[42] . Yvonne Dausab, "The Best Interest of the Child", http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_h.pdf, accessed on 20/3/2020.

[43] The Constitution of Rwanda of 2003 as revised in 2015, *supra* note1.

[44] Article 2 of the UN Convention on Rights of Child, *supra* note 5.

[45] Article 12 of the UN Convention on the Rights of the Child, *supra* notes 5.

[46] Judges interviewed indicated that when they consider important and necessary they call children to hear them and express their views.

does not end the relationship between parents and their respective legitimate children born of that marriage. Article 245 of the family law states that children continue to enjoy benefits from a marriage of their parents. In this regard, parents are obligated to keep educating their children.[47] This obligation to contribute to the child welfare and education lasts until below 21 years old as provided under article 322 of the family law. The child's health and welfare mean a lot, much consideration is provided not only to the child's financial support to satisfy his/her basic and essential needs, but also the importance is given to the child custody. In this regard, the Rwandan family law provides for provisional measures with respect to child's financial support and custody and visitation right in ongoing divorce process[48] even after divorce.

2.3.3.1. Child custody and visitation right

The concept of the child's custody is not defined by the Rwandan family law. The child's custody consists of determination of the place where the child under 21 years old will live and the parent or third person who will be responsible for the daily life of the child. In divorce process, the judge may accord exclusive child's custody to one of the spouses principally the parent who wins the divorce or the other parent or the third party in the best interest of the child.[49]

In the case N° RCAA0134/15/HC of 30/6/2016, opposing *Ndizihiwe v Mukamwezi* the plaintiff claimed for the custody of the children born of the dissolved marriage. The children's custody was vested with the mother because the decision ensures the stability and continuity of the children in their living environment. The mother had been living together with her children for eleven years, where she kept parental responsibilities of raising, caring, supervising children. Thus, attachments were developed between the mother and the children. In addition, it was not in the best interest of the children to be raised by the stepmother who lived with their father. Furthermore, the nature of the father's job who used to work far from the family home would prevent him from finding required time to spend and stay with the children and cover their daily needs. The High Court fairly

[47] Articles 203 of the Law n° 32/2016 of 28/8/2016, *supra* note 12.

[48] Article 225 of the Law n°32/2016 of 28/8/2016, *supra* note 12.

[49] Article 225 of the Law n° 32/2016 of 28/8/2016, *supra* note 12. Article 18 of the Law n 001/2020 of 20/2/2020, *supra* note 4.

considered the principle of best interest of the child while determining the children's custody. This attachment with a parent was taken into account in another case opposing *Nyirabagirinka v Ngerageze*.[50]

Similarly, in the case MS v NWB, Case N^{0} 46820/201, the High Court of South Africa (North Gauteng, Pretoria) accorded the child custody to the mother taking into account the attachments which were developed between the mother and the child during seven years the child had been living with her. We embrace the decisions of the aforementioned courts because a period of time a child spends with a parent contributes to the development of bonds which must be taken into account in order to avoid disrupting the living environment of the child.

However, the non-custodial parent would be vested with visitation right as the child must keep ties with both parents. The non-custodial parent is awarded visitation right and judges while ruling on the divorce case are obligated to specify appropriate modalities for exercise of that right[51] and it may be expected that the judges' ruling would be done in the best interest of the child. In the case of divorce N° RC 0189/14/TB/NYBYE of 09/02/2014 which opposed *Ndizihiwe* and *Mukamwezi* the court ruled that the non-custodial parent who was the father was entitled to visit his five children and to be visited by them. The court did not decide on modalities of exercising the right to child visit.[52]

To the contrary, in the case N° RCA 0040/11/TGI/NYGE of 30/06/2011 which opposed *Gashumba* and *Valoi* the Intermediate Court of Nyarugenge ruled in the best interest of the children with respect of children's visit because the judge determined the modalities according to which the father could visit his children. For those who were studying in boarding schools, the father might respect the scheduled period fixed by schools for children's visits. For those who were not in boarding schools, the father had to visit them one weekend over 2. During holidays, children had to spend a half of the holidays with each of their parents.

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[50] In the case N^{0} 0390/15/TB/MUH of 4/04/2017, *Nyirabagirinka v Ngerageze*, the Primary Court denied the custody of six children to the father because of his misconduct as he used to maintain concubines. In addition, children developed attachments with their mother who lived together with them.

[51] Article 18 of the law n^{o} 001/2020 of 20/2/2020, *supra* note 4.

[52] In the case N^{0} 0390/15/TB/MUH of 4/04/2017, *Nyirabagirinka* v *Ngerageze*, the judge accorded to the non-custodial parent the right to visit his children and to be visited by them without deciding on modalities of exercise of this right. This may be a source of intolerable disturbances from either the non-custodial parent or his/her children with regard to the custodial parent, children, or the non-custodial parent's new family.

The determination of modalities of child visits would protect them from boring visits, unnecessary disturbances, to mention a few. The aforementioned article 244 goes further where it tackles the issue of child support as obligation of divorcing parents towards their children. In fact, both parents must contribute to the welfare of their children. Irrespective of the parent the child is placed with, both parents have the right to supervise the maintenance of their children.

2.3.3.2. Child's financial support

In divorce cases, a crucial issue to be solved is how the children will be financially supported. The Rwandan family law provides this obligation under article 244 mentioned above where it specifies that parents must contribute to the alimony in proportion to their means. The obligation of the child alimony rests on both parents as it sounds from this article. The law specifies that the contribution of non-custodial parent must be done within the means of the provider. The Rwandan family law is silent about determination of the rate of the child support. It is obvious that it is left to the discretion of the judge. In the case of divorce N° RCAA 0002/15/TGI/NYGE of 12/03/2015 which opposed *Nzabamwita* and *Nibaseke*, the appellant claimed the reduction of the alimony of 50,000 Rwandan francs ordered by the Primary Court of Nyamirambo. The appellant earned 2,000 Rwandan francs per day and it is practically impossible to get 50,000 Rfw of alimony for his three children. Simple calculations show that *Nzabamwita* could not afford to pay this amount of 50,000 Rfw given that even his wife was aware that he earned 2,000 Rfw. The Intermediate Court of Nyarugenge reduced the amount of alimony to 30,000 Rfw. The Primary Court ordered alimony of 50,000 considering only the needs of the children. At least the Intermediate Court of Nyarugenge balanced the needs of the children with the earnings of the non-custodial parents. Nevertheless, this is not the only factor to take into account while calculating the amount of alimony to be granted to children. On this, it is worth borrowing from a case in South Africa *Strydom v Strydom*, Case n° AR 598/2018 the South African High Court of KwaZulu Natal, Pietermaritzburg, a non-custodial parent claimed the reduction of the alimony amounting to R 2,500/month/child for the 2 children. The High Court did not give him a cause because it made calculations of alimony considering not only the needs of the children, but also resources of the appellant's incomes and savings and necessary

expenses. Then the High Court maintained the alimony of R 2,500/month/child and other necessary expenses for the two children. Furthermore, the financial resources of the non-custodial parent must be taken into account as the duty of alimony rests on both parents pursuant to article 244 mentioned above. More importantly, the needs of the children must be balanced with other charges of the non-custodial parent. It is understandable that it would be unfair where the payment of child support leaves the non-custodial parent living under notorious poverty or looks like burdensome to him/her.

It is of interest to mention that the right to the child support goes along with the duty of the child education vested within parents. Article 322 of the law nº 32/2016 of 28/08/2016 specifies that parents are bound to perform the duty of education for their children below 21 years of age. However, in the case Nº RC/0325/15/TB/GIS of 24/2/2016, *Mushimiyimana v Mbahungirehe*, the judge ordered the non-custodial parent to provide alimony to the child until she reached six years old.

The court order relating to child support can be subject to modification upon the request of either parent under substantial circumstances.[53] We consider that the latter must be substantial changes in relation to the cost of children rearing or parents' income. Consequently, the court should modify upwards or downwards a child support for adjustment to adapt it to the actual needs of the child and means of the parents. In the perspective of guaranteeing the child's welfare, a number of factors must be taken into consideration by judges while deciding in divorce case in the best interest of the child.

3. Consideration of the best interest of the child in divorce proceedings: case law analysis

This section critically analyses Rwandan courts' practice with regard to the consideration of the best interest of the child in awarding the child custody, child visit and support.

[53] Article 228 para 2 of the law nº 32/2016 of 28/8/2016, *supra* note 12.

3.1. COURTS' PRACTICES AND BEST INTEREST OF THE CHILD IN DIVORCE PROCEEDINGS

The Rwandan family law does not provide any clear guidance in respect of factors to take into account in case judges are deciding on the child custody, support and visitation right; nor were judicial or administrative guidelines established in this regard[54] even though the best interest of the child is recognized by family law as legal standard in decision-making process.

It is evident that the lack of guidelines on factors determining the best interest in respect to the child custody and support in divorce case may lead to absence of uniformity in decision-making and lack of predictability and fairness of decision on child custody, visitation right and support.[55]

3.1.1. The child custody and best interest of the child

The child custody means the determination by the court of the place where the child under twenty-one years of age must live and the person who is entitled to assume the child's day-to-day care during divorce proceedings or after divorce has been granted by the court.[56]

During divorce process, parents fight over the child custody, or one spouse shows sentiment to remain with children without the either spouse's objection.[57] The child custody may raise little or no disputes if parents come up with an arrangement on the child custody provided that the judge finds that the arrangement is made in the best interest of the child.[58] More importantly, let us underline that the child custody can be revisited by the competent court in the best interest of the child.

There is no doubt that divorce of parents creates adverse effects to the child. This becomes worse in case of disputed custody.[59] The judge retains his/her discretion

[54] All Presidents of Primary Courts interviewed revealed that there are no guidelines in relation to factors to be considered while they decide on the best interest of the child in divorce cases. They use they discretion in ruling considering what should contribute to the child welfare.

[55] Harry D. Krause, *Family Law*, Illinois,West Publishing, 1995, at 249.

[56] *Ibidem.*

[57] *Idem*, at 295

[58] William P. Statsky, *Family Law, the Essentials*, *supra* note 3 , at 176-177.

[59] Harry De Krause, *Family Law in a Nutshell*, *supra* note 55, at 295.

when taking decision on the child custody but he/she is called to base on factors helping to guarantee to the maximum care and welfare of the child. The judge ruling could be based on facts and impressions that are not captured in a written record because of lack of guidelines while those factors should help to motivate the position of the court.[60] It is evident that the judge contributes undoubtedly to the safeguard of the child's welfare as long as the best interest of the child is taken into account while deciding on child custody and visitation arrangements in divorce case. It is of interest to recall that no guidelines in this regard are availed to judges. In fact, judges affirmed that they use their discretion to decide what would be fit to the child depending on the surrounding circumstances.[61] In this perspective a number of factors should help judges to decide custody arrangement in the best interest of the child for the child of divorcing couples. The child welfare principle must be given a paramount consideration in all issues in relation to the child.[62]

3.1.1.1. The stability of the child and psychological bonds with the parent

When the court determines the person who must live with the child in a divorce case, it must take into consideration how long the child has been under the control and care of the parent or any other person. It is quite obvious that if it is established that a child has been in care of one parent, the stability of a child would be preserved if that parent is awarded child custody.[63]

However, the stability of the child must be regarded widely; the judge must avoid whatever would upset the situation in which the child lives in favor of uncertain future of the child. The parent who actually will maintain maximum stability and continuity of child's lifestyle would be preferable.[64] In the case Nº RCAA 0134/15/HC/NY of 30/6/2016, *Ndizihiwe v Mukamwezi* children's custody was given to the mother who has been raising alone children for 11 years while

[60] Apart from legal motivation where judges used to reproduce family law provisions in relation to the best interest of the child, many case laws explored showed that motivation of facts the judge based on was left out. This is justified by the lack of guidelines.

[61] All judges of Primary courts interviewed affirmed that no guidelines are availed to them for the better application of the principle of best interest of the child during divorce proceedings.

[62] Mary Welstead &Susan Edwards, *Family Law*, *supra* note 31, at 326.

[63] *Ibid.*

[64] WIlliam P. Statsky, *Family Law The Essentials*, *supra* note 3, at 185.

the husband deserted the family residence. Thus, the children inevitably would be comfortable to stay with the mother. The stability of the children was ensured because the psychological bonds were developed between the mother and the children during the eleven years they stayed together under the care and supervision of the mother alone. It can be upheld that the court accorded the children's custody to the mother basing on the attachments developed between children and her in the absence of the father.[65]

In intent to preserve the child welfare, the stability or *statu quo* principle must guide the judges where they decide on the custodial parent and child residence. Once it is proved that the child's stability was established because the child has been living with a given parent, the child stability must not be altered. In the case Nº RC 00049/2017/TB/KGO of 11/01/2018 *Ntihabose v. Kuradusenge*, a mother was awarded child custody because not only she won the case but also used to be with the child for long time. Various primary courts ruled in this sense.[66] The Court can even accord the child custody to the parent who loses the case when it is established that psychological bonds were developed between him/her and the child. For instance, in the case Nº RC 00714/2016/TB/KCY of 21/4/2017 *Murwanashyaka v. Uwera* the child custody was given to the husband even if he had lost for excess and abuse towards his wife. Despite that, the judge found that it was in the best interest of the child to vest with him the child custody because the child had been staying with him.

To safeguard the child's welfare, the judge must ensure the continuity of the child care by granting custody to the one who was providing care to the child.[67] It would be detrimental to the child if he/she realizes inconsistency between his/her life before and after separation of his/her parents.[68] The court ruling must always clarify instructions on how the non-custodial parent can visit his/her children or be visited by them and keep a regular communication with them in order to make sure that they will not suffer his/her absence. In a nutshell, the court's order on the child's custody would not impact on the changing of

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[65] N° RC AA 0134/15/HC/NY of 30/6/2016 para 8, *Ndizihiwe v Mukamwezi.*

[66] See examples of Nº RC 0373/10/TB/NGOMA of 25/10/2010, *Kayitesi v. Sebagambyi.* N° RC 0716/11/TB/Nyab of 16/3/2012, *Murebwayire v. Harerimana.*

[67] Mary Welstead &Susan Edwards, *Family Law*, *supra* note 31, at 335.

[68] *Ibid*.

the *statu quo* like quality of education, shelter, food, etc. Thus, the continuity in the child's environment must be guaranteed as well as permanence of the child's psychological attachment.

3.1.1.2. The benefit for children to have a meaningful relationship with both parents

The Rwandan family law requires both parents to contribute to the care and welfare of their children until the children reach 21 years of age. In this line, any arrangement in relation to child custody and visitation right that promotes cooperation between parents is in the best interest of the child. While determining the custodial parent, the judge must designate the parent showing willingness and ability to respect and appreciate bond between the child and the non-custodial parent, ability to recognize the importance of continuity of relationship between a non-custodial parent and children. In fact, any arrangement for determination of the custodial parent and child's residency must as much as possible preserve contact between parents and a child.[69] One may wonder how the judge should discover inability to preserve relationship between children and the other parent. The hostility of one spouse to another while disputing over the child custody indicates that the hostile parent will not promote relationship with the other parent.

Furthermore, the parent who constantly provides argument full of disrespect vis-à-vis the other parent could not permit continuity of relationship with the other parent.[70]

3.1.1.3. The need to protect the child from physical or psychological harm

Wherever it is established that there is a likelihood of spousal abuse, a child is likely to be exposed to an atmosphere in which the violence. There is no need to award child custody to a parent while surrounding circumstances indicate that there is high possibility for future abuse of a child, or apparent indicators of unfitness for custody.[71] While deciding on child custody, the judge must avoid awarding custody to the parent who infringed any harm to the child be it physical, sexual or mental or neglect. This is the same in case it is likely that

[69] Mary Welstead &Susan Edwards, *Family Law*, *supra* note 31, at 236.

[70] *Ibidem.*

[71] *Ibidem.*

the child is at risk of suffering the harm in the future.[72] In the case nº RCOO63/TB/KCY, *Bizimana v. Habiyambere*, the Primary Court of Kacyiru accorded child custody to the father who won the case on the fault of the wife who committed adultery. The court motivated that she could not provide better education and be a model for her children even those under 6 years of age. Other court ruled in this sense[73] where the immorality of the custody-seeker renders him or her unfit for custody.

Nevertheless, the judge can decide otherwise considering the age of the child and psychological bonds that have been developed between the child and the parent of proven misconduct. It happened in the case N° RC00023/2016 of 10/5/2017 which opposed *Simpunga* to *Kakiyombe*. The age of the children should be carefully considered when it is established that the attachments were developed for a certain reasonable period of time between the mother and the child.

The role of the judge would be to rule on the case considering specific and particular surrounding circumstances the child have been living in. The judge must avoid as much as possible the decision which will disturb the living environment of the child. We consider that to separate a child from his/her mother who has been raising a child for a long time is not in his/her best interests, despite that article 11 of the law nº 71/2018 of 31/8/2018 relating to the child protection expressly specifies that the child custody may even be vested with the third party in case of domestic violence, mistreatment, and mental disability of a parent and deprivation of parental authority. In any case,

the decision on the child custody would consider surrounding circumstances so that the court's decision contributes to the child's welfare with respect to guaranteeing as much as possible the child's permanent psychological stability.

In short, the age of the child, psychological bond with a parent and protection of the child against physical and psychological harm must be balanced in his/her

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72 *Idem*, at 388.

73 Primary Court of Kacyiru, Nº RCOO63/TB/KCY, of 22/04/2010, *Bizimana. v Habiyambere*; Tribunal de Grand Instance de Gasabo, Nº RCA 00062/17/TGI/GSBO of 08/02/2018 I vs H, the father was awarded child custody not only he won the case but also the wife lost the case because of adultery and it was doubtful that a mother of bad behavior could give good example to the children including girls; N RC 0390/15/TB/MUH of 4/04/2017, *Nyirabagirinka v Ngerageze*, the husband was denied to the custody of the child because he used to maintain concubines.

best interest.

3.1.1.4. Parent's ability to provide for the child needs

As stated earlier, the welfare of the child is given priority where the judge awards child custody to a parent. The judge must take into account a standard of care. This will be justified by material advantages that a custodial parent should avail to the child[74] to preserve the continuity of the child's lifestyle standards. To meet the child's needs, the judge must take into consideration the parent's availability to ensure the day-to-day needs and care of the child. In the case Nº RCA 0040/11/TGI/NYGE, *Gashumba v. Valoi*, the Intermediate Court of Nyarugenge denied custody to the father because he was jobless and he could not afford expenses required to meet needs of children. In addition, he could not pay school fees for his children for luxury school he wanted them to attend. His wife who was capable to meet needs of her children was the one awarded children' custody. It is obvious that the custodial parent would be the one capable to provide reassurance and comfort to the children during or after divorce proceedings.[75] In this respect, the custodial parent would preferably be the one who used to meet children's teacher, to respond to medical appointment, to help children to do homework, etc.[76] We appreciate the court's decision because on one hand, article 18 of the law nº 001/2020 of 2/2//2020 amending the law nº 32/2016 of 28/8/2016 governing persons and family set out a principle according to which "the custody of the children is awarded to the spouse who obtains divorce. (…)." In this case, the appellant won this case of divorce and she proved that she was able to afford financial expenses incurred by the education of the children. By contrast, the husband was jobless and was accused of failing to contribute to the household expenses. Thus, he could not cover the day-to-day needs of the children.

Practically, the child's best interest prevails over any other considerations. In the case Nº RCA 0074/12/TGI/GSBO of 18/1/2013, *Uwidutije v. Harindimana* a mother was denied custody for her children below 7 years of age because she could not afford their needs. Even in appeal, the court maintained that she was unable to pay 10,000 Rwandan francs for child support ordered by the Primary

[74] Mary Welstead &Susan Edwards, *Family Law*, *supra* note 31, at 339.

[75] William P. Statsky, *Family Law The Essentials*, *supra* note 3, at 185.

[76] *Ibidem*.

Court.[77] Financial situation of the parent is not the only determining factor to base on in order to decide on the custodial parent. The age of the child would also matter. Even though, article 18 of Law Nº 001/2020 of 20/2/2020 amending Law Nº 32/2016 of 28/8/2016 removed the principle that was set out in article 243 according to which a child under 6 years of age cannot be separated from her mother unless it is established that it is not in the best interest of the child. No one can doubt that, in Rwanda, mothers used to stay with children for longer periods than the fathers during the time of breastfeeding and babysitting of their children. The World Health Organization recommends mothers to breastfeed their children in order to ensure the child health and survival given that the breast milk contains antibodies which protect children who are fragile against childhood diseases. The exclusive breastfeeding for the first 6 months is important, thereafter, children should be given nutritious complementary foods and continue breastfeeding up to the age of two years or beyond[78] Thus from this point of view, it is not in the best interest of the child to separate a child under six years old from his/her mother as far as the determination of the custodial parent is concerned unless it is established otherwise.

More importantly, let us underline that in determining the child custody, the best interest of the child is not always seen in the mirror of the custodial parent's financial situation. In the case of divorce N° RC00023/2016 of 10/5/2017 which opposed *Simpunga* and *Kakiyonde*, the Primary Court of Byumba granted divorce on the fault of the wife. The court granted the children's custody to the mother who lost the case because of excess and abuse against her husband. However, the court took into consideration the age of the two children born of the dissolved marriage. They were below seven years of age. The wife managed to raise her two children. In addition, the court took into account the attachments which were developed between children and their mother. Financial situation of the mother was not a determining factor in the decision of choosing the custodial parent. The divorcing spouses admitted that they did not have any financial challenges. Then the court ordered the non-custodial parent to pay the alimony amounting to 50,000 Rwandan francs and expenses relating to health insurance scheme, a half of children's school fees.

[77] Tribunal de Grand Instance de Gasabo, Nº RCA 0074/12/TGI/GSBO of 18/01/2013, *Uwidutije v Harindimana.*

[78] WHO, "Breastfeeding", https://www.who.int/health-topics/breastfeeding#tab=tab_1, accessed on 23/10/2020.

We appreciate the court's decision because the age of the children was a leading factor to determine the children's custody with respect to their best interest rather than the mother's misconduct or lack or insufficiency of financial means. The court took measures to compensate the outstanding possible balance by ordering the husband to pay alimony and other necessary expenses for children.

It should not be ignored that the parent's physical and mental health plays a considerable role in the child health and welfare. Much attention should be paid to impaired children. The court must consider that the custodial parent will be able to meet physical educational and emotional needs for the disabled child. The parent should be with sufficient resources to afford appropriate accommodation, schooling provisions, and housing, to mention few for disabled child.[79]

3.1.1.5. Child preferences and wishes

Article 28 of the United Nations Convention on Rights of the Child guarantees to the children the right to express their views and to be heard in all matters affecting them during judicial and administrative proceedings. However, the weight given to the child's views will depend on the child's age and maturity. This article goes further to specify that the opportunity to be heard must be provided in any judicial and administrative proceedings.[80] Thus, the child is entitled to participate in decisions affecting him/her.

Nevertheless, it is of importance to note that this participation in decisions affecting children is recognized to the child who has reached a certain reasonable age, level of understanding and development.[81] Even though an infant should express his/her views and feeling about the parents he/she wants to live with, it is evident that he/she is unable to assess what would be in his/her best interests; a young child should validly express his/her wishes and feelings about the parent they want to stay with while being incapable to make choice in complex situation.[82] We consider that the child wishes and feelings are not decisive for the judge to award custody to the designated parent; rather the judge must

[79] William P. Statsky, *Family Law, the Essentials*, *supra* note 3, at 334.

[80] Article12 of UN Convention on the Rights of the Child, *supra* note 5.

[81] Mary Welstead&Suzan Edwards, *Family Law*, *supra* note 31, at 291.

[82] *Idem*, 292.

balance this with other factors for the best interest of the child.[83] The judge must assess if the child truly upholds the expressed wishes, feeling and preferences or was under someone else's influence, to assess the child's capacity to uphold such expressed sentiment. In addition to that, the best interest of the child must be taken into account.[84] The judge must relate what the child wants with actual needs of the child in order to preserve the child welfare.[85]

3.1.1.6. Parents' religion

In determining the custodial parent, the court must be neutral with respect to parents' religion. The judge must not be fanatic and show what religion is preferable or correct. Instead, he/she must take into account that the practice of the religion might not undermine children's right and best interest.[86] Furthermore, the child should express his/her wishes and feeling about this issue, however the judge must ensure the continuity of the child cultural development.[87]

The list of this factor is not exhaustive, any other factor or circumstance that the Court thinks is relevant should be taken into consideration.

3.1.2. Child visitation right and best interest of the child

Divorce terminates spousal communal life. The separation of parents produces adverse effects on moral and spiritual growth of the children given that children are deprived of full time affection and guidance from the noncustodial parent.[88] In fact, the child custody should be awarded to the spouse who won divorce case or to the spouse who lost the case or third party if the court finds this in the

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[83] In all case laws relating to divorce I explored, I did not find any case where the opinion of the child appears in the court's ruling. The judge would have good reason for not putting the child's opinion in the court's ruling because this could not be well perceived by the parent against whom the child was testifying and who at the end would become the custodial parent. This also is done is the best interest of the child of divorcing parents.

[84] Mary Welstead&Suzan Edwards, *Family Law*, *supra* note 31, at 292

[85] From the interviews conducted with Presidents of 8 different Primary Courts, children are not always called to give their views. However, in some cases the judge can invite children for this purpose and they are not bound by the child's views in their decisions.

[86] William P. Statsky, *Family law, the essential*, *supra* note 3, at 189. For example, the parent religion which does not allow the child to continue other activities, like studying, etc while those activities are decisive for the better future of the child.

[87] *Idem*, at 207.

[88] *Idem*, at 185.

best interest of the child.[89] The non-custodial parent is provided with a visitation right of the child in order to preserve ties between the child and both parents and to keep closeness to the child.[90] Conditions for enforcement of visitation right are specified in the court order following the discretion of the judge. In the case Nº RCA 0040/11/TGI/NYGE, *Gashumba v. Valoi* the judge at least decided on modalities and conditions of exercising visitation right by obliging the father to visit his children at school or at home during the weekend every two weeks and staying with children for a half of holidays. However, in other different case laws consulted in this study, judges used to reproduce the provisions of the law.[91]

In some case laws the judge gives the latitude to the noncustodial parent to visit the child whenever he wishes. However, it is the role of the judge to determine those modalities, otherwise this can affect right to privacy of the custodial parent.[92]

Worse again in other cases, the judge awards the visitation right to the non-custodial parent without specifying conditions and modalities of enforcement of this right.[93]

Where judges are deciding on conditions of visitation right they must consider also that the child's welfare should not be affected. Sometimes the visitation right should be denied in restricted circumstances such as cases of brutal enforcement of visitation right which can be detrimental to the child when there is apparent conflict and tension between a non-custodial parent and the other parent.[94] In these circumstances, the visitation right should be suspended until when the atmosphere becomes favorable to the enforcement of that right. It is advisable to encourage voluntary and peaceful compliance with conditions of visitation

[89] Article 18 of the law nº 001/2020 of 20/2/2020, *supra* note 6.

[90] Harry D. Krause, *Family Law in a Nutshell*, *supra* note 55, at 219.

[91] Tribunal de Première Instance de Nyarugenge, Nº RCA 0040/11/TGI/NYGE of 30/6/2011, G. D. vs V. J.M.

[92] Nº RC 00052/17/TB/KGO of 30/11/2017, *Uwanjye v Ndagijimana.* Nº RC 00051/2016//TB/BY of 30/6 2017, *Sediki v. Majyambere.* Nº RC 0126/2016 TTB/BY of 30/06/2017, *Karikumutima v. Nkomeje.* Nº RC 0716/11/TB/Nyb of 16/3/2012, *Murebwayire v Harerimana*, Nº RC 00136/2017/TB/KCY of 24/5/2017, *Kabera v Maima.* The Courts ruled that the non-custodial parent should visit their children whenever they wished.

[93] Nº RC 0106/2016/TB/BY of 28/2/2017 of the Primary Court of Byumba, *Kuradusenge v. Salehe.*
Nº RC 00714/2016/TB/KCY of 21/04/2017 *Murwanashyaka v. Uwera.*
RC 27.708/98 of 27/8/1998 of the Tribunal of the first instance of Kigali, *Mukakagenza v. Ndoli.* The courts awarded visit right the fathers without defining conditions and modalities of enforcement such a right

[94] Harry D. Krause, *Family Laws in a Nutshell*, *supra note* 55, at 219.

right by both parents.[95] It is in the best interest of the child if the custodial parent encourages children to find time to be with the noncustodial parent so that they can explore and realize the affection of the either parent; this will ease the execution of child support obligation of the noncustodial parent.[96] In case of disputed child custody, the court order must clearly indicate that a custodial parent has no right to limit or to defeat the non-custodial parent's visitation right[97] unless this can endanger the child welfare. In fact, regular and consistent visits to the children contribute much more to the stability and security of both children and parents.[98]

Additionally, visitation right should be denied to the non-custodial parent in case it would affect child physical, mental, moral and emotional health.[99] If it is established that the non-custodial parent's behavior can endanger the child welfare, the visitation right would not be in the best interest of the child. The non-custodial parent should be denied to contact child in exceptional situation like domestic violence, criminality, etc. For example, a husband who has been violent to the wife would be denied to contact children[100] because the violence towards the mother produced emotional and psychological harm to the child.[101] Nevertheless, it would be in the best interest of the children to ensure that the non-custodial parent keep ties with his/her children once he/she changes positively his/her behavior. This would surely contribute to the children's psychological development.

3.1.3. Child support and best interest of the child

As mentioned above, the Rwandan family law obligates both parents to support their children. Each parent accomplishes this responsibility within the limits of his/her means and needs of the child.[102] The components of the child support

[95] *Idem*, 319.

[96] *Ibid.*

[97] William P. Statsky, *Familly Law, the Essentials*, *supra* note 3, at 179.

[98] *Idem*, at 180.

[99] Harry De Krause, *Family Law in a Nutshell*, *supra* note 55, at 319.

[100] *Ibid.*

[101] Mary Welstead & Suzan Edwards, *Family Law*, *supra* note 31, at 345.

[102] Art. 204-205 of the law n° 32/2016 of 28/8/2016, *supra* note 12.
In the case Nº RCAA0134/15/HC/NYA of 30/6/2016, the High Court of Nyanza ordered the non-custodial parent to pay 67,000 Rwandan francs and the custodial parent to pay 20,000 Rwandan francs as alimony to

include provision of food, clothes, shelter, ensure medical care of the children, school fees, to mention a few.

One may wonder the age of the child who deserves support from his/her parent. It is not ignored that child support obligation is the composite of child education. Article 322 of Family law envisages that parents are bound by the duty of education towards their children below 21 years of age. We consider that the range of age must be considered with some nuances. The child support obligation must continue for the child who was incapacitated by the competent court as long as the legal incapacity lasts. Parents are *a priori* guardian for the incompetent child the time the court decides on that legal incapacity.[103] The Rwandan law is silent about parents' support obligation towards the emancipated child. Harry D. Krause considers that where a child is emancipated, the support obligation ceases because the child is considered to be like any other adult person responsible for his or her life.[104] It is unfortunate that in the case N° 0325/15/TB/GIS of 24/2/2016, *Mushimiyimana v. Mbahungirehe*, the judge ordered the father to pay the child's alimony until the child would reach six years of age. We consider that the Court ruling was not in the best interest of the child because as mentioned above alimony is a composite of the duty of education of child which lasts until the child reaches below 21 years of age.

A judge can give a consideration to the arrangement of parents on the children's alimony as far as it does not compromise the child's best interest. In the case N° RC 00793/2016/TB/KCY of 20/04/2017, *Musirimu v. Umutoni*, in the parents' arrangement of 20/9/2016, parents agreed that the father would pay the child alimony of 1,000,000 Rwandan francs for four years after which the child would be given to the father. They agreed that the father would pay 21,000 Rwandan francs each month. In the best interest of the child, the judge ruling extended this period of four years to the time the child would reach civil majority. However, it is important to recall that the duty of the child education lasts until before 21 years of age, not until civil majority which is 18 years of age. In addition, the judge

provide to the children born of the dissolved marriage. In some other case laws, the judge used to order the payment of alimony to the non-custodial parent and did not motivate why the either parent was exonerated from performing this parental duty. Nº RC0373/10/TB/NGOMA of 25/10/2010, *Kayitesi v Sebagarambyi*. The father was ordered to pay 50,000 Rwandan francs.

[103] Article 152 of the law n° 32/2016 of 28/8/2016, *supra* note 12.

[104] Harry D. Krause, *Family law in a Nutshell*, *supra* note 55, at 256.

did not provide any motivation to justify how the sum of 21,000 Rwandan francs which was proposed in the parents' arrangement was in the best interest of the child with respect to the child support.

The other crucial issue that arises from the range of age below 21 years of age is where the child above 21 years of age hasn't completed his/her higher education. One may wonder if parents are not bound by education past 21 years of age. Is a 21 years of age petition founded where he/she claims for tuition fees, accommodation, etc,

what would be the legal framework? Harry De Krause affirms that parents are bound to pursue education past 21 years old to help those children to accomplish their studies.[105] This must take into account the ability of parents and child learning capacity;[106] even though the law provides that the duty of education ends before 21 of age is reached.

The performance of the obligation of child support must not be burdensome to the non-custodial parent. It would be unfair if the payment of child support leaves the noncustodial parent living in notorious poverty. Furthermore, it would be meaningless if the court orders child support which a non-custodial parent is not able to afford. In the case nº RCA 0207/15/TGI/NYBE of 13/3/2016, *Nkubito v. Mukamana*, the Intermediate Court of Nyamagabe reduced the child support ordered by the lower courts because the income of the non-custodial parent was not taken into account.[107] Furthermore, the High court of Nyanza determined child support to be paid by a non-custodial parent basing on various circumstances including the salary, and other actual expenses to be covered by the same salary including payment of loan, insurance scheme, home rent, living expenses to mention a few.[108] Also in the case Nº RC 0053/16/TB/KINIH of 23/06/2016 opposing *Uwamariya* and *Hategekimana*, it started from the mediation Committee where the custodial parent claimed alimony of 50,000 Rwandan francs.

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[105] *Idem*, at 256-258.

[106] William P. Statsky, *Family Law the Essentials*, *supra* note 3, at 218.

[107] RCA 0207/15/TGI/NYBE of 13/3/2016, *Nkubito v. Mukamana*.; Nº RCA 002/15/TGI/NYGE, of 12/3/2015 Omar who was ordered to pay 50000 Rwandan francs in the first instance while he could gain 2000 per day. Then, In appeal, the Intermediate Court of Nyarugenge reduced the alimony up to 30000.

[108] High Court of Nyanza, Nº RCAA 0134/15/HC/NY of 30/6/2016, *Ndizihiwe v Mukamwezi*.

The Committee accorded a monthly alimony of 20,000 Rwandan francs. The non-custodial parent lodged an appeal claiming for its reduction as he could not afford to pay 20,000 Rwandan francs every month. He proved that his salary was equal to 99,160 Rwandan francs, he had been reimbursing a loan of 1,000,000 Rwandan francs, had got other 4 children with a wife they were legally married and had responsibility to maintain and educate them. The Primary Court of Kinihira balanced the best interest of the child with not only the earning of the provider of alimony, but also his actual charges and best interest of other children. Then, the Court ordered that the alimony be reduced up to 10,000 Rwandan francs. We consider that the purpose is to avoid that the child support becomes burdensome to the parent who has to pay. These court's decisions are realistic because the judge fixed the amount of the alimony in consideration of the earnings of the providers, their actual charges including loan payment, education of other children, and other expenses of his daily life. The Court balanced the needs of the beneficiary of the alimony with that of other family members of the provider. Nevertheless, resources of the provider[109] must be taken into account as well as the financial situation of the custodial parent.[110]

However, the judge does not sometimes decide on child support. In case nº Nº RC 0277/15/TB/NGOMA opposing *Nyiramuruta v. Ndayambaje* of 18/05/2015 a judge did not decide on the child support while the mother who was granted child custody raised this issue during divorce proceedings, and the judge did not justify why he did not take stand on the issue. In any case in the best interest of the child, nothing would prevent the judge from deciding on the children's alimony in divorce proceedings in accordance with article 244 of the law nº 32/2016 of 28/8/2016, which specifies that "Regardless of which person the children are placed with, parents retain the right to supervise the maintenance and education of their children. They must also contribute to the alimony in proportion with their means." In the case Nº RC00011/2017/TB/G of 15/02/2018, *Umufasha v. Kubana*, the Primary Court of Gasaka decided that the child alimony could not be granted because, on the one hand, the non-custodial parent was in

[109] Strydom v Strydom, Case nº AR 598/2018 South African High Court of KwaZulu Natal, Pietermaritzburg, a noncustodial parent claimed the reduction of the alimony amounting to 2,500/month/child for 2 children, The High Court denied the reduction taking into consideration of the appellant's incomes and savings. Then the High court maintained the alimony of 2,500/month/child and other necessary expenses relating to medical care for the children

[110] Republic of Rwanda, Supreme court, *Leading Cases Arising from Civil Court in Rwanda, Family law, Administrative Law & Labor Law*, Volume 2, November 2017, at 30.

prison and had no salary, and on the other hand, the custodial parent failed to identify other sources of incomes or resources of the non-custodial parent.

Even though, the Rwandan family law is silent on the matter with respect to child support guidelines, the court should consider the relevant facts suggested in literature, including the child's preferences and wishes, relative financial means of parents, the earning ability of parents, the standards of living and circumstances of parents, needs and capacity of the child for education including higher education, age of the child, financial resources and earning ability of the child, responsibilities of parents to support others, the value of services contributed by the custodial parent, among others.[111] One may wonder what will happen if the court is required to give primary consideration to the best interest and child welfare for two or many children subjects of the same claim, or simply other children while only one is subject of the petition.

In this context, primary consideration does not mean first consideration. Instead, it denotes the most important consideration.[112] That is to say that the child best interest and welfare does not prevail over other children's interests and welfare or that of his/her parents and other persons. The interests of two children subject of petition can be balanced with or against each other depending on circumstances.[113] If need be, the court can also diligently take into account interests of the child's parents and others.[114]

However, as discussed throughout this paper, this blatant lack of child support guidelines with regard to the principle of best interest of the child, leads to inconsistency in decision-making, lack of predictability, fairness in decision making[115] to mention a few.

[111] Harry De Krause, *Family Law in Nutshell, supra* note 54., *at* 246-247.

[112] Oxford Advanced Learner's Dictionary, *International Student's* edition, Oxford, 2006.

[113]Jonathan Herring, *Family Law*, 4th edition, London, Pearson Longman, , 2009, at 417-425.-4 In the case Re T and E, [1995] 1FLR 581, [1995] 3 FCR 260. For the purpose of medical treatment, conjoined twins were separated to the disadvantage of one because it case there was no separation both twins would die, to the contrary, J would survive and M would die. The best interest of one twin was considered weighty that that of the other. Even the court of appeal authorized the operation in this sense. Also in the case [1994] 2 AC 212., Birmingham City Council v H (a minor) a minor who was under 16 years of age had been taken into care with her baby separately. The minor applied to contact her baby. The request was refused because it was considered as unnecessary in the baby's best interest.

[114] Nº RCA 0207/15/TGI/NYBE of 13/3/2016, *Nkubito v Mukamana*.

[115] Harry De Krause, *Family Law in Nutshell, supra* note, 55, at 249.

In case the provider of child support dies, does his /her estate continue to be a source of child support? [116] Under community of property regime, the surviving spouse is bound to continue to take care of the children from the dissolved marriage as well as legitimate child of the deceased parent.[117] It means that a step-parent is obligated to provide child support to a child of his/her deceased spouse. Furthermore, if it is established that the surviving spouse fails to raise minor children, the law allows the opening of succession and a half of the property is allocated to the children and the guardian is appointed to administer the child's property. Normally the execution of succession occurs upon the death of the surviving spouse or his/her remarriage.[118] This article hinders the exercise of inheritance rights by rightful heirs. The entirety of the property falls in the hands of the surviving spouse while no protective measures are envisaged by the law to safeguard the property which is meant to be shared out by all rightful heirs and legatees. In addition, pursuant to article 83 of Law n°27/2016 of 8/7/2016, the inventory of assets and liabilities is carried out at the time of partitioning. Under separation of property regime, the surviving spouse is entitled to manage the inherited property of the minor children until they reach majority age (article 78, 2° of Law n° 27/2016 of 08/07/2016) unless it is established that he/she does not comply with this duty here the law envisages appointment of a guardian for this purpose.

As mentioned earlier, child support should fluctuate depending on the increase of income of either spouse or needs and income of the child. The modification downwards should occur where the provider cannot afford the amount originally awarded by the court provided that the ground is beyond the control of the provider.[119] This is to say that the self-imposed poverty is not a ground to reduce child support. The provider must always act in good faith.[120]

The Rwandan family law does not solve the problem of how to determine the child support and its nature. It only provides that the extent of performance

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[116] William P. Statsky, *Family Law, The Essentials*, *supra* note 3, at 209.

[117] Article 76, 1° of the law n°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, Official Gazette n°31 of 1/8/2016.

[118] Article 52 para 3 of the Law n°27/2016 of 08/07/2016, *supra* note 114.

[119] William P. Statsky, *Family Law the Essentials*, *supra* note 3, at 218.

[120] *Idem*, at 219.

of this obligation depends on the ability of the provider and needs of the child. Nevertheless, a number of factors should help judges to appropriately and fairly decide in the best interest of the child. In this perspective, those factors include the child's living standards, and own income or financial resources, income or other financial resources of the custodial and non-custodial parent, financial need of non-custodial parent, responsibility of non-custodial parent to support others for example members of the second family from second marriage.[121] In the case RC 00075/2017/TB/KGO, *Muhire v. Muhimpundu*, a father was ordered to pay 1/3 of his salary every month without taking into account other responsibilities. As far as the nature of child support is concerned, we consider that it should be performed in money or in kind as the law remains silent on this matter. A judge ruled that a plot of land will constitute child support for the child. In some case laws explored for the purpose of this study, judges mistakenly motivated that the children have right over their parents' property,[122] which is not right as long as parents are still alive. In this vein, in case of sharing the property of the divorcing spouse, the judges used to give a big portion of 75% of the entire assets to the custodial parent to the detriment of non-custodial parent and in addition to this, judges ordered the child support to be paid by a non-custodial parent. The High Court of Nyanza in case *Ndizihiwe v. Mukamwezi* ruled differently where it decided that divorcing spouse who was married under community of property regime have to share equally their respective property. It is evident that children should benefit from their parents' assets while they are accomplishing their duty of education and catering for children.

As evidenced throughout this paper, Rwandan law contributes to the enforcement of the child support obligation. In case one spouse fails to accomplish the duty of education, the other spouse can request the court to compel him/her to perform this duty including child support.

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[121] *Idem*, at 210.
Jill Black, Jane bridge& Tina Bond, *A Practical Approach to Family Law*, 7th ed. 2004, at 308.

[122] Nº RC00049/2017/TB/KGO OG 11/1/2018, *Ntihabose v Kuradusenge*; Nº RC00057/2017/TB/KGO of 08/02/2018, *Mushimiyimana v Ngayaberura*; Nº RC00051/2017/TB/KGO of 17/12/2017, *Mukakabera v Bizimana*.

4. CONCLUSION

The best interest of the child is provided as fundamental legal standard by international conventions and domestic laws to be given a paramount consideration in all decision-making processes that can affect the child. In this perspective, the Rwandan family law obligates judges to consider primarily child's best interest while they determine child custody, child support and visitation right in divorce cases.

Unfortunately, the best interest of the child as legal norm is not defined and it is criticised to be vague and broader. The interpretation and application of this norm depends on the judges' discretion and values of the community they consider to reasonably contribute to the child's welfare. The task of courts becomes complicated because of absence of guidelines in this respect. The end result is the lack of predictability of case laws, inconsistencies and unfairness observed in some case laws. Most of case laws explored for the purpose of this study lack factual motivations which would call legal motivation as far as child support was concerned. Sometimes the alimony ordered by the court seemed burdensome because judges do not balance the child best interest with other basic needs of other members of the family.

Furthermore, no criteria to determine child support were availed to judges. Concerning visitation right, most of judges accord visitation right to a non-custodial parent; however, they do not determine conditions and modalities for enforcement of this right. They only reproduce the article of the law providing this right. Surprisingly, some judges take decisions whose execution would infringe the right to privacy of the custodial parent where they allowed the non-custodial parent to visit children whenever they want. From these aforementioned findings, we suggest that guidelines be provided in order to guarantee consistencies, fairness and predictability of, divorce case laws with regard to the child custody, child support and visitation right. Those guidelines include a number of factors like the capacity of parents, child ultimate safety and well being, family integrity, emotional ties, child age, child preferences and wishes, mental and physical capacity of the child or parent, to mention a few.

Even though the best interest of the child is the first aspect to consider while a

judge is determining child support, it is not the only one to take into account. It must be balanced with interests of other family members in order to avoid that it becomes burdensome for the provider.

Even though the best interest of the child is a legal norm each judge is required to implement while deciding on the case involving the child's interests, the case law analysis shows that the best interest of the child varies from a child to another. The judge must be aware of the fact that every child is unique, is found in a specific situation with particular surrounding circumstances. That is why the judge is required to be careful while he/she is assessing what would be in the best interests for each child. In some cases, the custody was granted to the parent who obtained divorce in the best interest of the child. In other cases, the custody was accorded to the spouse who lost the case because it was in the best interest of the child considering the age of the child, and the attachment which were developed between the losing party and the child.

Thus, we suggest that the administration of courts in Rwanda organizes training sessions to the benefit of judges in charge of ruling on divorce cases. They will be provided with factors that should be considered while deciding in the best interest of the child with regards to child's custody, child's visit, and child's support. The critical analysis of divorce related case laws would help to improve courts' practices in the line of safeguarding the children's welfare while judges are deciding on the child custody, child support and visit in divorce cases. Furthermore, judges will be recalled that the courts' decisions must be sufficiently and strongly motivated with regard to facts and laws. The judge is required to justify the reasons that push him/her to take the decision. Proceeding in this way will promote transparency and fairness in the ruling process.

5. REFERENCES

INTERNATIONAL CONVENTIONS

1. United Nation Convention on protection of the Rights of the Child of 20/11/1989, ratified by the Presidential Order n°773/16 of 13/9/1991.
2. United Nation Convention on Protection of Children and Cooperation in respect of Inter-country Adoption of 29/05/1993, ratified by the Presidential Order n°24/01 of 07/05/2010.
3. United Nation Convention on Rights of persons with disabilities.
4. African Charter on rights and welfare of the Child of 11/06/1990, ratified

by the Presidential Order n°11/01 of 30/05/2001.

DOMESTIC LAWS

1. Constitution of the Republic of Rwanda of 2003 revised in 2015, Official Gazette n° special of 24/12/2015.
2. Law N° 71/2018 of 31/08/2018 relating to the protection of the child, Official Gazette n° 37 *bis* of 10/09/2018.
3. Law Nº 32/2016 of 28/8/2016 governing persons and family, Official Gazette n° 37 of 12/09/2016.
4. Law Nº 001/2020 of 20/02/2020 amending the law n°32/2016 of 28/08/2016 governing persons and family Official Gazette n° 06 of 17/02/2020.
5. Law Nº 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, Official Gazette n°31 of 01/08/2016.
6. Law N° 22/2018 of 29/04/2018 relating to civil, commercial, labor and administrative procedures, Official Gazette n° Special of 29/04/2018.

BOOKS

1. Harry D. Krause, Family law in nutshell, 3rd edition, Illinois West Publishing, July, 1995
2. Jill Black, Jane bridge & Tina Bond, *A practical Approach to Family law*, 7th ed. 2004
3. Jonathan Herring, *Family Law*, fourth edition, London, Pearson Longman, 4th edition 2009.
4. Mary Welstead &Susan Edwards, *Family law*, Second edition, Oxford, 2007.
5. WIlliam P. S tatsky, *Family law, the essentials*, Second edition, New York, Thomson Delmar Learning, 2004.
6. Republic of Rwanda, Supreme Court, *Leading Cases Arising from Civil Court in Rwanda, Family law, Administrative Law & Labor Law*, Volume 2, November 2017.

CASE LAWS

1. Nº RCAA 0134/15/HC/NY of 30/06/2016, Ndizihiwe v Mukamwezi.
2. Nº RC 00049/2017/TB KGO of 11/01/2018 Ntihabose v Kuradusenge.
3. Nº RCOO63/TB/KCY, Bizimana v Habiyambere.
4. Nº RCA 0040/11/TGI/NYGE of 30/6/2011 Gashumba v Valois.
5. Nº RCA OO74/12/TGI/GSBO of 18/01/2013 Uwidutije v Harindimana.
6. Nº RC OOO52/17/TB/KGO of 30/11/2017, Uwanjye v Ndagijimana.
7. Nº RC 00051/2016//TB/BY of 30/06 2017, Sediki v Majyambere.
8. Nº RC 0106/2016/TB/BY of 28/02/2017, Kuradusenge v Salehe.
9. Nº RC 0126/2016 TTB/BY of 30/06/2017, Karikumutima v Nkomeje.
10. Nº RC 0277/15/TB/NGOMA of 18/05/201, Nyiramruta v Ndayambaje.
11. Nº RCA O207/15/TGI/NYBE of 13/03/2016, Nkubito v Mukamana.
12. Nº RC 00075/2017/TB/KGO, Muhire v Muhimpundu.
13. Nº RC00049/2017/TB/KGO of 11/1/2018, Ntihabose v Kuradusenge.
14. Nº RC00057/2017/TB/KGO of 8/2/2018, Mushimiyimana v Ngayaberura Fidele.
15. Nº RC00051/2017/TB/KGO of 17/12/2017, Mukakabera v Bizimana.
16. Nº RC00011/2017/TB/Gas of 15/2/2018, Primary Court of Gasaka, Umufasha v Kubana,
17. Nº RC 0053/16/TB/KINIH of 23/6/2016, Uwamariya v Hategekimana.

18. Re T and E, [1995] 1FLR 581, [1995] 3 FCR 260. Birmingham City Council v H(a minor), [1994] 2 AC 212.,
19. Strydom v Strydom, Case nº AR 598/2018 South African High Court of KwaZulu Natal, Pietermaritzburg
20. Nº RC0373/10/TB/NGOMA of 25/10/2010 Kayitesi v Sebagarambyi.
21. Nº RC0716/11/TB/Nyab of 16/3/2012, Murebwayire v Harerimana.
22. MS v NWB Case nº 46820/201, the High Court of South Africa (North Gauteng, Pretoria)
23. Nº RC 00136/2017/TB/KCY, of 24/05/2017, Kabera v Maima.
24. Nº RC 00714/2016/TB/KCY of 21/04/2016, Murwanashyaka v Uwera.
25. Nº 0325/2015/TB.GIS of 24/2/2016, Mushimiyimana v Mbahungirehe.
26. Nº RC 0390/15/TB/MUH of 04/04/2017, Nyirabagirinka v Ngerageze.
27. Nº RC 00793/2016/TB/KCY of 20/04/2017, Musirimu v Umutoni

ELECTRONIC SOURCES

1. Nadia D., "Best Interest of the Child Principle in the Context of Parent Separation or Divorce as Conceptualized by the Community", Edith Cowan University, 2014, at 20, http://ro.ecu.edu.au./theses/1463, accessed on 10/6/2018.
2. Jean Zermatten, "Best Interest of the Child, Literal Analysis, Function and Implementation", *Working Report*, 2010, at 6, accessed on 04/ 05/2018, https://www.childsrights.org/documents/publications/wr/wr_best-interest-child2009.pdf
3. Yvonne Dausab, "The best Interest of the Child", http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_h.pdf, accessed on 12/1/2021.
4. Mélanie Chatenoud, "Best Interest of the Child", https://www.humanium.org/en/the-childs-best-interest/, accessed on 20/11/2020.
5. X. "Best Interest of the Child Law and Legal Definition", https://definitions.uslegal.com/b/best-interest-of-the-child/; accessed on 23/10/2020.WHO, "Breastfeeding", https://www.who.int/health-topics/breastfeeding#tab=tab_1, accessed on 23/10/2020.

Women's Right to Inheritance Before the Succession Law in Rwanda

By Yves Sezirahiga*

ABSTRACT

In this article, the author demonstrates that contrary to the general belief, the law n° 22/99 of 12/11/1999 on inheritance (the first law on inheritance in Rwanda)[1] did not create a new inheritance right for women. It rather explicitly formalized a pre-existing right that since the 1956 decision of King Mutara Rudahigwa in the Rwubusisi case, guarantees children and widows to inherit irrespective of their gender. Women's right to inheritance draws its genesis from the constitutional principle of equality and equal protection of the law and the constitutional recognition of the only custom practices that are not repugnant to written law, morality, and justice. It also originates from a number of international legal instruments such as the International Covenant on Economic, Social and Cultural Rights (ICCPR)[2], Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[3], African Charter on Human and Peoples' Rights (ACHPRs)[4] , etc. These international instruments ratified by Rwanda are other important genuine sources of the women's right to inheritance since, upon ratification, Rwanda had an international obligation to eradicate custom practices that discriminated against women.

Even though the emphasis is put on the existence of women inheritance right long ago before the first law on succession in Rwanda, it is argued that the right to inheritance of the women whose succession opened before the first law on succession in Rwanda should be enforced within the respect of the droits acquis in order to safeguard the social stability.

Keywords: Women's rights, discrimination, inheritance, customary practices, international treaties, constitutional principles of equality and equal protection

1. INTRODUCTION

Before adopting the first law governing succession as part of the family law

*Yves SEZIRAHIGA (PhD), Assistant Lecturer at the University of Rwanda, School of Law. Member of Rwanda Bar Association and East African Law Society [Email: sezyves@yahoo.fr , Tel: +250788493141].

[1] Law n° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, O.G. n° 22 of 13/11/1999.

[2] Rwanda acceded to the International Covenant on Civil and Political Rights (ICCPR) on April 16, 1975 pursuant to the Decree Law No. 08/75, *Journal officiel* of 12 February 1975.

[3] Rwanda ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Presidential decree no 436/12 of 10 November 1980, *Journal officiel* N° 4 of 15/12/1981.

[4] Rwanda ratified the African Charter on Human and Peoples' Rights (ACHPRs) of 27 June 1981, by Presidential Decree n° 10/1983 of 1st July, 1983, *Journal officiel*, N ° 13 of 01/07/1983.

in Rwanda, the family law was fundamentally dualistic. It resulted from both legislative and customary sources. Whereas the civil code adopted in 1988 governed the law of persons, the custom continued to regulate the matrimonial property and succession.[5]

Customary law did not allow women to inherit parents' or husband's property. Inheritance followed the principle of patrilineal succession. Only the male(s) of a family succeeded the entire estate after the death of a parent at the expense of their female sibling(s).

Although a woman had no automatic right to succession like a man, women could inherit land as a gift from their parents or in the absence of male descendants. Equally, custom recognized usufruct rights to surviving widow on her deceased husband's property under the condition of staying in the matrimonial home.[6]

The 1999 Succession law[7] broke from this customary practice. Iformalized inheritance within the Rwandan legal system and granted to descendant female(s) the right to equally inherit the property from their parents just like their male(s) sibling(s). According to Article 50 of this law, "[a]ll legitimate children of the de cujus, in accordance with civil laws, inherit in equal parts without any discrimination between male and female children."

In its article 49 para. 1, the 1999 Succession law defined 'Succession' as "an act by which the rights and obligations on the patrimony of the de cujus are transferred to the heir." Its paragraph 2 provides that "[t]he succession goes through probate at the death of the de cujus, at his/her domicile or residence."

The 1999 Succession law was repealed and replaced by the Law Nº27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions (Hereinafter The 2016 Succession law)[8] , which, in slightly different words, reiterates the 1999 Succession Law definition and commencement of succession in its article 51 and 52 paragraph 1 respectively. Thus, while article 51 of the 2016

[5] Charles Ntampaka, "Family Law in Rwanda", in A. Bainham (ed.), *The International Survey of Family Law* 1995, p. 415

[6] United Nations Development Fund for Women (UNIFEM), "Women's Property Rights and the Land Question in Rwanda", in *Women's Land and Property Rights in Situations of Conflict and Reconstruction*, February 1998, p. 41.

[7] Law n° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, *O.G.* n° 22 of 13/11/1999.

[8] Law Nº27/2016 OF 08/07/2016 governing matrimonial regimes, donations and successions, O.G., n°31 of 01/08/2016.

Succession Law defines succession as "the transfer of rights and obligations on the assets and liabilities of the de cujus," article 52 paragraph 1 states that "succession opens upon the death of a person, at his/her domicile or residence."

In light of the above provisions and the custom, female(s) whose parents, husbands, and/or siblings died before November 15th, 1999,[9] have been constantly denied inheritance by the courts[10] on the grounds of custom practices that excluded women from inheritance.

Nevertheless, in a few other cases[11], courts granted women in a similar situation inheritance rights under the principle of equality before the law, and equal protection of the law, guaranteed by the Rwandan Constitution since 1962[12] and by different international conventions ratified by Rwanda.[13]

This article first contextualizes the custom practices related to inheritance in Rwanda and the origin of the 1999 Succession law. It then analyses how different courts across the country have addressed women's inheritance in cases initiated before its entry into force. Finally, it demonstrates that several legal instruments recognizing to women the right to inheritance existed long before the adoption of a specific law on succession. It should be stressed here that women's right to inheritance introduced by the 1999 Succession law was reiterated in the 2016 Succession law.

2. WOMEN AND INHERITANCE CUSTOM PRACTICES IN RWANDA

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[9] The date of its publication. i.e. entering into force.

[10] Nº RCA 0128/014/TGI/HYE, Mukambuguje v. Havugiyaremye and Semahe, judgement of 30/01/2015, RC 0299/07/TGI/NYGE, Kasine v. Twagirimana, judgement of 15/07/2011, RCAA 0069/12/CS, Murengeramanzi v. Mukarurangwa *et al*., judgement of 04/04/2014, RCA 0322/011/TGI/MHG, Dushimimana v. Usabumubyeyi *et. al*., judgement of 30/09/2011.

[11] Nº R.C.A 0196/15/TGI/NYBE, Nyirahabineza *et al.* v. Habimana, judgement of 18/02/2016, Nº RCA0005/15/TGI/HYE, Uwambajimana v. Ngoga et. al., judgement of 11/6/2015, Nº RCAA 0006/15/CS, Nsanzabera v. Bariganza, judgement of 10/02/2017.

[12] Article 16 of Constitution of 1978: "All citizens are equal before the law, without discrimination of any kind, especially in respect to race, color, origin, ethnicity, clan, sex, opinion, religion or social position". Article 16 of the Constitution of 1991 " All citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status"., Article 16 of the constitution of 2003: "All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law". Article 15 of the Constitution of 2003 revised in 2015: "All persons are equal before the law. They are entitled to equal protection of the law".

[13] Rwanda acceded to the International Covenant on Civil and Political Rights (ICCPR) on April 16, 1975, ratified the African Charter of Human and people's Rights on 17 May 1983 and ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Presidential decree no 436/12 of 10 November 1980, Official Gazette no 4 of 15/12/1981.

The traditional Rwandan family was exclusively patrilineal. The lineage was exclusively traced through the male. The lineage consisted of all persons, male and female, who descended in a direct line from a common male ancestor. A man's sisters were also members of his lineage, but their children were not; they were considered part of their father's lineage. Likewise, a man's son's children were part of his lineage, but his daughter's children were not. In other words, the lineage did not include wives of the male or descendants of female ones.[14]

Based on the patriarchal tradition, men occupied the positions of authority and were considered superior to women and viewed as the head of the family with the full power of decision and control over all assets and property of the family or household. As the marriage did not affect the family membership of the spouses, only the lineage defined one's right to use and inherit the lineage or family assets.

Therefore, as the inheritance was primarily driven by lineage membership and connected with the death of one of its members, at the death of a male head of the household, property over his assets was passed to male heirs or the man's brothers. Women were not permitted to inherit.

It should be mentioned here that even though women had no automatic right to inheritance like men, daughters could inherit the land as a gift. Moreover, where there was no son, a surviving widow had usufruct rights on her deceased husband's property.[15]

For instance, a woman could receive a gift of land from her father upon her marriage or presentation of a newborn baby to her father's family or after a funeral if she was responsible for burying the deceased.[16] Similarly, a 'repudiated daughter' (indushyi) could also ask or receive from her brothers or father, a portion of the land from the lineage's land. This was also the case for a woman who never married and did not bear children. However, contrary to the gifts that remained the outright property of the woman, a 'repudiated daughter' and a woman who never married could have access to the lineage land for as long as

[14] As of today, even though the law does not include wives in the lineage of their husbands; wives were guaranteed inheritance rights over their husbands' property and the descendants of female and of male were also guaranteed equal inheritance rights. See for instance, articles 54, 75, 76 and 78 of the law N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, O.G., n°31 of 01/08/2016.

[15] Republic of Rwanda, Ministry of Lands, Environment, Forests, Water and Mines, National Land Policy 20 (2004), p. 20.

[16] Katrijn Vanhees, "Property Rights for Women in Rwanda: Access to Land for Women Living in *de facto* Unions", Master in *de Rechten, Faculteit Rechtsgeleerdheid Universiteit Gent*, 2013-2014, p. 33.

she was deemed in need, if necessary, for life.[17]

In addition to land gifts, women could also have access to land through inheritance either by the father's will or in the absence of male heirs.

A woman possessed a usufruct right over her deceased husband's assets. However, the usufruct rights of the widow over her deceased husband depended on her good conduct and lasted until her sons (if any) were mature enough to manage the family property or as long as she remained faithful to her husband's lineage through sexual abstinence or levirate marriage, i.e., marrying the brother of her deceased husband. Depending on the situation, the ownership right over the deceased husband's assets was exercised either by her son(s) or by her brother-in-law, to whom she remarried.[18]

As the code on family law adopted in 1988[19] did not address the issues of matrimonial property and succession (it only regulated the law of persons and the family), people continued to follow the custom in all matters not regulated by written law. This practice arose from article 3 of the 1988 family code, which provided as follows:

> The law shall govern all matters dealt with by the letter or spirit of any of its provisions. Where legislation is silent, the judge shall base his judgment on customary law, and in the absence of a custom, the same shall be based on the rules he would set out if he were the legislator. However, he shall be guided by solutions established by legal scholars and case law.[20]

In the light of the above-mentioned article 3 of the Civil Code Book I, the customary law continued to govern inheritance and matrimonial property until the publication of the Law nº 22/99 of 12/11/1999, which supplemented book one of the civil code and instituted part five regarding matrimonial regimes, liberalities and successions (hereinafter the 1999 Succession law).[21]

[17] Burnet, Jennie E. and Rwanda Initiative for Sustainable Development, "Culture, Practice, and Law: Women's Access to Land in Rwanda" (2003). Anthropology Faculty Publications. Paper 1., p. 188.

[18] *Idem*., pp. 187-188.

[19] Law No. 42/1988 instituting the Preliminary Title and First Book of the Civil Code, 27 October 1988, *O.G*., 1989.

[20] Article 3 of the Civil Code, Book I.

[21] Law nº 22/99 of 12/11/1999 to supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, *J.O.* n° 22 of13/11/1999. This law was repealed in 2016 by the Law

3. THE GENESIS OF THE SUCCESSION LAW IN RWANDA AND ITS IMPACT ON THE WOMEN INHERITANCE RIGHT

Change in the inheritance system was deemed necessary to empower women and girls to legally claim their land in the aftermath of the Genocide against the Tutsi, which left many widows and orphans.

The Genocide against the Tutsi of April 1994 resulted in the death of more than 1,000,000 Tutsi and moderate Hutus altered the country's demographic composition so radically that after the Genocide, women and girls represented between 60 and 70 percent of the population and between a third and a half of all women were widows.[22]

Therefore, as under the customary law practices, the property passes through males members of the household, widows and female orphans lacked the legal capacity to claim properties belonging to their parents, siblings and/or husbands who died during the Genocide against the Tutsi. Moreover, those who attempted to recover land belonging to their husbands or their own families faced opposition from their husbands' families or male members of their own families.[23]

To address this conflict and inequality between men and women in the enjoyment of their rights, then the Ministry of Gender, Family and Social Affairs introduced a draft of a law on inheritance and marriage settlements allowing a daughter to inherit property from parents and a widow to manage the marital property and inherit her deceased husband's property.[24] In November 1999, the draft law was passed into the 1999 Succession law, which granted equal rights to male and female children to inherit property from their parents and provided for spouses married under the regime of community of property to have joint rights to property.

Even though the 1999 Succession law paved the way for women's access to land and legally abolished gender discrimination in inheritance practices for all

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Nº27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, *O.G. n°31* of 01/08/2016.

[22] Krishna Kumar, at Al., *Rebuilding Postwar Rwanda: The Role of the International Community*, Center for Development Information and Evaluation, USAID Evaluation Special Study No. 76, p. viii.

[23] Alfred Buregeya *at al*., *Women's Land and Property Rights in Situations of Conflict and Reconstruction*, The United Nations Development Fund for Women (UNIFEM), 2001, p. 41.

[24] *Idem*, p. 42.

legitimate children,[25] some judges did not follow the move. The 1999 Succession law did not serve its' raison d'être', i.e., solving the inheritance related problems of many widows and female orphans of the Genocide against the Tutsi, because some judges denied inheritance to women who lost their siblings, father and/or husband before November 1999 pretending the non-retroactivity nature of the 1999 Succession Law[26] as if before 1999 women could not legally inherit. It is argued here that, contrary to what some judges believed, the 1999 Succession law did not, in fact, create the right of women to inherit. It instead reiterated and strengthened the women's inheritance right that legally existed since the adoption of the first Constitution in Rwanda in 1962 and through the ratification by Rwanda of the core international treaties that prohibit all forms of discrimination, especially discrimination based on sex.

4. THE LEGAL UNCERTAINTY OF THE CUSTOMARY INHERITANCE SYSTEM IN THE RWANDAN JURISPRUDENCE

The decisions of different courts on the women's right to inheritance demonstrate the difficulties that arose from the application of the 1999 Succession law. Some judges categorically denied inheritance to women based on custom and non-retroactivity nature of the 1999 succession law,

while others recognized such right either on the basis of the equality principle enshrined in the Rwanda Constitution or on the basis of international treaties ratified by Rwanda or on both.

Consequently, those divergent court decisions created a legal uncertainty of the customary system of inheritance.[27]

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[25] See article 50 of the Law N°22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding matrimonial regimes, liberalities and successions

[26] *Idem*., article 49, paragraph 2, and article 95.

[27] This was for instance the case in Mukambuguje v. Havugiyaremye and Semahe Callixte; Kasine v. Twagirimana, Murengeramanzi v. Mukarurangwa *et al* and of Dushimimana v. Usabumubyeyi, just to name the few.

4.1. THE CUSTOM AND NON-RETROACTIVITY EFFECT OF THE 1999 SUCCESSION LAW

In all cases where the court denied women from inheriting the properties of their siblings, parents and/or husbands deceased before the publication of the 1999 Succession law, judges based their decisions on the exclusion of women from inheritance by custom practices and on the non-retroactive nature of the 1999 Succession Law.

For instance, in Mukambuguje v. Havugiyaremye and Semahe, the Intermediate Court of Huye confirmed the Primary Court's decision and rejected the appeal of Mukambuguje against her two brothers. The Court confirmed what the lower court had decided. It held that:

> [a]rticle 95 of the law N°22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding matrimonial regimes, liberalities, and successions provides that it comes into force from 12/11/1999; which means that it cannot be applied to matters that happened before its publication. Before its publication, the custom was applied and didn't authorize females children to inherit as the previous judge (Primary Instance Court) explained. Therefore, it is obvious that the land was inherited by the male children of Gakoko Jean, i.e., Havugiyaremye and Semahe, thus Mukambuguje should not inherit other than what the custom allowed her at that time.[28]

Equally, in the Kasine v. Twagirimana case, the Intermediate Court of Nyarugenge denied the right to inheritance to Kasine and Kantarama on the ground that their father died before the 1999 Succession law came into force when the inheritance was governed by the custom. The court held that:

> [a]s Kasine requests a share in the assets left by her father Hitimana, and Kantarama requests a share on the house situated

[28] Nº RCA 0128/014/TGI/HYE, *Mukambuguje* v. *Havugiyaremye* and *Semahe*, judgement of 30/01/2015, para. 9, p.2. A rough translation of the original text that reads: "*Ingingo ya 95 y'itegeko n° 22/99 ryo kuwa 12/11/1999 ryuzuza igitabo cyambere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashakanye , impano n'izungura iteganya ko iri tegeko ritangira gukurikizwa kuva tariki ya12/11/1999; bivuga ko ridashobora gukurikizwa ku byabaye mbere y'uko ritangajwe. Mbere y'uko rijyaho hakurikizwaga umuco kandi umuco ntiwemereraga abana b'abakobwa kuzungura nk'uko umucamanza wambere (w'Urukiko rw'Ibanze) yabisobanuye. Aha rero birumvikana ko isambu yazunguwe n'abana ba Gakoko Jean b'abahungu aribo Havugiyaremye Deswaldi na Semahe Callixte , bityo Mukambuguje Valentine akaba atagomba kuyizungura, uretse ibyo umuco wamwemereraga icyogihe*".

> in Kiyovu as well, the court finds that they have no right to inherit their father who died before the law N°22/99 of 12/11/1999 mentioned above that allows females to inherit their parents is published.[29]

In the same line as the previous cases which denied the right to inheritance on the basis of custom and non-retroactive nature of the law N° 22/99 of 12/11/1999, in Dushimimana v. Usabumubyeyi et al. case, the intermediate Court of Muhanga firmly and expressly declared unlawful the court decision allowing inheritance to a female whose parents died before 12/11/1999. It overturned the decision of the Primary Instance court of Gacurabwenge, arguing that a decision allowing inheritance rights to females is contrary to the law. The court held that:

> [t]he court believes that Dushimimana is the principal heir who should have inherited the estate left by their parents died in 1994 as well as children of his male siblings who were alive after their parents' death, therefore the Primary court argument that inheritance didn't take place while Dushimimana the rightful successor confirms that he already inherited the estate, the decision of the Primary Instance Court recognizing the female right to inheritance violates the law.[30]

The Intermediate Court of Muhanga added that:

> [i]t finds that female children have been recognized the right to inheritance by the law N° 22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding matrimonial regimes, liberalities and successions, article 95 of this law provides that it comes into force on the day of its publication in the official gazette, this law didn't provide that it

[29] Nº RC 0299/07/TGI/NYGE, *Kasine* v. *Twagirimana et. al*, judgement of 15/07/2011, para. 6, p. 3. A rough translation of the original text that reads: "*Kuba Kasine Espérance asaba umugabane mu mutungo wasizwe na se Hitimana, Kantarama nawe ashaka ko bagabana amazu yo mu Kiyovu, urukiko rurasanga nta burenganzira bari bafite bwo kuzungura se wapfuye mbere y'uko itegeko n°22/99 ryo kuwa 12/11/1999 ryavuzwe haruguru riha uburenganzira umwana w'umukobwa kuzungura ababyeyi be risohoka*".

[30] Nº RCA 0322/011/TGI/MHG, Dushimimana v. Usabumubyeyi et. al., judgement of 30/09/2011, para. 7, p. 3. A rough translation of the original text that reads: "[7] *Urukiko rurasanga Dushimimana Phillippe ariwe muzungura w'ibanze wagombaga kuzungura umutungo wasizwe n'ababyeyi babo bapfuye mu 1994 ndetse n'abana bakomoka ku bavandimwe b'ababuhungu bariho nyuma y'uko ababyeyi babo bapfa, rusanga rero kuba urukiko ku rwego rw' ibanze ruvuga ko nta zungura ryabayeho kandi Dusabimana Phillipe wagombaga kuzungura yemeza ko yazunguye icyemezo cyafashwe n'urukiko rwemeza ko n'abakobwa bagomba kuzungura kinyuranyije n'amategeko*".

> will address inheritance issues that existed before its publication. Thus the court finds that female siblings of Dushimimana do not have any right to inheritance on the estates left by their parents in 1994 because the heir recognized by the law at that time is Dusabimana Phillippe.[31]

Even though with time, the position of the Supreme Court of Rwanda on this issue has evolved as discussed below, in the Murengeramanzi v. Mukarurangwa case while determining the law that should govern the inheritance of Semanzi François, who died in 1994 during the Genocide against the Tutsi, the Supreme Court of Rwanda rightly confirmed the non-retroactivity nature of the law N° 22/99 of 12/11/1999 and denied inheritance to a widow. In this regard, the Supreme Court held that:

> [a]s for the law that applies in the inheritance of the de cujus Semanzi François, the court finds that the law N°22/99 of 12/11/1999 comes into force after the death of Semanzi François as he died in the Genocide against the Tutsi in 1994, and legal scholars including Henri de Page and René Dekkers in the book entitled «Droit Civil Belge, T.9, Les successions, 2e éd., Bruxelles, 1974, p.41, said that inheritance goes through probate at the death of the de cujus (la succession s'ouvre par le décès), this is different from what Murengeramanzi Claver says that inheritance starts with the partition of the de cujus's estate, i.e., when there are in the hands of right-owners, therefore the custom should apply because it is the one existing that time. Per customary law, the wife didn't inherit her husband. Still, custom recognized usufruct rights to surviving widow and the administration of the de cujus properties till the majority of the children. [32]

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[31] *Idem*., para. 8, p. 3. A rough translation of the original text that reads: "[8] *Rusanga abana babakobwa bemerewe kuzungura n'itegeko n° 22/99 ryo ku wa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingongo ya 95 y'iri tegeko iteganya ko ritangira gukurikizwa kuva risotse mu igazeti ya Leta, iri tegeko ntiryateganyije ko rizacyemura ibibazo byabaye mbeye y'uko risohoka ku bijyanye n'izungura, bityo rusanga nta burenganzira ababa babakobwa bavukana na Dusashimimana Phillippe bafite bwo kuzungura umutungo wasizwe n'ababyeyi babo mu 1994 kuko umuzungura wari wemewe n'amategeko icyo gihe ari Dusabimana Phillippe*.

[32] Nº RCAA 0069/12/CS, *Murengeramanzi* v. *Mukarurangwa et. al*., judgement of 04/04/2014, paras. 35 and 36, p. 12. A rough translation of the original text that reads: " *35. Ku byerekeranye n'Itegeko ryakurikizwa mu kuzungura nyakwigendera Semanzi François, Urukiko rurasanga Itegeko nº22/99 ryo kuwa 12/11/1999 ryaragiyeho nyuma y'urupfu rwa Semanzi François kuko yapfuye muri jenoside yakorewe abatutsi mu mwaka wa 1994, kandi abahanga mu mategeko barimo Henri de Page na René Dekkers mu gitabo cyitwa «Droit Civil Belge, T.9, Les successions, 2e éd., Bruxelles, 1974, p.41, bavuga ko izungura rifungurwa iyo uzungurwa apfuye (la succession s'ouvre par le décès), ibi bikaba bitandukanye n'ibivugwa na Murengeramanzi Claver ko izungura riba iyo ibintu nyakwigendera yasize bizunguwe, ni ukuvuga bigeze mu maboko y'abo bigenewe, bityo hakaba*

As it appears from the above examples, all judges who denied inheritance right to women erroneously considered the date of the publication of the 1999 Succession law as the date of the birth of the women's right to inheritance in Rwanda and overlooked the principle of equality enshrined in the Rwandan Constitution since 1962 and reiterated in all subsequent Constitutions of the Republic of Rwanda.

Surprisingly, it is unfortunate that none of the cases which denied the women's right to inheritance took time to discuss the application or not of the constitutional equality between man and woman enshrined in the Rwandan Constitution since 1962[33] or in international conventions ratified by Rwanda discussed below.

In fact, even though in most of such cases, the plaintiffs did not request their inheritance right based on the Constitution or international treaties ratified by Rwanda, this should not have been a reason for a judge to overlook their inheritance right under other sources of law which had and still have a high binding power than custom.

Regarding inheritance rights, the constitutional principle of equality of all before the law should have been interpreted as guaranteeing equal inheritance rights over the de cujus properties.

4.2. PROACTIVE MOVE TOWARD THE RECOGNITION OF WOMEN'S RIGHT TO INHERITANCE

Certain courts' proactive and progressive approach in dealing with the inheritance of women whose siblings, parents, and/or husbands deceased before the promulgation and publication of the 1999 Succession law should be commendable. With time, the courts' position as to the Rwandan women

hagomba gushingirwa ku mategeko y'umuco kuko ariyo yakoreshwaga icyo gihe.
36. Mu mategeko y'umuco, umugore ntiyazunguraga umugabo ariko yahabwaga ibimutunga iyo umugabo yabaga amaze gupfa, umutungo usigaye akawucungira abana kugeza bakuze".

[33] Article 16 of the 1962: "All citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status". Article 16 of Constitution of 1978: "All citizens are equal before the law, without discrimination of any kind, especially in respect to race, color, origin, ethnicity, clan, sex, opinion, religion or social position". Article 16 of the constitution of 1991 " All citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status"., Article 16 of the constitution of 2003: "All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law". Article 15 of the constitution of 2003 as modified in 2015: "All persons are equal before the law. They are entitled to equal protection of the law".

right to inheritance evolved positively when certain judges started to question the place of the inheritance custom practices (often referred to as a ground to exclude women from inheritance) vis – à- vis the anti-discrimination provisions of the Constitution and international treaties ratified by Rwanda.

In this regard, courts, including the Supreme Court of Rwanda, re-established the Rwandan women right to inheritance based on previous court decisions which granted such right based on the non-discrimination principle provided in the Rwandan Constitution and international legal instruments ratified by Rwanda such as the Universal Declaration of Human Rights (hereinafter UDHR), the International Covenant on Civil and Political Rights(hereinafter ICCPR), and the International Covenant on Economic, Social, and Cultural Rights(hereinafter ICESCR), the African Charter on Human and Peoples' Rights (hereinafter African Charter") and the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW).[34]

For instance, in Uwambajimana v. Ngoga et al. case, the Intermediate Court of Huye ruled that the custom was not the first basis that the court could have based on in the absence of a law. The court ruled so based on the principle of the hierarchy of norms provided in article 6 of Law n°18/2004 of 20/06/2004 related to the civil, commercial, labour, and administrative procedure in force at the time of the trial of the case Nº RC 0479/07/TB/BSSMANA at the first level, which stipulated that:

> [j]udges shall decide cases by basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they have to do so, guided by judicial precedents, customs, and usages, general principles of law and written legal opinions.[35]

Following the principle of the hierarchy of norms, the intermediate Court of Huye authorized Uwambajimana to inherit her father's estates based on court decisions (precedents) that recognized inheritance rights to women issued before the promulgation and publication of the 1999 Succession law. It referred

[34] Rwanda acceded to the ICCPR on April 16, 1975, ratified the African Charter of Human and people's Rights on 17 May 1983 and ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Presidential Decree N° 436/12 of 10 November 1980, Official Gazette no 4 of 15/12/1981.

[35] Nº RCA 0005/15/TGI/HYE, *Uwambajimana v. Ngoga et. al.*, judgement of 11/6/2015, para. 20, p. 5.

to the case Nº RCA 8689/132 rendered by the Appeal Court of Nyabisindu on 29/10/1996 and RA 0967/13.03/84 rendered by the 'Cour de Cassation' of Rwanda on April 10th, 1985 in Mukamusoni v. Buyitare case. Specifically, in the latter case, the court had held that:

> ..., nothing in the law upon which the Court can base to decide that a daughter could not inherit her father's estate, as the Constitution in force in its article 16 prohibits discrimination based on sex.[36]

It is unfortunate, however, that the judge, in this case, chose to base his decision on the precedent rather than on the anti-discrimination provisions of the Constitution of Rwanda and international legal instruments ratified by Rwanda. It seems that without such precedents, the judge in the above-mentioned case would not have allowed Uwambajimana to inherit the de cujus. In reality, the judge expressly excluded the possibility of basing on the Constitution and international treaties alone when recognizing women the right to inheritance in the absence of precedents. The judge argued that:

> [e]ven though such principle existed and was provided in the laws (Rwandan Constitution and International treaties ratified by Rwanda) as explained, alone it does not give women the right to inheritance in case inheritance started when there was no law governing it. Instead, the way courts have interpreted the equality principle led to the evolution of custom practices regarding women's inheritance.[37]

The recognition of women's inheritance right in this case should be appreciated for its progressive effect in re-establishing women's inheritance rights. Still, the judge erred in his reasoning. By arguing that the anti-discrimination provisions of the Constitution and international treaties alone could not give women a right to inheritance, the judge overlooked the legally binding force of the Constitution

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[36] *Idem*, para. 22, p. 6. A rough translation of the original text that reads "..., *nta mpamvu yemewe n'amategeko rwashingiyeho rwemeza ko umukobwa adashobora kuzungura ibya se na cyane igihe Itegeko Nshinga ririho,mu ngingo yaryo ya 16 ridashigikiye ubusumbane bw'abantu bushingiye ku gitsina*"

[37] *Idem*., para. 21, p. 6. A rough translation of the original text that reads " *nubwo iryo hame ryari ririho kandi riteganywa muri ayo amategeko nkuko byasobanuwe,sibyo ubwabyo biha umukobwa uburenganzira bwo kuzungura mu gihe izungura ryatangiye nta tegeko ribigenga ririho ahubwo uburyo iryo hame ryagiye risobanurwa n'inkiko mu manza zinyuranye nibyo byatumye habaho ukwivugurura k'umuco mu birebana n'izungura ku gitsina gore*."

and ratified international treaties provisions vis- à – vis the cases laws. In other words, the judge ignored that provisions of the Constitution and international treaties prevail over the case laws in terms of hierarchy. Surprisingly, the decisions that the judge referred to in this particular case, were based on the same customary practices that discriminated against women.

In the logic of respecting the principle of the hierarchy of norms, which is the cornerstone of his motivation, the judge in the Uwambajimana case should have based his decision on the anti-discrimination laws first and then supported his position with the precedents. This is the approach taken by the High Court of Kigali and the Supreme Court, which in several cases expressly referred to the Constitution of Rwanda and ratified international treaties as the primary legal sources for the right to inheritance to Rwandan women whose siblings, parents and/or husbands died before 1999.

In this regard, in Mukayiranga v Kayingerwa and Mukamusoni v Mukagasana et al., the High Court of Kigali established that Mukamusoni in particular, and women in general, regardless of her marital status or her relationship with her biological family, has the right to inherit the property of her sister who died during the Genocide on the basis of equality principle and prohibition of discrimination based on sex.[38]

Similarly, contrary to its previous decision in the Murengeramanzi v Mukarurangwa case discussed above, the Supreme Court of Rwanda reviewed its earlier position on the right of women to inherit from parents, husbands and/or siblings who died before the entry into force of the first law on succession in Rwanda. In the Nsanzabera v Bariganza case, the court firmly and expressly held that:

> ..., even before there was nothing that prohibited a female child from inheriting her parents because, in 1962, the Constitution of the Republic of Rwanda provided that all human beings are equal before the law regardless of their ethnicity, color, race, gender, language (...), the same was once again provided in the Constitution of the Republic of Rwanda of 20/12/1978 as well as that of 10/06/1991. Therefore, saying that Uwamahoro Béatrice

[38] Nº RCA 0087/12/HC/KIG, *Mukamusoni v. Mukagasana et al* cited by Sam Rugege, Women and Poverty in Rwanda: The Respective Roles of Courts and Policy, Working Paper No. 1, January 2015, p. 31.

> did not have the right to inherit her parent because she is a female is unsubstantiated.[39]

It is worthy to note that a more proactive and progressive approach toward eliminating the custom practices that exclude women from inheritance comes from King Mutara Rudahigwa, who formally recognized the discriminatory nature of the custom practices related to women's inheritance.

As explained by Sam Rugege, the former Chief Justice of the Supreme Court of Rwanda, in 1956, King Mutara Rudahigwa decided to divide equally the estates of the Chief Rwubusisi among his children and widows, irrespective of their gender.[40] In a written testimony in the succession case of the descendants of Rwubusisi addressed by the Intermediate Court of Nyarugenge, the King stated (or 'yaciye iteka') that:

> [b]ased on the common human values that should guide us in the improvement and adjustment of the national culture and custom towards justice and equity: We have decided to put the sons and daughters of Rwubusisi on the same level in sharing the inheritance.[41]

As discussed in the next section, the above contradictory courts' decisions would not have been possible had the first judges who decided on this issue followed the provisions of the Constitution and international treaties ratified by Rwanda prohibiting discrimination based on sex.

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[39] A rough translation of the original text that reads: ..., *na mbere y'aho nta cyabuzaga ko umwana w'umukobwa azungura ababyeyi be kuko kuva mu mwaka wa 1962, Itegeko Nshinga rya Repubulika y'u Rwanda ryemeraga ko abantu bose bangana imbere y'amategeko hatitawe ku bwoko, ku ibara ry'umubiri, ku nkomoko, ku gitsina, ku idini (...), ibyo bibaka ari nako byemejwe mu Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 20/12/1978 ndetse no mu Itegeko Nshinga ryo ku wa 10/06/1991, bityo kuvuga ko UWAMAHORO Béatrice nta burenganzira yari afite bwo kuzungura umubyeyi we ngo kuko ari umubobwa, bikaba nta shingiro bifite.*

[40] Sam RUGEGE, *op. cit*., p. 32.

[41] *Idem*., p. 33. A rough translation of Sam Rugege of the original text in Kinyarwanda from a document entitled "*Ubuhamya bg'izungura ry'umutware Rwubusisi*" done at Kigali on 02/02/1956 submitted to the court as an evidence in the succession of the descendants of Rwubusisi in Nº RC 0215/12/TGI/NYGE. The original text reads: "*Dushingiye k'uburyo busanzwe bwa kintu bugomba kutuyobora mwigorora n'itunganya ry'umuco w'igihugu twerekera mu nzira y'ubutabera no gushyira mu gaciro: Twemeje gushyira ku rugero rumwe abahungu n'abakobwa ba Rwubusisi muby'iminani*"

5. INHERITANCE CUSTOM PRACTICES AND THE CONSTITUTIONAL RIGHT TO EQUALITY AND EQUAL PROTECTION BY THE LAW

The first Constitution of the Republic of Rwanda adopted in 1962, and subsequent Constitutions, namely that of 1978, 1991, and the 2003 Constitution as amended in 2015, with slightly different terms, established the principles of equality and equal protection under the law. They also provided that:

> customary law remains in force only to the extent that it has not been superseded by legislation and that it contains nothing that is contrary to the Constitution, to legislation, to regulations, to public order or to public decency.[42]

A plain reading of the above constitutional provision shows that the Rwandan legislation firmly limited the application of customary law, where a written legal source existed.

The traditional cultural practices and beliefs which exclude women in succession are incontestably in violation of the constitutional principle of equality and equal protection of the law and thus should not have been served as the legal basis for denying inheritance to women. Wherever the legislator intended that a man and woman be treated differently, they stated so in unambiguous terms. This was, for example, the case in the law on the commerce of 1913[43] that stipulated that women were not allowed to be commercially active without the explicit permission of their husbands, or the civil code of 1988 that fixed the wife's domicile as that of her husband[44].

The court decisions that denied women the right to inheritance on the basis of custom practices violated the Constitution of Rwanda and the Rwandan obligations arising from the ratification of international treaties. It is beyond dispute that international obligations require the equal treatment of men and women in the ownership and disposition of property, including property acquired during the marriage and passed on under the intestate inheritance laws.

Since the ratification by Rwanda of the ICCPR in 1975 and of the CEDAW in

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[42] See article 93 of the 1962 and 1978 Constitutions, article 98 of the 1991 Constitution, article 201 of the 2003 constitution and article 176 of the 2015 constitution.

[43] See Décret du 02/08/1913 sur des commerçants et de la preuve des engagements commerciaux, in *B. O.*, 1913.

[44] Law No. 42/1988 instituting the Preliminary Title and First Book of the Civil Code, 27 October 1988, O.G., 1989, article 83.

1981, Rwanda had an international legal obligation not only to guarantee women's equality under and through the law but to undertake to change cultural practices and beliefs that undermine the realization of equality in women's lives. As a matter of fact, article 2 of CEDAW obliges all States parties to modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women.

Elaborating and interpreting the States obligation under the article 16 (1) (h) of CEDAW, the CEDAW Committee in its General recommendation 21 declared that:

> there are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.[45]

In April 2015, in the case E.S. and S.C. v. the United Republic of Tanzania concerning the issue of two widows in Tanzania (E.S. and S.C.) who, under Tanzania's customary inheritance law, were denied the right of inheriting or administering the estates of their late husbands, CEDAW Committee also found that legal framework to be gender discriminatory.[46] According to the CEDAW Committee

> although the State party's Constitution includes provisions guaranteeing equality and non-discrimination, the State party

[45] Committee on the Elimination of Discrimination against Women, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), U.N. Doc. A/49/38 at 1 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 250 (2003), para. 35.

[46] CEDAW, E.S. and S.C v. United Republic of Tanzania, Communication No. 48/2013, CEDAW/C/60/D/48/2013, 13 April 2015. See also Helen Dancer, An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania. Social and Legal Studies (2017), 26 (3), p. 295.

> has failed to revise or adopt legislation to eliminate the remaining discriminatory aspects of its codified customary law provisions with regard to widows.[47]

It also pointed out that Tanzania, by condoning legal restraints on inheritance and property rights, has denied the two women equality in respect of inheritance and thus violated several provisions under CEDAW, especially those pertaining to equality before the law.[48]

In the same way, the African Charter requires States to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of women as stipulated in international declarations and conventions."[49]

These international instruments and their interpretations reflect the extent of the Rwandan obligation to guarantee women's equal rights under the law and to eliminate cultural practices and beliefs as well as material conditions that undermine that equality.

As the discrimination nature of the custom practices related to women's inheritance is an issue in most African countries[50], different domestic courts have on several occasions declared such custom practices unconstitutional and contrary to the State's international obligation to prohibit discrimination against women.[51]

In South Africa, for instance, the Constitutional Court found the customary law of male primogeniture (by which only male relatives of the deceased could inherit property) in breach of the Constitution.[52] In the Bhe and Others v Magistrate Khayelitsha and Others case, the majority judgment held that the customary law of primogeniture discriminates unfairly against children born out of wedlock and women. It further ruled that excluding women from inheritance on the grounds

[47] CEDAW, E.S. and S.C v. United Republic of Tanzania, *op. cit.*, para. 7.6.

[48] *Idem.*, para.7.9.

[49] Article 18 para. 3, African Charter.

[50] See for instance Mashalaba Siyabulela Welcome, Discrimination against Women under Customary Law in South Africa with Reference to Inheritance and Succession, Mini-Dissertation Masters' degree, Fort Hare/ University of Fort Hare, 2012, Abby Morrow Richardson, 'Women 's Inheritance Rights in Africa: The Need to Intergrate Cultural Understanding and Legal Reform', (2004) *11 (2) Human Rights Brief*, 19-22 and Ndulo, Muna, "African Customary Law, Customs, and Women's Rights" (2011). Cornell Law Faculty Publications. Paper 187.

[51] *Idem.*

[52] Bhe v Khayelitsha Magistrate (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) South African Constitutional Court.

of gender was a clear violation of section 9(3) of the South African Constitution, which prohibits discrimination on various grounds.[53] Former Chief Justice Pius Langa further stated that this exclusion is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group exacerbated by old notions of patriarchy and male domination was incompatible with the guarantee of equality under the constitutional order.[54]

In light of the above, it should, however, be noted that discriminatory practices remained until the adoption of the 1999 Inheritance law. Unfortunately, the 'droits acquis' created through successions opened before the first succession law in 1999 had to be preserved to maintain social stability. In this regard, what was determinant was whether partition of the estate had taken place and not when the succession opened. This was also the spirit behind Article 101 of the 2016 Succession law, which stipulates that 'a succession having been opened from October 1st, 1990 and whose partition has not yet taken place, is carried out in accordance this law'.

6. CONCLUSION

This article demonstrates that the 1999 Succession law did not create a new inheritance right for women. Instead, this law formalized inheritance rights that legally existed since the adoption of the first Constitution in Rwanda in 1962 and the ratification by Rwanda of different international instruments forbidding discrimination based on sex.

Although discriminatory inheritance practices against women remained until the adoption of the 1999 inheritance law, these practices had no legal or customary foundation. Their survival was more the result of the government's failure to enforce existing laws guaranteeing women's rights to inheritance. Customary practices discriminating against women in inheritance had been reversed since the 1956's King Mutara's ruling in Chief Rwubusisi's case. Furthermore, the Principles of equality and equal protection of the law enshrined the Rwandan Constitution, and several international human rights treaties ratified by Rwanda outlawed discrimination in inheritance matters.

[53] Bhe and Others v Magistrate Khayelitsha and Others 2004 (1) SA 580 (CC), para 91.

[54] *Idem.*

7. REFERENCES

LEGISLATION

- Domestic instruments

1. Constitution of June 10th 2003as revised in 2015, Official Gazette n° Special of December 24th, 2015.
2. Constitution of June 10th, 2003, Official Gazette nº Special of June 04th, 2003.
3. Constitution de la République Rwandaise du 30 Mai 1991, Journal official No. Spécial du 10 Juin 1991.
4. Constitution de la République Rwandaise du 20 Decembre 1978, Journal official n° 24 bis du 20 Décembre 1978.
5. Constitution de la République Rwandaise du 24 Novembre 1962, Journal Officiel de la République Rwandaise, 1e année, n° 22 bis, 1er décembre 1962.
6. Law Nº 27/2016 of 08/07/2016 governing matrimonial regimes, donations, and successions, Official Gazette n° August 31st, 2016.
7. Law n° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities, and successions, Official Gazette n° November 22nd November 13th, 1999.
8. Civil Code Law No. 42/1988 instituting the Preliminary Title and First Book of the Civil Code, October 27th, 1988, Official Gazette, 1989.
9. Décret du 02/08/1913 sur des commerçants et de la preuve des engagements commerciaux, in Bulletin Officiel, 1913.

- Regional and International Instruments

1. African Charter on Human and Peoples' Rights (ACHPRs) of June 27th, 1981, ratified by Presidential Decree n° 10/1983 of 1st July 1983, Official Gazette n° 13 of 01/07/1983.
2. International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification, and accession by General

Assembly resolution 2200A (XXI) of December 16th, 1966.

3. Committee on the Elimination of Discrimination against Women, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), U.N. Doc. A/49/38 at 1 (1994),
4. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 250 (2003).
5. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified by Presidential Decree no 436/November 12th November 10th, 1980, Official Gazette nº 4 of 15/12/1981.

CASE LAW

1. Nº R.C.A 0196/15/TGI/NYBE, Nyirahabineza et al. v Habimana, the judgment of 18/02/2016.
2. Nº RC 0299/07/TGI/NYGE, Kasine v. Twagirimana et al., the judgment of 15/07/2011.
3. Nº RCA 0128/014/TGI/HYE, Mukambuguje v. Havugiyaremye and Semahe, the judgment of 30/01/2015.
4. Nº RCA 0322/011/TGI/MHG, Dushimimana v. Usabumubyeyi et al., the judgment of 30/09/2011.
5. Nº RCA0005/15/TGI/HYE, Uwambajimana v. Ngoga et al., the judgment of 11/6/2015.
6. Nº RCAA 0006/15/CS, Nsanzabera v. Bariganza, the judgment of 10/02/2017.
7. Nº RCAA 0069/12/CS, Murengeramanzi v. Mukarurangwa et. al., judgement of 04/04/2014.
8. Bhe and Others v Magistrate Khayelitsha and Others 2004 (1) SA 580 (CC).
9. CEDAW, E.S., and S.C. v. the United Republic of Tanzania, Communication No. 48/2013, CEDAW/C/60/D/48/2013, April 13th, 2015.

BOOKS AND ARTICLES

1. Abby Morrow Richardson, 'Women's Inheritance Rights in Africa: The Need to Intergrate Cultural Understanding and Legal Reform,' (2004) 11 (2) Human Rights Brief, 19-22.
2. Alfred Buregeya et al., Women's Land and Property Rights in Situations of Conflict and Reconstruction, The United Nations Development Fund for Women (UNIFEM), 2001.
3. Jennie E. Burnet. and Rwanda Initiative for Sustainable Development, 'Culture, Practice, and Law: Women's Access to Land in Rwanda,' (2003). Anthropology Faculty Publications. Paper 1.
4. Charles Ntampaka, "Family Law in Rwanda," in A. Bainham (ed.), The International Survey of Family Law 1995.
5. Helen Dancer, "An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania", Social and Legal Studies (2017), 26 (3).
6. Katrijn Vanhees, Property Rights for Women in Rwanda: Access to Land for Women Living in de facto Unions, Master in de Rechten, Faculteit Rechtsgeleerdheid Universiteit Gent, 2013-2014.
7. Krishna Kumar, at Al., "Rebuilding Postwar Rwanda: The Role of the International Community, Center for Development Information and Evaluation," USAID Evaluation Special Study No. 76.
8. Mashalaba Siyabulela Welcome, Discrimination against Women under Customary Law in South Africa with Reference to Inheritance and Succession, Mini-Dissertation Masters' degree, Fort Hare/University of Fort Hare, 2012.
9. Ndulo, Muna, 'African Customary Law, Customs, and Women's Rights,' (2011). Cornell Law Faculty Publications. Paper 187.
10. The Republic of Rwanda, Ministry of Lands, Environment, Forests, Water and Mines, National Land Policy 20 (2004).

11. Sam Rugege, "Women and Poverty in Rwanda: The Respective Roles of Courts and Policy," Working Paper No. 1, January 2015.

The Management of Cohabitation of Separated Spouses under Rwandan Law

Jean Damascene Munderere*

ABSTRACT

This paper examines effects of cohabitation of judicially separated spouses who, by the court's decision that granted them legal separation, are exempted from the duty of cohabitation but retain all other duties arising from marriage. Such cohabitation made during the period of judicial separation can have multiple consequences and greatly affects the woman and the child born from it. Under Rwandan law, the legal nature of cohabitation between judicially separated spouses is not clear. In addition, in case a child is born from such cohabitation, his or her status is not clearly determined, and he or she can be an illegitimate or legitimate child. Moreover, the wife who got pregnant during legal separation finds herself in precarious conditions and it is up to her to prove instant cohabitation she had with her legally separated husband. In order to fix these issues, this paper recommends that the proved cohabitation be considered as reconciliation of judicially separated spouses which entails resumption of life together and termination of divorce proceedings that could result from legal separation. It is also recommended that the resumption of cohabitation be formalized by a reconciliation agreement enforceable erga omnes. Finally, the paper recommends revisions of the Rwandan family law to include legal provisions that can assist to solve issues resulting from cohabitation of spouses undertaken during judicial separation.

Key words: cohabitation, legal separation, separated spouses, reconciliation, reconciliation agreement.

1. INTRODUCTION

Despite the community of life created by marriage, some causes can lead to its dissolution, such as death and divorce, as stipulated in Article 214 of the law no 32/2016 of 28/08/2016 governing persons and family. Alongside these two causes which lead to the total dissolution of the marriage, there is legal separation, which is the condition of two spouses who get a judicial exemption from the obligation of cohabitation[1] while remaining with all other marital obligations.

* Jean Damascene Munderere (PhD) is the Dean of the School of Law at INES-Ruhengeri. He is also a former lecturer at the Institute of Legal Practice and Development (ILPD).

Legal separation is preferred by spouses who might have causes for divorce but who have not yet matured their decision to divorce.
Legal separation suspends only the obligation of cohabitation and allows the marriage to remain with its all other obligations between spouses. Therefore, the separated spouses remain married and continue to be subject to the duty of mutual assistance and fidelity as prescribed by Article 250, paragraph 2 of the same law. However, the causes that triggered the legal separation do not leave the spouses under the same roof; hence legal separation leading to separation of residences and reduction of affection they had during the marriage.

The Rwandan family law provides for grounds of legal separation, its procedure, and its effects. Nevertheless, it seems silent about management of effects that may result from the breach of the judicial obligation of not cohabiting between judicially separated spouses. In fact, the latter should not entertain any intimate relationships apart from discharging their obligation of mutual support and all the duties vis-à-vis children's education and other needs. If for one reason or another the legally separated spouses manage to meet for sexual intercourse, which are naturally implied under the duty of cohabitation for the spouses, this raises an issue then to legally qualify such cohabitation made when the judge has made a decision suspending it. It would be qualified as adultery as spouses are prevented to live together and accomplish their duty of cohabitation, an assumption seeming absurd in consideration of the definition of this supposedly adultery as the involved partners are still legally married. Besides, some analysts consider this informal cohabitation as free union even if it is voluntarily carried out by spouses legally married while, for others, it is just taken as a gesture of reconciliation, voiding the judicial decision in the sense that the conciliation of spouses entails termination of divorce proceedings. Nonetheless, this informal reconciliation differs from the divorce proceedings which results from spouses' declaration before the judge indicating their intention to restore their living together or resume cohabitation for a period of more than three (3) months.[2]

Another issue is raised in cases where the wife becomes pregnant during legal separation. There is a concern about the fate of a child born or conceived from such cohabitation. Indeed, the passion between a man and a woman can lead

[1] Art.250, para. 1 Law nº32/2016 of 28/08/2016 governing persons and family, O.G Nº37 of 12/09/2016

[2] Art. 237, para 1, Law nº32/2016 of 28/08/2016 governing persons and family, O.G Nº37 of 12/09/2016.

them to live together even if they are legally separated and, if a child is conceived, the evidence that the woman will be able to exhibit to force the husband to recognize the child is not easily established especially as the presumption "pater est quem nuptiae demonstrant" cannot legally operate in such circumstances, given that they are supposed to be officially separated. This article studies these issues and clarifies the legal nature of that kind of cohabitation and how its effects can be managed.

The present paper generally aims to examine issues arising from cohabitation between spouses during the legal separation. It specifically examines the legal nature of cohabitation, to assess its impacts and issues arising from it; and suggests solutions that can assist in addressing loopholes and weaknesses still identified in Rwandan family legislation related to consequences of such an irregular cohabitation.

In order to attain the research objectives, different techniques and methods were used. The documentary technique has been used in collecting data from different written documents relevant to the topic including law texts, books, journal articles, annual reports, newspapers, etc. The exegetic method was helpful to interpret the various law materials. The analytic method was used to examine different elements of data collected for the purposes of explanation and interpretation. Finally, the synthetic method helped in regrouping the collected data in a coherent manner. The present research does not pretend to be exhaustive; instead, it is limited in space and domain. It is limited to Rwanda and to family law.

In addition to an introduction, this paper has two parts. The first part studies issues arising from cohabitation of judicially separated spouses. The second part focuses on the legal mechanisms proposed to address challenges raised by cohabitation of judicially separated spouses. The paper is ended by a conclusion.

2. ISSUES ARISING FROM COHABITATION OF SEPARATED SPOUSES

Before discussing different issues raised by cohabitation of judicially separated spouses, a general overview on legal separation under Rwandan family law is necessary.

2.1. RWANDAN RULES GOVERNING LEGAL SEPARATION

In Rwandan law, legal separation is regulated by provisions of the Law nº32/2016 of 28/08/2016 governing persons and family which provides for its forms, procedure and its consequences.

2.1.1 Forms and procedure of legal separation

According to Article 248 of the law governing persons and family, in its first paragraph, legal separation has the following forms: legal separation for any cause provided by the law and legal separation by mutual consent. The second paragraph of this article provides that the petition for legal separation may be filed by spouses under the same conditions and on the same grounds as divorce. The same article also adds that the petition for legal separation is filed, heard, and decided in accordance with provisions of the law relating to divorce.[3] According to this article, legal separation for causes provided by the law is filed in case there is one or many grounds as those provided for divorce in article 218 of the law governing persons and family.[4] For legal separation by mutual consent, it can be applied in the same conditions as those of a divorce by mutual consent, which is provided in article 229 of the same law.[5] It is important to note that while divorce for legal grounds can be applied anytime if one of the spouses can invoke one of the grounds provided by the law, divorce by mutual consent can be applied for after, at least, two years of marriage.[6] This means that legal separation for grounds provided by the law can be applied for anytime, while application for legal separation by mutual consent can only be admissible if the applying spouses have been married for at least two years.

With regard to the procedure, legal separation is applied for in the same procedure as that of the application for divorce, as article 248 mentioned above stipulates. If

[3] Art. 248, para. 3, Law nº32/2016 of 28/08/2016 governing persons and family.

[4] Grounds for divorce are adultery, desertion for a period of at least twelve (12) consecutive months, conviction for an offense severely tainting the honour, refusal to provide for the household needs, excess, abuse or serious insults by one towards another, gender based violence, de facto separation for a period of at least two (2) years, and non-cohabitation for more than twelve consecutive (12) months from the day of celebration of marriage on unjustifiable grounds.

[5] Divorce by mutual consent is the one jointly applied for by both spouses after they agree on ending their marriage and its effects while submitting to the judge a written agreement settling the effects of divorce on spouses and their property as well as their children.

[6] Art. 232, para. 1, law governing persons and family.

it is legal separation for legal grounds, it is instituted by one of the spouses, tried, and decided by a competent court according to ordinary proceedings. This kind of action expires after (5) years from the date the cause of divorce was discovered.[7] In case of legal separation by mutual consent, it is applied in the same conditions as those of divorce by mutual consent. It is jointly applied for by both spouses (who have been legally married for at least two years) before a competent court. It is crucial to mention that during the procedure for legal separation, the judge has to first attempt reconciling the spouses intending to be legally separated, as required by article 236. During the first hearing held in camera, the judge hears both spouses separately and together, tries to conciliate them, gives them advice he or she considers necessary and makes observations to them with respect to the effects of their action. If conciliation fails, the proceedings for legal separation continue as provided in article 238. Articles 236 and 238 refer to conciliation during divorce proceedings, but as article 248 paragraph 3 states that an action for legal separation is filed, heard and decided in accordance with provisions of this Law relating to divorce, it means that conciliation procedure used in divorce procedure also applies in legal separation procedure. Article 249 of the same law deals with the connection between the application for legal separation and that for divorce. It provides that when the petitions for legal separation and for divorce are concurrently filed, the court first decides on legal separation.

2.1.2. Effects of legal separation

The separation of spouses impacts spouses themselves, children (if any), property, and even on third parties.

For spouses, legal separation relieves them of the duty of cohabitation but does not entail the severance of a marriage bond or the dissolution of matrimonial regime. In fact, the suppression of the duty of cohabitation is the essential effect of the legal separation. However, after ruling on legal separation, the duty of support and fidelity remains.[8] The judgment of legal separation loosens the bonds of marriage but it does not remove them. For this reason, the duty of faithfulness or fidelity of the spouses survives the legal separation and its breach leads to adultery. The duty of mutual assistance also survives the legal separation. In fact, the abolition

[7] Art. 220, Law governing persons and family.

[8] Arti. 250, paras. 1 & 2, Law governing persons and family.

of the duty of cohabitation automatically leads to the duty of assistance. This duty is reciprocal, and it is not necessary to distinguish whether it is the plaintiff or the defendant who is the creditor.[9] The legal separation judgment determines alimony for the spouse in need irrespective of the spouse with whom the fault rests.[10] Additionally, the legal separation results in the separation of residences for the spouses which is also pronounced by the judge on the very day of the legal separation.[11] In fact, the persistence of marriage between separated spouses is shown in the fact that they can come together without having a new union celebrated. Such a union is tantamount to reconciliation.

Regarding children born from parents involved in legal separation, they are protected in accordance with provisions of Articles 243, 244, 245 and 246 of this Law.[12] According to the provisions of these articles, legal separation cannot deprive children of any benefits accorded to them by law or matrimonial regime of their parents. However, because legal separation results in separate residences for the spouses, the court will also have to determine the fate of the children. The family law first states that "Custody of children is awarded to the spouse who obtains divorce (or legal separation)." The other spouse has the rights to visit them, to talk to them or to be visited by them. The judge, while rendering the judgment, determines appropriate modalities for the respect for such rights. However, the court may, on its own motion or upon application by either spouse requesting for divorce (or legal separation) or any other interested person, order that child custody be granted to the spouse who lost the case or any other third party, taking into account the children's best interests. The court may also order that custody of children be shared between both spouses if it is in the children's best interests. It is important to mention that measures ordered by the court with regard to children are always provisional and may be revoked upon application by any interested party by way of unilateral petition.[13]

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[9] Arts. 204 and 251, Law governing persons and family; Sobal, J., & Rauschenbach, B. S. (2003). Gender, marital status, and body weight in older U.S. adults. Gender Issues, 21, 75–94. http://dx.doi.org/10.1007/s12147-003-0007-y Socio-Economic Panel (SOEP), data for years 1984-2014, version 31, SOEP, 2015, doi: 10.5684/soep.v 31.

[10] Arts. 250 and 251, Law governing persons and family.

[11] Article 251, Law governing persons and family.

[12] Art. 250, para. 3, Law governing persons and family.

[13] art.18 law n° 001/2020 of 02/02/2020 amending law n° 32/2016 of 28/08/2016 governing persons and family, O. G. n° 06 of 17/02/2020.

Concerning the property, in cases where legal separation has been decided, the management of the property is done in accordance with legal provisions governing the management of property of the spouses involved in divorce proceedings.[14] In addition, the legal separation judgment determines alimony for the spouse in need irrespective of the spouse with whom the fault rests.[15]

Legal separation can have an effect on third parties, for example, if the spouses incurred debts before their separation. The spouses then determine terms of payment of these debts before their separation. These terms must in principle be accepted by the judge to facilitate the repayment of the debts incurred by the spouses. In order to protect third parties, the change of the matrimonial regime of the spouses following their separation must be known by the civil registry officer in order to publish it. It is in this context that the Law on matrimonial regimes, donations and succession states that "the change in the matrimonial regime is pronounced by the court, once that decision is no longer subject to appeal, it is sent to the civil status registrar of the place where civil marriage was celebrated to be transcribed into the marriage certificate of the spouses."[16] This procedure is done to protect third parties who wish to create or extinguish the relationship obligations with separated spouses.[17]

2.1.3. End of legal separation

Generally, the legal separation ends with the death of one of the spouses, the voluntary resumption of life together, or with divorce.[18]

1º Death of one of the spouses

When the husband or wife dies, the marriage, which had not been dissolved by the legal separation, becomes dissolved by death. Article 214 of the law governing persons and family provides death as one of the causes of marriage

[14] Article 250, para. 4, Law no 32/2016 of 28/08/2016 governing persons and family.

[15] Art.250&251 of the same law

[16] Article 23 of the Law no 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, O.G. no 31 of 01/08/2016.

[17] See generally Barbara Glesner Fines, Joinder of Tort Claims in Divorce Actions, 12 J. AM. ACAD. MATRIM. LAW. 285, 287-89 (1994)

[18] Ibidem

dissolution, and article 215 of the same law specifically states that "death of one of the spouses dissolves marriage." If it is the custodial parent of the children is predeceased, there is, in principle, automatic devolution of parental authority to the other spouse.[19]

2º Reconciliation of separated spouses

It is always possible for the spouses to end the legal separation by reconciling themselves, more precisely by a voluntary resumption of the common life.[20] This situation is very likely when the legal separation was pronounced because of adultery, but also and above all under the emotional effect that followed the fact of adultery. It may be that, on reflection, at the end of the emotions, the spouses will resume the common life.[21] The resumption of common life erases the effects of separation on children and on spouses. If, on their free will, they resume common life, there is no separation of residences, the custody of children comes back under both parents, and there is no alimony that is provided by one spouse to another. Most importantly, spouses resume their cohabitation obligation which was suspended by the court's decision of legal separation.[22]

3° Conversion of legal separation into divorce

After two (2) years of legal separation, the court, upon joint application by both spouses and either of them, converts the legal separation judgment into a divorce judgment. The application for the conversion of legal separation into divorce is filed in accordance with the ordinary rules relating to the application for divorce.[23] This means that if it is divorce for grounds provided for by the law, the conversion of legal separation into divorce will respect its rules, and if it is divorce by mutual consent, the spouses will respect its rules.

If before the 2-year period ends the woman has become pregnant, the husband

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[19]Brinig, Margaret; Douglas W. Allen (2000). "These Boots Are Made for Walking: Why Most Divorce Filers are Women". American Law and Economics Review. 2 (1): 126–129.

[20]Wagner, G. G., Frick, J. R., &Schupp, J. (2007). The German Socio-Economic Panel Study (SOEP): Evolution, scope and enhancements. SSRN Electronic Journal. http://dx.doi.org/10.2139/ssrn

[21]Doherty, William J.; Willoughby, Brian J.; Peterson, Bruce (April 2011). "Interest in Martial Reconciliation Among Divorcing Parents". Family Court Review. 49 (2): 313–321.

[22]Blackstone, Commentaries on the Laws of England, p. 435 (Legal Classics Library spec. ed. 1984.

[23] Art. 252, Law governing persons and family.

will be able to say that the pregnancy of the woman in separation is a sign of her infidelity, probably the very cause of adultery. Pregnancy and the birth of a child are evidence of a woman's sexual relationship with a man. It might not be known whether it is her husband or not, but what is known is that the wife is separated from her husband and they no longer live together; hence this pregnancy leads to a presumption of her infidelity and adultery. There is, therefore, the presence of a material element of such an infidelity and adultery which is the sexual union with another person.[24] In these circumstances, divorce, which appears to be a sanction imposed against the offending spouse,[25] should be used against the spouse who is going to be responsible for marriage dissolution. It has been instituted to this effect that the guilty spouse should lose the benefits of the support that the other spouse was paying during legal separation, including the allocation of custody of the children, and priority should be given to the innocent spouse.[26] However, for the custody of children, it will all depend on what is in the best interests of the children. This has been the position of the Primary Court of MUKAMIRA in a judgment decided on 01 August 2008 in a marriage between a wife, U. and husband, ND. In that case, U. was separated from ND. and became pregnant. The Court held that U. failed in her duty of fidelity that a woman owes her husband. Even if the spouses were separated for eight months, they were still married and each owed the other the duty of fidelity. Although U. said that it is her husband who was the author of her pregnancy, the court did not take it as true because she failed to prove resumption of cohabitation. The court ordered that ND. is divorced with U. because of adultery; it ordered that children over 7 years of age would be kept and educated by ND. and suspended alimony that ND. was paying to U. during the separation period.

Besides, it is noteworthy to mention that apart from adultery, the family law in its article 218 provides other causes of divorce: notably,desertion for a period of at least twelve (12) consecutive months (except if desertion is caused by mistreatment of one of the spouses which has been notified to and recorded by administrative authorities); conviction for an offense severely tainting the honour; refusal to provide for the household needs; excess, abuse or serious

[24] MUTONI M, *Des problèmes juridiques des femmes divorcées*, Mémoire, Butare, U.N.R., 2000, p. 23.

[25] Ibid.

[26] RUDACOGORA J., *Les causes de divorce en droit écrit et coutumier au Rwanda*, Mémoire, Butare, U.N.R., 1977, p. 32.

insults by one towards another; gender based violence; de facto separation for a period of at least two (2) years; and non-cohabitation for more than twelve consecutive (12) months from the day of celebration of marriage on unjustifiable grounds.Spouses who have been legally separated for at least two years can ask conversion of legal separation into divorce. Once the divorce has been decided, there is no longer legal separation. After discussing the form, procedure, effects of legal separation and how it can be ended, the following part explores issues that result from cohabitation of spouses who have been judicially separated.

2.2. ISSUES RESULTING FROM COHABITATION OF JUDICIALLY SEPARATED SPOUSES

When it is proved that an estranged husband and wife have executed a separation decision and subsequently engaged in sexual intercourse or resumed cohabitation; the issues raised in Rwandan family law include determining whether the enforceable portions of that judicial separation should be void or remain irrevocable as a matter of law, and the legal nature of such cohabitation and the management of its effects. These issues are not regulated under Rwandan family law and are hereunder discussed.

2.2.1. Legal nature of cohabitation between judicially separated spouses

As defined, cohabitation is an obligation to have sexual relations with one's spouse. The problem is what nature the cohabitation of the spouses in legal separation will have. Some people believe that the cohabitation of spouses in legal separation is adultery,[27] others consider it as a free union between separated spouses, and others consider it as a resumption of common life between legally separated spouses.

2.2.1.1. Cohabitation described as adultery

1º. Definition of adultery

Adultery is a violation of the duty of fidelity arising from the intimate and

[27]See W. Kent Davis, Answering Justice Ginsburg's Charge That the Constitution is "Skimpy" in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law, 39 S Tex L Rev 951, 954-55 (1998)

monogamous nature of marriage; it is an absolute cause of legal separation.[28] Adultery must have a material element that involves a sexual union with a person other than one's spouse, as prescribed by article 136 of the law nº 68/2018 of 30/08/2018 determining offences and penalties in general.[29]For the intentional element, consent must be free. In other words, the parties must have wanted this sexual intercourse independently of any pressure or violence. If this consent is tainted, adultery will not be considered as a cause of divorce or legal separation.[30]

According to article 136 of the law n°68/2018 governing offences and penalties in general, any spouse who has sexual intercourse with a person other than his/her spouse, commits an offence. Upon conviction, he or she is liable to imprisonment for a term of not less than six (6) months and not more than one (1) year. The prosecution of adultery is initiated only upon complaint of the offended spouse, and in that case, the prosecution is initiated against the accused spouse and the co-offender.

2º. Conditions for the qualification of a crime of adultery

For adultery to be found, first the accused must be legally married and be unfaithful to his or her spouse. Second, the spouse must have had a sexual relationship with someone other than his or her spouse. This is what is referred to in criminal cases as a material element of the offence of adultery. As long as sexual union is not consumed, there is no adultery. Mere attempts and licentious behavior do not constitute adultery.

The analysis of the concept of adultery allows us to affirm that spouses in legal separation that meet sexually for various reasons, i.e. during a baptism party of a child or a birthday, do not commit adultery for following reasons:

First, spouses who have cohabited, even though the duty of cohabitation has been suspended by the judge, remain married. The first element constituting adultery is the fact of being unfaithful to one's spouse, and both have the status of the wife and husband between themselves. There is therefore no breach of the duty of fidelity. The offence of adultery involves the prior existence of the

[28] Ibid.

[29] Law Nº68/2018 of 30/08/2018 determining offences and penalties in general, O. G. nº Special of 27/09/2018.

[30]Maura I. Strassberg, The Challenge of Post-Modern Polygamy: Considering Polyamory, 31 Cap U L Rev 439, 445 (2003) (noting the rise in these types of flexible relationships).

marriage contract with another person and sexual intercourses with a person to whom one is not legally married. As discussed earlier in this paper, the legal separation does not dissolve the marriage. The legally separated spouses do not therefore commit infidelity; their cohabitation is between themselves, not with other persons. Even if they did not respect the decision of the judge who pronounced legal separation, they did not violate the duty of fidelity. It would therefore be faulty reasoning to think that they committed an offence of adultery while they are still married.

Second, the offence of adultery requires a free intention of the spouse who intended to act voluntarily and freely with a person other than his spouse. Considering cohabitation of the spouses in legal separation as adultery would be impossible because the two spouses did not have the guilty intention of violating their duty of fidelity. We therefore say that the cohabitation of spouses in legal separation is not adultery.

2.2.1.2. Cohabitation described as a free union

The cohabitation of spouses in legal separation can also be considered as a free union. There is free union when a man and a woman live together without being united by the bonds of marriage. They therefore make a community of beds, tables, and roofs. Free union is distinguished from marriage by the fact that marriage implies an officially celebrated marriage according to the forms prescribed by the law and in accordance with the conditions it imposes. Such cohabitation may be considered as free union due to the fact that both spouses are judicially prohibited to cohabitate; in that situation they informally resolve to reunite without resorting to courts to formalize their reconciliation.

It is deemed opportune to clarify the phenomenon of free union by its typologies. The first category of free unions contains purely casual or transient relationships that do not in principle have legal consequences for partners, but which often create an unfortunate situation with respect to children who are often left to their single mothers. Rwanda is experiencing several cases of this situation of single-parent families which have resulted from free unions of this first category.[31]

The second category of free unions is one marked by a stable relationship which

[31] Legros, Dominique (2013). Mainstream Polygamy: The Non-Marital Child Paradox In The West. Springer Science & Business Media.

is limited to the bed community, and so are some cases of creation of families commonly referred to as "second or third office" which are frequent mainly in urban centers.[32]

The third category of free unions is characterized by a true community of life, as close to marriage as the real institution. However, despite the characteristic of this third category of free unions of having true community of life close to marriage, there are still differences with legal marriage that unites judicially separated spouses. First, the free union is a union of fact, while the separated spouses have a union of law, their conjugal union has been officially celebrated.[33] Second, people living in this type of free union are more or less stable and continuous even if their union is not recognized by law. On the other hand, the cohabitation of spouses in separation has no stability or continuity. Their cohabitation was mainly caused by a transient situation of a night or a single day (and sometimes a small moment). Their cohabitation does not have a character of stability and continuity that free unions of the second and third category possess.

Cohabitation of legally separated spouses is very close to the first category of the free union which leads to casual or transient relations. However, for this category, relationships are casual or transient but are repeated. The two partners do not reside together but they are dating, whereas the cohabitation of the spouses in legal separation might take place in few occasions so that it will be difficult for a third person to prove it.[34]

In addition to differentiating cohabitation of legally separated spouses from free unions based on their categories, it is important to differentiate them based on the obligations of the persons involved in these different relationships. Persons living in free union relationships are not subject to the obligation of care and assistance, and are not bound by the duty of fidelity because there is no marital relationship between them. For judicially separated spouses, they are exempted from the duty of cohabitation but remain bound to respect all other duties and obligations arising from marriage.

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[32]Jennifer Wriggins, Kinship and Marriage in Massachusetts Public Employee Retirement Law: An Analysis of the Beneficiary Provisions, and Proposals for Change, 28 New Eng L Rev 991, 991 (1994).

[33]Statsky, William P. (2012). Family law (Sixth ed.). Cengage Learning. p. 254-260

[34] ibidem

Further, the effects of free unions are different from the effects of cohabitation of spouses in legal separation. When there is a breakdown of such a union, the court determines the fate of the estate of the partners and children.[35] In a judgment rendered by BUSASAMANA Primary Court on 20/05/2008, a woman alleged that her husband sold the fields and went to look for another woman. The husband left with all the belongings, leaving the wife with eight children.[36] The court ruled that the husband must bring these goods back to support the children. In the event of a legal separation; the court cannot determine the patrimony of the child born in the legal period of suspension, because his mother cannot prove that it is her husband who is the father of the child, for lack of continuous cohabitation.

The break-up between the separated spouses is the result of a decision of the judge based on a case defined by law, whereas the break-up of persons united freely can happen resulting from the decision of one or the two partners and it does not in itself constitute a fault. However, compensation may be awarded by a court decision, where the breach is the cause of a fault.[37]

2.2.1.3. Cohabitation described as a resumption of common life

After a long or short period of time, spouses in legal separation may decide to resume their life together. The causes that led to the loosening of the marital bond may disappear. Also, the conduct of one of the spouses, who caused the separation, can positively change so that the offended spouse decides to relive with his or her spouse and both resume their pre-separation state.[38]

The characteristic of the resumption of common life is the continuous cohabitation of the spouses as it was before the separation. The separation of residences resulting from the legal separation no longer exists, and the children entrusted to one or the other spouse are returned to the same family environment.[39]

If the legal separation has resulted in the payment of support, on the day of the

[35] Jean-Didier, Vincent (2010). Reclus, geographer, anarchist, environmentalist. Robert Laffont Prix Femina.

[36] Primary Court of Busasamana, 20/05/2008, R.C. R.C.0500/06/TB/BSSMNA, unpublished

[37] Legros, Dominique (2013). Mainstream Polygamy: The Non-Marital Child Paradox In The West. Springer Science & Business Media.

[38] Wineberg, Howard; McCarthy, James (7 March 1994). "Separation and Reconciliation in American Marriages". Journal of Divorce & Remarriage. 20 (1–2): 21–42.

[39] Ibid.

resumption of the common life, this pension ends. Only the separation of property that is the consequence of the legal separation requires a further modification: either adoption of limited common property, universal community of property, or maintenance of the separation of property already granted by the court. What is challenging with the resumption of common life is the official modalities to be followed to confirm the end of the separation and mark the resumption of the common life.

As for the evidence, the resumption of common life is easy to prove because it is continuous. For instance, persons surrounding the family find that the separated spouses have resumed the common life as before the legal separation. However, in a case of one-off cohabitation of the spouses in legal separation, the resumption of common life is well known by the two spouses only. Additionally, in such a case it is difficult for a third party to say that the spouses in legal separation had sexual intercourse, which is always done in a hidden and intimate way.[40]

In concluding, we can say that the cohabitation of spouses during separation cannot be equated with a resumption of common life, especially if it is a once-off or hidden cohabitation. From an intentional point of view, the spouses wanted for reason beyond their will, to make instant cohabitation, while the resumption of common life requires a period of reflection and the full conviction to resume the domestic union.[41]Once cohabitation of spouses judicially separated has taken place, it might result into different effects, which are examined below.

2.2.2. Consequences of cohabitation of spouses who are in legal separation

During cohabitation of legally separated spouses, they can give birth to children whose legitimate status may be difficult to establish.

2.2.2.1. In case of a child's conception: legal status of a child conceived in times of legal separation

It is noteworthy to hereby discuss the status of children born during the cohabitation of spouses who are judicially separated. The child may be considered

[40] See Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 HARV. WOMEN'S L.J. 23, 28 (2001)

[41] Doherty, William J.; Willoughby, Brian J.; Peterson, Bruce (April 2011). "Interest in Martial Reconciliation among Divorcing Parents". Family Court Review. 49 (2): 313–321

illegitimate or legitimate.

1° Illegitimate child

The bond of motherhood is established with ease, but this is not the case with regard to fatherhood, as it is presumed and sometimes skepticism may arise with the consequence of demonstrating by any means that a particular child is not the fruit of his or her presumptive father. The paternity claim exercised by the alleged father leads to illegitimate parentage in the child's mind. Under this point, it is important to first recall that the legal separation is a decision of the judge which suspends the spouses' duty of cohabitation. However, as mentioned above, there are some circumstances in which separated spouses may meet, and it can be difficult for a third party to prove that the spouses once cohabited after their separation. It is of course that, in the absence of the husband's good will to admit paternity, the wife will have difficulties in demonstrating by civil means that her husband is the author of her conception. With this in hand, the husband can challenge the paternity that the law grants him and, in this case, the child remains illegitimate.

The disagreement between the spouses was the cause of the separation, and on the basis of one of the statutory causes or their consent, the judge granted them separation. He suspended the duty of cohabitation between them but did not dissolve the marriage. Therefore, the duty of fidelity remains and is binding to the spouses. Normally, no cohabitation is tolerated as long as the spouses have not resumed life together. The instantaneous and transient cohabitation of the separated spouses is contrary to the judge's decision because the effect of separation is the non-cohabitation of the spouses. This makes it difficult for the mother to prove that the child conceived during legal separation is her husband's child, since they were not supposed to cohabitate.

The wife can be at ease in case the husband admits paternity of the child. However, such admission only results from his good will, especially since he is protected by a judgment of legal separation, which exempts him from cohabitation. In fact, in case of cohabitation of legally separated spouses, many women become victims. This issue is very similar to that of women in de facto separation, meaning when two spouses agree to cease living together, or when one of the spouses leaves the family home. There, husbands may completely deny their part in the

birth of children conceived in such periods. For example, the District Court of GIKONDO (currently KAGARAMA Primary Court) refused to establish paternity of a child to NYANDWI due to lack of evidence of cohabitation of the mother and the presumed father, given that they were under legal separation. The court indicated that "there is no evidence establishing the resumption of life together with the spouse."[42]

However, by experience, it was found out that reasons of disavowals of fatherhood are numerous, the main causes being the refusal of taking care of the newborn in terms of financial means and the determination not to resume life together with the separated woman.

Since it is not easy for the woman in separation to prove that she exclusively had sex with her former husband occasioning her pregnancy, there is nothing to prevent anyone from thinking that the woman cheated on her husband especially since they no longer live together. Thus, on the basis of this pregnancy, the husband can file for divorce by charging his wife with adultery, which constitutes a serious violation of the duty of fidelity.

According to Article 259 of the law governing persons and family, a husband can deny paternity of a child if the child was born after three hundred (300) days following the judgment granting separation of residence of spouses involved in divorce proceedings or legal separation, or if the child was born before one hundred eighty (180) days since the final judgment rejecting the application for divorce or since the conciliation of spouses who lived separately.[43] According to the interpretation of this article, the husband has the right to disavow the child by demonstrating that the legal separation from his wife lasted more than three hundred days before birth. As a result, children conceived during this period of separate residences are subject to disavowal.

In addition, in case their paternity has not been established, they can face difficulties in paternity claims. For example, in a paternity claim judgment issued by the Primary Court of NGOMA dated 27/06/2008, the court refused to grant paternity to H.C. because his alleged father showed the court a judgment pronouncing the legal separation from his wife of more than 300 days prior to

[42] Primary Court of GIKONDO, 17 August 2005, M.C/K., judgment nº R.C. 512/05/TD/KRO, non-published.

[43] Law Nº 32/2016 of 28/08/2016 Governing Persons and Family, O. G. nº37 of 12/09/2016.

birth. Indeed, the same court, in its judgment dated 03/03/2002, granted legal separation to the husband with his wife. Therefore, the child H.C. born on 26/08/2005 was not considered the product of the husband who said he was in the period of suspension of the duty of cohabitation. The court held that the child was born after more than three hundred days following legal separation and that Mrs. M.G., who represented her son, gave the court no evidence of the cohabitation that existed with her husband during the separation period.[44]

As a matter of fact, the de facto union between the husband and wife that took place during the legal period of the suspension of cohabitation does not protect the woman, as long as she cannot tangibly demonstrate the existence of such union. The only reliable evidence is to use DNA testing, which can only be used to establish the biological link between the father and the child born during legal separation.

Reading article 256 of law governing persons and family, it provides that the child's father is her mother's husband. However, the legal separation makes rebuttable this presumption and weakens its probative force. Indeed, this provision appears to be fragile in its application because the separation has suspended cohabitation for the spouses. Therefore, a child conceived during the legal separation, where cohabitation was suspended by the judge, cannot be considered to be the husband's child and as such that child is subject to disavowal.

2°. Legitimate child

A child conceived or born during marriage is legitimate. Also a child conceived in wedlock, but born after termination of the marriage status, is legitimate. The presumption of the legitimacy of a child born (or conceived) while the mother is married is one of the strongest rebuttable presumptions known to the law, and although legitimacy under such a condition may be challenged by the husband, and the wife (mother) may question the identity of the child, she cannot challenge its legitimacy.[45] However, it is very likely that the child conceived or born during

[44] Primary Court of NGOMA, Judgment R.C 0370/07/TB/NGOMA of 27/06/2008, (not published).

[45] Fitzpatrick, David (February 1987). "Divorce and Separation in Modern Irish History". Past & Present (114): 172–196. JSTOR 650964

the legal period of suspension of the duty of cohabitation may be legitimate, depending on the attitude of the mother's husband.

a) No challenge to paternity of the child

A husband who has not challenged the parentage relationship that results from the presumption of paternity that the law assigns to him is always presumed to be the father of the child, regardless of the period in which the child was born. Article 260 of the law governing persons and family provides that no one can claim a status contrary to that given to him by his birth certificate and possession in accordance with that title. It appears from this provision that if the child has been registered under the names of the mother and the father, the husband has taken care of the child as his child and he has not claimed against the status of the child, the latter remains legitimate. The husband's inaction must be interpreted as an acceptance of the child who was born in marriage despite judicial suspension of the duty of cohabitation. In this line, in litigation where the relatives of the de cujus were denying a child born when the latter was still alive, the Court of first instance of Gikongoro based its decision on the father's pre-death silence as proof of paternity of a child conceived during legal separation. The judgment stipulates: "... N. cannot reasonably deny the child born during legal separation from M. given that he has lived with the child for 5 years and during this period he did not reject his fatherhood till his death."[1]

The law does not depart from the case law: article 282 provides that claim for paternity may be admitted when the defendant has contributed to the maintenance, education and establishment of the child as a father. It should be noted that the separated spouse may, during this period of separation, continue to provide support to his wife who has even given birth to another child. This continuation of the provision of child's support implies the maintenance of the newborn if the separated husband does not deny paternity. It is in this context that the Kigali Court of First Instance, in its judgment of 09 July 1997, ruled that "the child NY remains among the successors of K. because, throughout his life, K. has not instituted a petition to deny paternity against NY. even if the latter was born during their legal separation."[2]

b) Resuming life together and paternity of the child

The resumption of life together despite the woman's conception of a child during legal separation is a sign of reconciliation of legally separated spouses. In this situation it is best for the husband to accept the legitimacy of the child. Once the spouses manage to forget the causes of their separation and resume cohabitation and common life, this gesture is a sign that the child born may have legitimate parentage. Reconciliation of the separated spouses goes with the resumption of the common life or the resumption of the duty of cohabitation, which had previously been suspended by the legal separation. It is very likely that separated spouses, who may have lived together on their own will, may also be able to reconcile. Their feelings of love, which reappear and lead to cohabitation, can also lead to their reconciliation. As a result, the child born in the legal period of suspension of the duty of cohabitation is automatically legitimate.

After discussing the issues or challenges raised by cohabitation of judicially separated spouses, especially those related to the status of a child conceived during legal separation and the difficulties of a woman to prove paternity of a child born in such conditions, the following part of the paper provides solutions to address such challenges.

3. PROPOSED MECHANISMS TO HANDLE EFFECTS OF COHABITATION OF JUDICIALLY SEPARATED SPOUSES

To address issues arising from the cohabitation of judicially separated spouses, the alternatives below are proposed de lege ferenda.

3.1. CONSIDERATION OF RESUMPTION OF COHABITATION AS PROOF OF RECONCILIATION AND END OF LEGAL SEPARATION

For a long time, most family laws have stated that the "resumption of marital relations" will void a separation of spouses to the extent that such an agreement remains executory.[46] However, the definition of resumption of marital relations has remained uncertain. It was judicially held that resumed cohabitation,

[46]Weiss, Robert S. (January 1976). "The Emotional Impact of Marital Separation". Journal of Social Issues. 32 (1): 135–145.

irrespective of sexual activity, is a resumption of marital relations as a matter of law. In this regard, it was previously addressed that cohabitation that was manifestly continuous voids a judgment of separation as reflected by judicial decisions from other jurisdictions summarized below.

1° The North Carolina Supreme Court has held that a husband and wife resuming cohabitation and holding themselves out as living together as man and wife had resumed the marital relationship even without engaging in sexual intercourse.[47] However, in Murphy v. Murphy, the North Carolina Supreme Court rejected the Court of Appeal's requirement of intent, and held that "sexual intercourse between a husband and wife after the execution of a separation agreement avoids the debts contracted."[48]

2° The North Carolina Supreme Court again held that "when separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife 'in the ordinary acceptation of the descriptive phrase "...in contemplation of law", their action amounts to a resumption of marital cohabitation which rescinded their separation agreement. After reviewing the evidence before the superior court, the Adamee court found that "no issue arose for either judge or jury to decide as to their resumption of marital relations. As a matter of law, they had done so."[49]

3° The Supreme Court, by Chief Justice Sharp, ruled that "the heart of a separation agreement is the parties' intention and agreement to live separate and apart forever, and they void the separation agreement if they re-establish a matrimonial home."[50]

4° In State v. Gossett, the husband separated from his wife pursuant to a separation agreement providing for the support of the wife. When the husband failed to provide this support, he was charged with non-support under the criminal statutes. The husband pleaded the separation agreement as a defense.

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[47] In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

[48] Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978)

[49] In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

[50] Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, cert. denied, 293 N.C. 740, 241 S.E.2d 513 (1977); Newton v. Williams, 25 N.C. App. 527, 214 S.E.2d 285 (1975).

The wife testified that she and her husband engaged in sexual intercourse during the interval between the execution of the separation agreement and the issuance of the warrant. The trial judge instructed the jury to regard the agreement as void if they found the wife's testimony to be true. The North Carolina Supreme Court upheld the conviction on appeal. Although no intent to reconcile existed, at least one author felt that Gossett was limited to its facts since it arose in a criminal context.[51]

The above discussed foreign judgments shows that some courts have held that cohabitation of judicially separated spouses means that they have reconciled and ended their legal separation. In case it is considered in this way, there will not be any challenge related to the status of a child who is born from that cohabitation.

3.2. FORMALIZATION OF SPOUSES' RELATIONSHIPS WITH A RECONCILIATION AGREEMENT

When separated spouses decide to informally restore marital relationships, there is a set of legal risks, especially for the wife, in cases of unexpected pregnancy while the cheating husband is not seriously engaged in the relations latently initiated, as illustrated in the section above. To address such an issue in Rwandan family law, it is hereby proposed de lege ferenda to require a reconciliation agreement, which involves that, despite the previous procedure before the court whereby the couple resolved to cut off relationships and recourse to legal separation, they finally realize that they still need to live together taking into account various material and immaterial interests, and therefore decide to put their reconciliation into a formal agreement.

Romantic relationships do not move in a straight line. Most married couples understand that even the strongest relationships are sometimes challenged and pushed to the breaking point before spouses are ready to give their marriage another chance. If spouses have already requested legal separation and have later reconciled, they can submit what is known as a "reconciliation agreement" to the court.[52]

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[51] 1 R. LEE, NORTH CAROLINA FAMILY LAW § 35 at 153, n. 105 (3d ed. 1963).

[52] See Pamela Paul, How Divorce Lost its Groove, N.Y. Times (June 17, 2011), available at http://www.nytimes.com/2011/06/19/fashion/how-divorce-lost-its-cachet.html?pagewanted=all

A reconciliation agreement is an official agreement between spouses indicating that they no longer wish to seek a divorce or dissolution of marriage. While many reconciliation agreements come in the form of formal legal filings, including filing for divorce or filing for separation, this is not always the case. Some couples have merely discussed divorce or perhaps a spouse has outright stated that they intend to file for divorce. Within the context of these agreements, terms may be included that address financial and other practical considerations if the couple should eventually divorce.[53] Regardless of where spouses are in the legal process, reconciliation agreements are a way to address the issues that led to the desire to divorce or legally separate. It is important that reconciliation agreements state any and all significant marital disputes and lay out concrete and actionable solutions to those problems.[54] For fault divorces, these issues can include adultery, GBV, desertion from the household, failure to provide alimony, and more. More commonly, no-fault divorces cite irreconcilable differences or separation.[55] A reconciliation agreement can therefore include how these issues are addressed and how they are going to move forward with reconciling each other and continuing with their marital relationships.

3.3. IMPORTANT CONSIDERATIONS

Whether considering cohabitation as a proof of resumption of common life of judicially separated spouses or requiring the use of a formalized reconciliation agreement, there are certain important things to be considered. The first is checking the content of a reconciliation agreement, and the second is requiring cancellation of the decision that granted legal separation.

3.3.1 Content of a reconciliation agreement

In countries where it is practiced especially in US, spouses who finally left out their disputes and intend to resume their cohabitation cannot elaborate the

[53] See, e.g., Paul R. Amato & Alan Booth, A Generation at Risk: Growing Up in an Era of Family Upheaval (1997); Judith Wallerstein et al., The Unexpected Legacy of Divorce: A 25 Year Landmark Study 167 (2000); Alan L. Otten, The Lasting Impact of Divorce on Children, Wall St. J., July 20, 1993, at B1

[54] See Laura Bradford, Note, The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws, 49 Stan. L. Rev. 607, 617–20 (1997)

[55] See HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 133–37 (1997)

reconciliation agreement by themselves. They are often assisted by mediators who help them to point out grounds of their conflict and how they agreed to overcome them and the document is signed and approved by the court to officiate its enforcement and de facto void the judicial separation.[56]

In Rwanda where the mediation body is not yet operating, this task may be entrusted to the attorneys who sometimes resort to this alternative in the legal assistance. Therefore, among issues settled, spouses may agree on the children custody applying the best interest of the child; the partition of assets depending on the chosen matrimonial regime and other debts contracted with third parties in case of divorce. However, it is important to remember that reconciliation agreements are made with the intention of staying in the marriage, but are often entered into during a difficult or tumultuous personal time. For this reason, judges will be careful to examine the terms of all reconciliation agreements to ensure that neither party was coerced into agreeing to unfavorable terms in order to make a "sacrifice" or to make up for previous indiscretions.[57]

3.3.2. Cancellation of the judicial separation

Since for the decision that granted judicial separation is a judgment in rem, if the parties want to resume cohabitation, it is necessary for them to get the order of judicial separation annulled by the court. Normally, the court cancels the decision upon consent and presentation of both spouses.Not only a legal separation is the physical and actual separation of an otherwise legally married couple, this being often the precursor to a divorce or annulment but also it is a court order that is similar to a divorce. Assets are divided and child custody is decided. A court will also rule on child and spouse support. A legal separation is often a trial divorce where the concerned couple decides to separate for a period of time to see if they can work out the problems in their marriage or to see if they should file a divorce. Once this legal separation has been granted by the court, spouses may still petition the court to have the motion of separation terminated.[58]

[56] Jacobs Beger, LLC, Reconciliation Agreement, available online at https://divorcingoptions.com/Handouts/Reconciliation_Agreement_PDF_Handout_Version.pdf

[57] https://jacobsberger.com/marital-agreements/reconciliation-agreements/ (visited on the 29th August 2021)

[58] Dawn, Melody, How to Cancel a Legal Separation, available online at https://legalbeagle.com/6777896-cancel-legal-separation.html; see also https://allbanhotec.com.br/reviews/45c663-why-should-i-get-a-legal-separation (visited on the 29th August 2021)

If this happens, spouses can reverse their legal separation and return to their joint status, provided neither of spouses has initiated a divorce. Inspired from the American law, the following should be adopted to reverse a legal separation: Spouses have to discuss the matter and attain a consensual agreement to reverse their legal separation taking into account their mutual interest to resume their marital relationships. Thereafter, they should write to the court expressing their request for cancellation of the court's decision that granted them legal separation.

With the above proposed mechanisms that are important in addressing issues caused by cohabitation of legally separated spouses; this paper suggests that the following be considered in Rwandan family law.

3. 4 AMENDMENT OF LEGAL PROVISIONS APPLICABLE TO LEGAL SEPARATION

Legal provisions that regulate legal separation can either be revised or repealed to remain with divorce only.

3.4.1. Eventual revisions of legal provision governing legal separation under Rwandan law

Given different issues raised by cohabitation of spouses who have been legally separated that have been discussed in this paper, and which are not addressed under the current Rwandan family law, it is recommended that legal provisions related to legal separation be revised in order to include legal provision that can help in resolving those issues. Inclusion of legal provisions that recognize cohabitation of spouses judicially separated as either a resumption of common life or reconciliation of concerned spouses should be considered by the legislator. This will help to prevent difficulties that children born from that kind of cohabitation face while attempting to claim their paternity. However, the revisions have to be clear on how such cohabitation can be proved.

3.4.2. Eventual repeal of legal provisions applicable to legal separation

Another alternative solution to issues caused by cohabitation of judicially separated spouses would be to set aside all legal provisions regulating legal

separation. If they are removed from the law, spouses may mainly petition for divorce. If the conciliation process provided by article 238 of the current law nº 32/2016 of 28/08/2016 governing persons and family as amended to date dealing with attempt to conciliate spouses contemplating divorce fails and spouses persist in their intention to divorce, the court decides to authorize them to continue with divorce proceedings. This means that instead of specific provisions on legal separation, the legislator may maintain just rules on divorce. If Rwandan law remains with legal provisions on divorce only, there will be no challenges related to legal separation as discussed in this paper. There will not be spouses who are exempted from the duty of cohabitation while they are still bound by other marital relationships. It is important to note that this duty of cohabitation, which is suspended during legal separation, is the one that causes issues examined in this paper.

4. CONCLUSION

During legal separation a series of events that include informal resumption of cohabitation may result in the birth of children or other challenges. However, the Rwandan family law is silent on these issues. This article has discussed different issues that result from informal cohabitation of judicially separated spouses and proposes how they can be addressed. In the first part of this paper the Rwandan legal regime of legal separation of spouses is presented by highlighting Rwandan rules governing legal separation in terms of forms and procedure of legal separation, effects of legal separation and causes entailing the end of legal separation. Issues resulting from cohabitation of judicially separated spouses such as the legal nature of such cohabitation and effects that result from it have also been examined. Different considerations given to the nature of cohabitation of legally separated spouses such as consideration as adultery, free union or resumption of life together have been explored. Additionally, consequences of informal cohabitation of judicially separated spouses have been discussed particularly the consequence of eventual birth of the child conceived from such informal cohabitation. The paper examined the legal status of that child who can be considered as either illegitimate or legitimate. It is indicated that establishment of the child's status is difficult since the Rwandan law does not regulate it adequately.

The second part of the article proposes mechanisms that can be adopted to help in handling issues raised by cohabitation of spouses judicially separated such as consideration of resumption of cohabitation as proof of reconciliation and end of legal separation, and formalization of spouses' relationships with a reconciliation agreement. The article summarized important considerations to take into account while applying the proposed mechanisms namely consideration of the content of a reconciliation agreement and cancellation of the decision that granted judicial separation.

This article shows that there is a significant need to fill the loopholes found in Rwandan family law in relation to the fate of the resumption of marital relationships between judicially separated spouses. The proposals above inspire the needed and recommended legal amendments to fix this existing issue.

5. REFERENCES

LEGISLATION

1. Constitution of the Republic of Rwanda of 04 June 2003 as revised in 2015, Official Gazette nº special of 24/12/2015
2. Law n° 001/2020 of 02/02/2020 amending law n° 32/2016 of 28/08/2016 governing persons and family, Official Gazette n° 06 of 17/02/2020
3. Law nº32/2016 of 28/08/2016 governing persons and family, Official Gazette nº37 of 12/09/2016
4. Law nº27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, Official Gazette n°31 of 01/08/2016
5. Law nº68/2018 of 30/08/2018 relating to offences and penalties in general, Official Gazette no. Special of 27/09/2018

CASE-LAW

1. T.P.I. of Kigali, 16 January 1990, R.C 14652/89, unpublished
2. T.P.I. of Gikongoro, 20 January 1970, in R.J.R.,1981/1 p.195

3. Primary Court of Mukamira, le 01 august 2008, R.C.0117/08/T.B/MUKAMIRA, unpublished

4. Primary Court of Busasamana, 20/05/2008, R.C. R.C.0500/06/TB/BSSMNA, unpublished

5. District Court of Kicukiro, , R.C. 512/05/TD/KCRO of 17/08/2005, unpublished

6. Primary Court of Ngoma, R.C 0370/07/TB/NGOMA of 27/06/2008,unpublished

7. Fletcher v. Fletcher, 123 N.C. App. 744, 750, 474 S.E.2d 802, 806 (1996)

8. Lange v. Lange, 164 N.C. App. 779, 596 S.E.2d 905 (2004) (unpublished),
9. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).
10. Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, cert. denied, 293 N.C. 740, 241 S.E.2d 513 (1977); Newton v. Williams, 25 N.C. App. 527, 214 S.E.2d 285 (1975).
11. Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978)
12. 25 N.C. App. 527, 214 S.E.2d 285 (1975).
13. Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, cert. denied, 293 N.C. 740, 241 S.E.2d 513 (1977).
14. Jones v. Lewis, 243 N.C. 259, 90 S.E.2d 547 (1956)
15. Gardner v. Gardner, 294 N.C. 172, 180, 240 S.E.2d 399, 405 (1978)

BOOKS AND REVIEWS

1. Alan L. Otten, The Lasting Impact of Divorce on Children, Wall St. J., July 20, 1993, at B1
2. Amato, Paul R., Jacob E. Cheadle. "Parental Divorce, Marital Conflict and Children's Behavior Problems: A Comparison of Adopted and Biological Children." Divorce, Conflict and Child Behavior Problem 86.3 (2008): 1140–1161. Business Source Premier. Web. 23 Nov. 2013.
3. Anthony C. Adamopoulos, Understanding Reconciliation Agreements, 133 Washington Street, Salem, Massachusetts 01970 (978) 744-9591.
4. Becker, Gary S.; Landes, Elizabeth; Michael, Robert (1977). "An Economic Analysis of Marital Instability". Journal of Political Economy. 85 (6): 1141–88.
5. Blackstone, Commentaries on the Laws of England, p. 435 (Legal Classics Library spec. ed. 1984.
6. Chester G. Vernier& John B. Hurlbut, The Historical Background of Alimony Law and Its Present Statutory Structure, 6 LAW & CONTEMP. PROBS. 197, 197 (1939).

7. COLOMBET ET LABRUSSE-RIOU, La filiation légitime et matérielle, Paris, Dalloz, 1997, nº 90, p.516, nº 16.
8. CORNU G., Droit civil : La famille, Paris, Montchrestien, 3éd., 1993, p. 296
9. Doherty, William J.; Willoughby, Brian J.; Peterson, Bruce (April 2011). "Interest in Martial Reconciliation Among Divorcing Parents". Family Court Review. 49 (2): 313–321.
10. Doherty, William J.; Willoughby, Brian J.; Peterson, Bruce (April 2011). "Interest in Martial Reconciliation Among Divorcing Parents". Family Court Review. 49 (2): 313–321.
11. E PAGE H., Traité élémentaire du droit civil belge, T.I., Bruxelles, A.R.S.C., 1954, 355p.
12. Edward W. Cooey, The Exercise of Judicial Discretion in the Award of Alimony, 6 LAW & CONTEMP. PROBS. 213, 219–20 (1939).
13. Emery, Robert (2013). Cultural Sociology of Divorce; An Encyclopedia. Sage Reference. pp. 30–31
14. Fitzpatrick, David (February 1987). "Divorce and Separation in Modern Irish History". Past & Present (114): 172–196.
15. Fitzpatrick, David (February 1987). "Divorce and Separation in Modern Irish History". Past & Present (114): 172–196. JSTOR 650964
16. H. LOCKE, Predicting adjustment in marriage 125-57 (3d ed. 1968).
17. J. RUBELLIN-DEVICH, Droit de la famille, Paris, Dalloz, 1999, p. 445.
18. Jennifer Wriggins, Kinship and Marriage in Massachusetts Public Employee Retirement Law: An Analysis of the Beneficiary Provisions, and Proposals for Change, 28 New Eng L Rev 991, 991 (1994).
19. Kent Davis, Answering Justice Ginsburg's Charge That the Constitution is "Skimpy" in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law, 39 S Tex L Rev 951, 954-55 (1998)
20) Laura Bradford, Note, The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws, 49 Stan. L. Rev. 607, 617–20 (1997)
21. Lindey, Separation agreements and ante-nuptial contracts 8-13 (1977)).
22. M. MUTONI, Des problèmes juridiques des femmes divorcées, Mémoire, Butare, 2000,p.4.
23. Manning, W. D.; Cohen, J. A. (2012). "Premarital Cohabitation and Marital Dissolution: An Examination of Recent Marriages". Journal of Marriage and Family. 74 (2): 377–387.
24. Maura I. Strassberg, The Challenge of Post-Modern Polygamy: Considering Polyamory, 31 Cap U L Rev 439, 445 (2003) (noting the rise in these types of

flexible relationships).

25. MUTONI M, Des problèmes juridiques des femmes divorcées, Memoir, Butare, U.N.R., 2000, p.2
26. NTAMPAKA, Ce que la femme et la fille rwandaises doivent savoir de leurs droits, V.I., la fille et la femme dans sa famille d'origine, HAGURUKA, Kigali, p.13.
27. P. MALAURIE et L. AYNES , Droit civil : la famille, T.3, Paris, Cujas, 6éd.,1999,p. 268.
28. R. LEE, North Carolina Family Law § 35 at 153, n. 105 (3d ed. 1963).
29. Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 HARV. WOMEN'S L.J. 23, 28 (2001).
30. Rodgers, Kathleen B, and Rose, Hillary A. Personal, Family, and School Factors Related to Adolescents' Academic Performance: A Comparison by Family Structure." Marriage and Family Review.V33 n4.pp 47–61. 2001.
31. RUDACOGORA J., Les causes de divorce en droit écrit et coutumier au Rwanda, Mémoire, Butare, U.N.R., 1977.
32. Sobal, J., &Rauschenbach, B. S. (2003). Gender, marital status, and body weight in older U.S. adults. Gender Issues, 21, 75–94. http://dx.doi.org/10.1007/s12147-003-0007-y Socio-Economic Panel (SOEP), data for years 1984-2014, version 31, SOEP, 2015.
33. Weiss, Robert S. (January 1976). "The Emotional Impact of Marital Separation". Journal of Social Issues. 32 (1): 135–145.
34. Weiss, Robert S. (January 1976). "The Emotional Impact of Marital Separation". Journal of Social Issues. 32 (1): 135–145.
35. Wineberg, Howard; McCarthy, James (7 March 1994). "Separation and Reconciliation in American Marriages". Journal of Divorce & Remarriage. 20 (1–2): 21–42.
36. Wineberg, Howard; McCarthy, James (7 March 1994). "Separation and Reconciliation in American Marriages". Journal of Divorce & Remarriage. 20 (1–2): 21–42. doi:10.1300/J087v20n01_02.

A Border Protection of Trademark in Rwanda: Challenges and the way Forward

Cyridion Nsengumuremyi*

ABSTRACT

The Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement) recommends an involvement of administrative or judicial authorities in a prevention of trademark infringement that can arise through the importation of goods. The Rwandan intellectual property law (IP Law) provides for a complementarity between courts and the Customs Authority to that end. TRIPS Agreement recommends a destruction of infringing goods as an effective deterrence against trademark infringement. However, it provides also for possibilities of release of goods before a determination on whether goods are infringing or not, and it cautions to take into account the seriousness of the case and interests of third parties.

The overall purpose for this article is an analysis of challenges surrounding the border protection of trademark in Rwanda and a way forward for better protection. The guiding research questions consist of the question on how to balance between the rights of the importer to have goods released into free circulation and the rights of a trademark holder to have a decided suspension of goods maintained. There is a question of a silence of the law on how many times a court can decide an extension of suspension of release of goods. Moreover, there is a question on how the court should take into account an effective deterrence of the infringer and the rights of third parties in a use of its discretional powers to decide a non-destruction of goods in the substance of the case. An effective approach to these research questions led to start with an overview on trademark infringement to facilitate an investigation of challenges relating to border measures against trademark infringement, and ultimately, an analysis of challenges relating to remedies in the situation the court deciding the case in substance finds goods to be infringing.

The study finds out that a right of inspection of goods by the right holder after their suspension from release into circulation by the Customs Authority can remove a suspicion on whether goods are infringing, leading to a definite release of the goods. It can also boost confidence for the right holder to go on with the case in substance which should involve an extension of suspension of release of goods to enable a discussion of any court remedy when the court finds the goods to be infringing. Concerning a number of times parties can go to court in the context of extension of suspension of release of goods, the study recommends an amendment of the IP Law to enable a suspension until the case is decided by courts at the final stage, and a complementary solution for the court administration to provide closer dates for cases of border protection of trademark. As to the disposal of infringing goods out the channels of commerce, an alternative

to a destruction of infringing goods that puts forward a total disconnection of the goods from the infringer should aim at a channeling of goods that are not sub standards to the population in need. In brief, the article concludes recommending an IP Law amendment and a capacity building for enforcing organs.

Key words: Intellectual property rights, trademark infringement, border measures, unfair competition, TRIPS Agreement.

1. INTRODUCTION

Border measures for the protection of intellectual property rights (IPRs) are recommended by the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement) concluded in the context of Uruguay round of negotiations and to which Rwanda is party since 1996.[1] TRIPS Agreement provides for an involvement of administrative or judicial authorities in the protection of intellectual property rights at the border. In the context of implementation of this provision, there are states parties to TRIPS Agreement that involve only customs authorities as an administrative body in the border measures for IPRs protection whereby the judiciary involves only when it comes

***Cyridion Nsengumuremyi** is a holder of Master of Laws (LL.M) in Intellectual Property from a joint program between University of Turin, Italy and the World Intellectual Property Organization (WIPO). He is a lecturer of Intellectual Property at the Institute of Legal Practice and Development (ILPD) in Nyanza and Kigali, Rwanda. Cyridion Nsengumuremyi is a practicing lawyer, member of Rwanda Bar Association. He specializes in intellectual property conflict resolution and he serves through litigation or arbitration. Moreover, he acts as an arbitrator in Ad Hoc and institutional arbitrations. He is a Managing Partner of innovationlex.

[1] The Uruguay round of negotiations consists of negotiations that led to the establishment of the World Trade Organization (WTO) and to a conclusion of Multilateral Trade Agreements in 1994. WTO succeeded to the General Agreement on Tariffs and Trade (GATT) established in 1947. At the time of GATT, signatories aimed at an agreement "*directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce*" (GATT 1947, Preamble, para2). During a GATT ministerial meeting held in Geneva in 1982, an idea of having new negotiations on other various aspects in international trade arose. These negotiations referred to as Uruguay round of negotiations started in Punta del Este in Uruguay in 1986 and ended in Marrakesh, Morocco in 1994 with a conclusion of the Final Act on Multilateral Trade Negotiations including the Agreement establishing the World Trade Organization (WTO) (see: WTO, Final Act embodying the results of the Uruguay Round of multilateral Trade Negotiations, available at https://www.wto.org/english/docs_e/legal_e/03-fa_e.htm, , accessed on May 29, 2021 ; see also WTO, WTO legal texts, available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm, accessed on May 29, 2021). Among Agreements signed in that context in 1994, there is a new GATT text. Moreover, the Final Act involved new areas that were not covered in the system of GATT 1947, and these include, among others, a General Agreement on Trade in Service (GATS), and an Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (WTO, WTO legal texts, available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm, accessed on May 29, 2021).

- According to the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement), accession to the WTO implies accession to the Multilateral Trade Agreements concluded in the context of Uruguay round of negotiations annexed to that Agreement (Marrakesh Agreement Establishing the World Trade Organization, article 12.1). An Agreement on Trade Related Aspects of Intellectual Property is Annex 1C to the WTO Agreement, and Rwanda became a full member of WTO on 22 May 1996 (WTO, Members and observers, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm#observer, accessed on May 29, 2021). In accordance with article 12.1. of the WTO Agreement, this accession to WTO by Rwanda implies an accession to TRIPS Agreement on the same date of 22 May 1996.

to the substance of the case on IPRs infringement. Moreover, there are states parties that involve courts early at the level of measures taken at the customs and also in a determination in the substance of the case on IPRs infringement. Rwanda is among states parties that involve courts early in provisional measures at the customs and in a determination of the case in substance on IPRs infringement. In jurisdictions in which only customs involve in a border protection of IPRs, customs authorities can take any measure including a suspension of release into free circulation of goods suspected to be infringing, extension of the suspension of release of goods into free circulation, and remedies that include a destruction of goods that infringe IPRs through the simplified procedures. On the contrary, in jurisdictions that involve courts in provisional measures at the level of customs, the Customs Authority's role in terms of taking an autonomous decision ends with deciding or not a suspension of release of goods into free circulation. In addition, they involve in an enforcement of a court decision to extend or not to extend the suspension, and they involve later in an enforcement of court remedies upon a decision in substance on IPRs infringement. As to courts, these involve in deciding or not an extension of suspension of release of goods into free circulation, hearing and deciding the case in substance on trademark infringement and deciding on remedies after a hearing of the case in substance on trademark infringement.

The current article aims to analyze challenges surrounding the border protection of trademark in Rwanda with reference to the court intervention, and to discuss a way forward for a better protection. To that end, it will have the following guiding research questions:

1. How should the rights of a trademark holder be practically balanced against the rights of the importer concerning a release or non-release of suspected goods before the case is heard in substance on trademark infringement?

2. How many times should a right holder file cases to court for extension of suspension of release of goods into free circulation at the expiry of the first period of 20 working days or 30 calendar days of extension decided by the court to extend the same period of time for suspension decided by the Customs Authority?

3. How should the court take into account an effective deterrence of the infringer and interests of third parties when it uses its discretional powers to decide a non-destruction of infringing goods?

To approach these research questions, the article will inspire mainly on a real situation of border protection of a duly registered trademark KANTA Brand for black hair dye products. This trademark underwent several infringements by several importers using different given names for imported products in a period of eight years from 2012[2] to 2020.[3] The Rwandan Customs Authority dealt with these infringements at several occasions in that period of time, and Rwandan courts that include the Commercial Court, the Commercial High Court and the Court of Appeal had the opportunity to decide on those cases in substance on trademark infringement. Besides the court of Appeal, other above-mentioned courts and the Supreme Court had also the opportunity to decide on those cases in a summary proceeding process concerning extension of suspension of release of goods into free circulation.[4]

After this introductory part (1), the article will start introducing on trademark infringement and related challenges at the level of litigation of the case in substance (2). After a general overview on trademark infringement, it will discuss challenges on border measures against trademark infringement through the importation of goods (3), and challenges relating to remedies in the situation the court deciding the case in substance finds goods to be infringing (4). The article will suggest some remedies as a way forward for a better border protection of trademarks (5) before a final conclusion (6).

2. A COURT CASE IN SUBSTANCE ON TRADEMARK INFRINGEMENT

Trademark is one among different forms of protection of intellectual property rights. Intellectual property rights are protected under different forms depending on the creation of the mind under consideration. Besides trademark, other forms of protection include but are not limited to patents, utility models, industrial design, geographical indications and copyright. Any form of protection of intellectual property rights grants exclusive rights to the right holder. A use of rights protected under any of the above mentioned forms of protection outside the authorization of the right holder constitutes an infringement of intellectual

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[2] MININTCO, 'Warning Letter of 12 July 2012', 2012.

[3] R.com A 00450/2019/HCC. (This judgment dated 17 January 2020 was the last judgement in substance recorded so far concerning infringement of trademark KANTA decided by commercial courts).

[4] The court of Appeal was established by Organic Law n° 002/2018.OL of 04/04/2018 establishing the Court of Appeal (*Official Gazette* n° Special of 30/05/2018). Before that date, an appeal of decisions taken by the Commercial High Court was filed within the Supreme Court, and it is in this context that the Supreme Court took a decision in a case of summary proceeding concerning extension of release of goods into free circulation in the case R.com A 00004/2017/SC of 11 July 2017. In this case, the Supreme Court favored a maintainance of suspension of release of goods until the case is decided in substance on trademark infringment (see 4.1.2 (a)).

property rights. TRIPS Agreement provides extensively for enforcement of IPRs[5]. In particular, it provides for border measures against infringement of trademark.[6]

An infringement of trademark can take place through a use at the local market of signs already registered as trademark, and it can take place by means of importation of goods bearing signs protected under trademark in the jurisdiction of importation. An infringement of trademark at the local market may take place following different scenarios. It may consist of goods manufactured locally on which similar signs to those registered as trademark were affixed. Moreover, it may consist of imported infringing goods that managed to reach the local market especially when the right holder didn't get information on their imminent importation to halt them at the custom (see 3 infra). The criteria for trademark infringement and different forms of trademark infringement are the same both in the situation of trademark infringement at the local market and in the situation of trademark infringement through importation of goods bearing signs already registered as trademark in the jurisdiction of importation. Equally, measures against trademark infringement in the jurisdiction where trademark infringement takes place are the same. It is about a removal of infringing goods from the market or a disposal of infringing goods out of the channels of commerce. Other measures that are common to both infringement of trademark inside the jurisdiction where trademark is protected and infringement of trademark through importation consist of injunctive reliefs in favor of a right holder, a destruction of infringing goods, and a payment of damages to the right holder. The only difference between infringement of trademark through importation and infringement inside the jurisdiction where trademark is protected refers to particular measures that apply at the border against infringing goods or imported goods bearing signs already registered as trademark by a different undertaker in the jurisdiction of importation. These measures that apply at the border enable to prevent infringing goods to enter the market where trademark is protected.

In Rwanda, most of cases of trademark infringement decided by courts in substance at the time of the current article are cases relating to the importation of goods bearing similar signs as signs protected under trademark at the local level. This situation may pertain to two factors. In principle, infringers prefer imitating trademarks that have already acquired a market share[7] and filing a court

[5] TRIPS Agreement, Agreement on Trade-Related Aspects of Intellectual Property Rights (as Amended on 23 January 2017)', January, 2017., Part III.

[6] TRIPS Agreement., art 51.

[7] Dennis S Corgill, ' Measuring the gains of trademark infringemnt,' Fordham Law Review 65, no. 5 (April 1997), pp 1954-1962.

case for trademark infringement which is conditioned by trademark ownership involves a degree of understanding and awareness on IPRs by businesses. Most of industrial products available on the Rwandan market are imported goods[8], and it is these goods that are more likely to attract trademark infringement than goods produced locally.

This section on a court case in substance on trademark infringement is of general character and it applies to both a court case in substance concerning infringement of trademark at the local market and trademark infringement through the importation of goods. However, it will involve cases of trademark infringement inside other jurisdictions to set a stage for cases of trademark infringement through the importation of goods that are common in Rwandan courts. It will cover a confusion and likelihood of confusion as criteria for trademark infringement (2.1.), different forms of trademark infringement (2.2), a relationship between trademark infringement and unfair competition (2.3.) and evidence in trademark infringement cases (2.4.).

2.1. CONFUSION AND LIKELIHOOD OF CONFUSION AS CRITERIA FOR TRADEMARK INFRINGEMENT

A trademark infringement refers to a use of a sign that leads or can lead to a confusion with an already recognized trademark. Both confusion and likelihood of confusion refer to a use of a non-recognized mark or a sign on goods that are identical or similar to goods protected under a recognized trademark. TRIPS Agreement[9], and even the Rwandan law[10] define trademark as a sign which is used to distinguish goods or services of one undertaker from those of other undertakers. A mark is recognized either by means of registration by the IP office, or simply because it is a well-known mark.[11] Sings that could amount in a confusion or a likelihood of confusion with the already registered trademark can't be registered as trademark in Rwanda.[12] Other signs that can't be registered as trademark under Rwandan law consist of signs that are imitative when compared to well-known marks or existing trade names[13], signs that are

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[8] NISR, 'Formal External Trade in Goods Fourth Quarter', March, 2020, 1–26., p 5.

[9] TRIPS Agreement., art 15.

[10] Rwandan IP Law, 'Law N° 31/2009 of 26/10/2009 on the Protection of Intellectual Property', *Official Gazette N° 50 Bis of 14 December 2009*, Deember, 2009., Ibid, art 133.

[11] TRIPS Agreement., Ibid, art 16.1.

[12] Rwandan IP Law., art 134(3°), 137.

[13] Ibid, art 136.

descriptive when compared to the goods to be protected under trademark[14], and signs adopted in bad faith or that can amount in an unfair competition in the case they were registered[15]. There are also signs that are contrary to public order or morality[16], and signs imitating flags, emblems, names or abbreviations of states or intergovernmental organizations.[17]

Besides the situation of a well-known mark that may be infringed through a use of imitating signs compared to those of the well-known mark, other signs prohibited from registration as trademark listed above don't affect necessarily a holder of a registered trademark as long as that right holder didn't neither use similar non-accepted signs as trademark. That is why it is about a confusion or a likelihood of confusion of an existing trademark that matters in the context of an infringement of a registered trademark. An infringer could have tried to register the mark and see the proposed sign refused from registration because it is already registered as a trademark in favor of a previous applicant to the IP office. The infringer could also have not tried to register that sign as trademark and simply decides to use it on identical or similar goods as those protected under trademark. What is common in these two different scenarios is that an infringement of an existing trademark constitutes a self-authorization to use a mark which is already registered in the name of another undertaker.

A confusion and a likelihood of confusion differ. Confusion refers to a situation where the misleading of consumers already took place. It is about a situation that already happened. A confusion in terms of trademark infringement pertains in principle to a use of identical mark (see 2.2.1. infra). A sign that led to confusion with an already recognized mark can't be registered as a trademark, and a use of that sign in the course of trade outside the right holder consent constitutes a trademark infringement.[18] Concerning a likelihood of confusion, this is about the probability for confusion. This means that the confusion has not yet taken place. Equally a sign which is likely confusing compared to an already recognized mark can't be registered as a trademark, and its use in the course of trade outside the right holder consent constitutes a trademark infringement.[19] A likelihood of confusion pertains mainly to similarity between a non-recognized mark or sign

[14] Ibid, art 138.

[15] Ibid, art 139.

[16] Ibid, art 140 (1°).

[17] Ibid, art 140 (2°).

[18] TRIPS Agreement., art. 16.1.

[19] Ibid.

with an existing trademark. A use of a confusing sign constitutes a trademark infringement itself and a use of a likely confusing sign involves other elements for an infringement to take place.

A likelihood of confusion involves different aspects in terms of relationship between a sign and an existing trademark for an infringement to take place. A likelihood of confusion refers to an average consumer of the product taken into consideration, and it involves a likelihood of association. A likelihood of confusion considers the trademark as a whole and not just some elements of the trademark especially as goods on which a sign which is likely confusing is used and that are presented to the consumer for purchase are not accompanied by goods protected under an existing trademark to enable a comparison by the consumer. As per Lloyd Schuhfabrik Meyer & Co. GMBH v. KlijsenHandel BV, "The average consumer normally perceives a mark as a whole and does not proceed to analyze its various details. [.....] the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind."[20],[21] The concept of "average consumer" in terms of trademark infringement refers, in addition, to the nature of goods. Consumers pay attention to goods that are expensive and that they purchase frequently, and they pay less attention to goods they acquire regularly and sometimes, in a hurry[22]. Furthermore, the concept of "average consumer" takes into account final consumers and not the retailers who are supposed to be more familiar with the products.[23] In this context, a likelihood of confusion has a relationship with a likelihood of association. A likelihood of association is about the fact that a sign which is likely confusing leads consumers to associate the goods on which the sign is used to the origin of goods represented by an existing trademark. In other words, consumers are led to think that goods with a likely confusing sign are the same as goods with a registered trademark.[24] A concept of "association" refers to a mental representation of the previous known trademark and the actual sign"[25], and a likelihood of association refers to the aural, visual or

[20] *Lloyd Schuhfabrik Meyer & Co. GMBH* v. *Klijsen Handel BV* CJEU, 22 June 1999, C-342/97, cited in: L. T. C. Harms, *A Casebook on the Enforcement of Intellectual Property Rights*, 4th Editio, 2018., Ibid, p 39.

[21] *Grandpa Pidgeon's of Missouri Inc* v. *Borgsmiller* 447 F2d 586,, cited in: Harms., p 40.

[22] New Zealand IP Office, Relative grounds - Identical or similar trade marks, available at https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/relative-grounds-identical-or-similar-trade-marks/, April 14, 2021.

[23] Ibid.

[24] Harms., Ibid, p 40.

[25] EUIPO, 'The Likelihood of Confusion and the Likelihood of Association in Benelux and Community Trade Mark Law : Concepts , Interpretations and Evolutions'., p 4.

conceptual similarity between the sign and the trademark.[26]

Some authors don't agree with a court determination of a trademark infringement based only on a likelihood of confusion between a sign and a trademark. According to Robert G. Bone, "the likelihood of confusion test is a test without a secure normative foundation"[27]. For him, "the test should focus not only on the probability of confusion but also on the trademark related harm that confusion generates"[28]. For Robert G. Bone, there is a need to "reconstruct the infringement test"[29] with reference to "the social value of trademark protection in economic terms"[30] and taking into account the consumer-autonomy[31] and a "proof of bad intent".[32] This approach from Robert G. Bone diverges from the concept of exclusive rights vested in a trademark ownership. Trademark ownership, and in particular trademark registration confers exclusive rights for exploitation of the trademark (TRIPS, art 16.1). This implies a prevention from use of a confusing mark also recommended by the Paris Convention for the protection of industrial property.[33] Therefore, a trademark right holder has no need to prove a loss suffered as long as he/she can provide evidence for trademark registration. A loss suffered can be though about in the context of damages to be awarded after an infringement has been established. An infringement and damages suffered with trademark infringement are two separate notions. A confusion or a likelihood of confusion are criteria that apply to any form of trademark infringement.

2.2. DIFFERENT FORMS OF TRADEMARK INFRINGEMENT

2.2.1. Identical marks

Trademark infringement by means of identical mark refers to confusion between a sign and an existing trademark. Identical marks are known for having the same elements in "all material respects"[34], "where the former reproduces, without

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[26] EUIPO., Ibid, p 3.

[27] Robert G. Bone, 'Taking the Confusion out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement', Northwestern University Law Review, 106.3 (2012), 1307–78., p 1037.

[28] Bone., Ibid, p 1037.

[29] Ibid, p 1438.

[30] Ibid, p 1438.

[31] Ibid, p 1439.

[32] Ibid, p 1350.

[33] Paris Convention, 'Paris Convention for the Protection of Industrial Property' ‹https://doi.org/10.1007/978-1-137-35471-6_5›., art 6bis, art 6quater (2).

[34] Harms., Ibid, p 28.

any modification or addition, all the elements constituting the latter"[35]. The Intellectual Property System doesn't accept a registration of an identical mark to avoid confusion with an already existing trademark[36]. The Rwandan law doesn't neither accept a registration of an identical mark to avoid confusion with an existing trademark.[37] However, this doesn't prevent infringers to use a confusing mark or a sign in a trade of identical goods and services outside the right holder's consent. This is in the situation where infringing goods bear signs that are identical to those for goods protected under a registered trademark.

An infringement by means of identical mark was determined by courts whereby these insisted on confusion between a sign and an existing trademark. In the case Celine v. Afflelou (Celine)[38], the appellant with a trademark of the same name used for optical items filed a court case for trademark infringement against Afflelou that uses the name Celine in a trade of eye glasses. The court of Appeal of Paris found a likelihood of confusion in terms of visual, aural and conceptual frameworks between the sign used by the appellee and the right holder's trademark. The court found that a name used by the appellee Celine was identical to that used by the appellant in terms of visual, aural and conceptual representation. For the court, even though the appellant was well-known and that this couldn't lead immediately an average consumer to associate the eye glasses to the appellant, the affixing of the terms Dion and Dion eyes on eye glasses frames by the appellee leads to nothing else than a confusion between the sign and the existing trademark. Moreover, a use of the term Celine leads to a likelihood of confusion in the mind of the public that would associate the sign and the trademark concerning their origins.[39] In Rwanda, a case of infringement by means of identical mark was recorded in the context of trademark infringement through importation goods. This was the situation in the FRANCAFLA case (see 3.3 infra). An infringement of trademark by use of identical marks has some shared characteristics with an infringement by a use of similar marks.

2.2.2. Similar marks

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[35] Ibid, p 32.

[36] TRIPS Agreement., art 16.1.

[37] Rwandan IP Law., art 134, 137.

[38] Cour d'Appel de Paris, 30 Nov 2005 (Celine c/ Afflelou (Celine)) PIBD 2006 no 824 III 132), in: M. –F. Marais, T. Lachacinski, "*L'application des droits de propriété intellectuelle: Recueil de jurisprudence*", OMPI, p 38.

[39] Ibid.

A prohibition of use of similar mark is provided by a same provision of TRIPS Agreement that prohibits a use of identical mark.[40] Equally, the Rwandan law doesn't authorize a registration of a similar mark. However, an infringement of trademark by means of similar mark is possible. There is similarity between a recognized mark and a similar non-recognized mark or sign whenever the non-recognized mark presents elements of similarity with the registered trademark. A similarity between a sign and an existing trademark involves a consideration of the entire trademark. This implies an overall impression that comes out of a comparison of the two. An overall impression between a sign and a registered trademark will certainly lead to a detection of points of dissimilarity besides points of similarity between the two. However, as mentioned earlier, a test of similarity in the context of trademark infringement doesn't take long on dissimilarities than similarities, and that is why it is a general impression that comes out the comparison that matters. When comparing the two, a weight must be put on points of convergence and not points of divergence. The test ignores points of dissimilarity or insignificant details with reference to an average consumer of the product[41],[42],[43] A test of similarity has also to take into account other aspects that include trade channels of the goods, nature of the goods and purchasers or the relevant market, and in particular, a look and a sound of the mark.[44] However, a test of similarity in terms of the look and sound of the mark has to be distinguished from a colour and sound mark.[45]

As it is for cases of identical marks, courts that decided on trademark infringement in terms of similar marks insisted on elements of convergence between a registered mark and a sign and not on insignificant differences between the two. In the case "Thermor", the right holder of trademark Thermor filed a court case for trademark infringement against the owner of Thermex. The two marks were used on the same types of utensils that serve in activities of water heating. The court of Appeal of Paris found that the denomination Thermex used an identical

[40] TRIPS Agreement., art 16.1.

[41] Supra at note 21.

[42] Supra at note 22.

[43] EU case law, cited in: Buydens, M., "*L'application des droits de propriété intellectuelle: Recueil de jurisprudence*", OMPI, 2014, pp.119-120.

[44] New Zealand IP Office, Ibid.

[45] Ramzi Madi, *Colour and Sound Marks: A Brief Overview of Civil Protection in Light of Jordanian Legislation*, *Arab Law Quarterly*, 2010, XXIV ‹https://doi.org/10.1163/157302510X12607945807232›., pp 42-44.

construction as for trademark Termor. This construction consists of having two syllables and seven letters for both Thermor and Thermex. For the court, the only difference which consists of different ending letters was not significant enough to enable a distinction between the two. The court found that this similar construction in the denomination of the two marks can mislead a consumer concerning the origin of the products. The court concluded in favor of trademark infringement by imitation.[46] In Rwanda, cases of trademark infringement in terms of a similarity criterion with reference to an identical construction of syllables and a number of letters in the name of a sign infringing a registered trademark include the KANFA case and the KANTO case (3.3.).

Besides cases where a difference between a trademark and a sign consisted for a sign or a non-registered mark to change just a letter in the registered mark, there are other cases of trademark infringement in terms of similarity in which a name given to infringing goods was distant to the name or a registered trademark. In the case Danone v. B'A, the appellant had commercialized alone on the French market the product Actimel that had no equivalent since 1997. Danone filed a court case for unfair competition against B'A for a commercialization of two products "B'A Force Equilibre" and "B'A Force vitalité" with a reproduction of similar features as for those for Actimel. The court compared the two products and found out that the appellee had not reproduced only one or two elements, but the whole of the characteristics that enable the public to identify Actimel through its attractive features. An imitation extended to the global appearance of the bottle and other aspects that include their packaging by six-two, a decoration with bending representations in the middle which is unique for Actimel, as well as dominant blue and white colours. In its defense, B'A alleged that the description above is technically inherent to the products. However, the court found that an unnecessary reproduction by B'A of an overall characteristic elements and other undertaken imitations for the commercialization of goods which is perfectly identical to that of the right holder led to a dilution of the right holder's trademark, and this led to a confusion in the mind of an average consumer.[47]

Cases with distant names that Rwandan courts decided consist of cases whereby an infringement refers to the general appearance of suspected goods compared

[46] Cour d'Appel de Paris 20 0ct 2000 "Thermor" PIBD no 712 III 38), in: M. –F. Marais, T. Lachacinski, ibid, pp38-39.

[47] Ibid, 23 Janvier 2002 Danone vs B'A (Actime vs B'A force equilibre ; Actimel vs B'A Force vitalite), in: M. –F. Marais, T. Lachacinski, ibid, pp 66-67.

to goods protected under a registered trademark. This general appearance refers among others to colours and other signs appearing on the packaging of infringing goods compared to those of goods protected under a registered trademark. Cases decided by Rwandan courts in this context include those relating to a trademark infringement through the importation of goods. They include different cases that used a name WILD OLIVE and the SMART SHINE case (see 3.3. infra). Cases of trademark infringement whether in terms of similarity of the sign and the registered trademark or in terms of identical sign compared to the registered trademark can, in addition to the principle claim of trademark infringement, be supported by adding a claim of unfair competition.

2.3. TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

There is a close relationship between trademark infringement and unfair competition. Trademark infringement by use of a confusing mark or a mark which is likely confusing constitutes an aspect of unfair competition practice. According to Paris Convention, any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.[48] These include all acts of such a nature as to create confusion by any means whatever with the goods of a competitor[49], or indications the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods[50]. TRIPS Agreement recommends a respect of the above provisions from the Paris Convention.[51] A close relationship between trademark infringement and unfair competition leads a claimant to be able to join an unfair competition claim to a trademark infringement claim.[52],[53]

From the perspective of comparison between the civil law and the common law traditions, the concept of unfair competition relates the most to the civil law system, whereas for the Common law system, a close concept to the civil law "unfair competition is" is the concept of "passing off". The concept of unfair competition has a relationship with fairness in trade activities. The civil law system puts forwards fairness in business activities than competition, to

[48] Paris Convention., art 10bis(2).

[49] Ibid, art 10bis(3)(i).

[50] Ibid, art 10bis(3)(iii).

[51] TRIPS Agreement., Ibid, art 2.1.

[52] Harms., Ibid, p 53.

[53] M. –F. Marais, T. Lachacinski, ibid, p 65, para5.

the point that this system is "criticized as uncompetitive.[54] On the contrary, the common law system finds competition as the most important, and take into account fairness "when a competitor's conduct is particularly extreme".[55] However, a gap between the civil law unfair competition and the common law passing-off systems are more and more becoming narrow[56] thanks to the ECJ role at the level of EU in particular,[57] what led to a broadening of the concept of passing off[58] and its closeness to the concept of unfair competition. Traditionally, the concept of "passing-off" refers more to the goodwill than to the goods, and claimants "prefer injunctive relief over monetary relief"[59]. Moreover, this concept was applicable across trade sectors.[60]

The Rwandan law provides for a prohibition of unfair competition and ignore the concept of "passing off". In addition to the protection of the rights of a trademark holder against a commercialization of goods using a sign which is identical or similar to the registered trademark[61], the Rwandan IP Law provides for a protection against unfair competition. It prohibits a registration of a mark "if the application has been made in bad faith or where the sign, if registered, would serve unfair competition purposes"[62], and the protection against unfair competition comes to supplement the protection provided by trademark registration[63].

The IP Law defines unfair competition as "an act or practice which, in the exercise of industrial or commercial activities, is unlawful or contrary to honest use"[64]. This may consist of an act of practice that misleads or causes confusion among consumers or damages the reputation of a lawful business including a business of a trademark right holder.[65] Unfair competition practices may facilitate a collection of evidence in trademark infringement cases.

[54] Mary Lafrance, '10 . Passing off and Unfair Competition Regimes Compared', 2011, 195–223., p 195.

[55] Ibid, p 195.

[56] Ibid, p 196.

[57] Ibid, p 197.

[58] Ibid.

[59] Catherine W. Ng, 'The Law of Passing Off – Goodwill Beyond Goods', 2016, 817–42 ‹https://doi.org/10.1007/s40319-016-0510-9›., p 824.

[60] Ibid, p 830.

[61] Rwandan IP Law., Ibid, art 133, 134, 136.

[62] Ibid, art 139.

[63] Ibid, art 178.

[64] Ibid, art 5(1°), 177.

[65] Ibid, art 180, 182, 183.

2.4. EVIDENCE IN TRADEMARK INFRINGEMENT CASES

Evidence in a trademark infringement case covers both a proof that the claimant is the owner of the trademark and that the trademark was infringed. A proof of ownership of trademark is established by a certificate of registration of trademark issued by a competent Government office. In Rwanda, a certificate of registration of trademark is issued by RDB. A certificate of registration of trademark shows, among others, the name and address of the right owner, a sign or a combination of signs registered as trademark and goods on which the trademark applies. Concerning an infringement of trademark, this can be proved by establishing that a sign which is similar to the sign registered as trademark was used without authorization of the trademark owner on similar goods by the defendant. According to the Rwandan law, evidence for trademark infringement has to refer to the provisions of the law, and it can be supported by case law and doctrinal writings.[66] Evidence in cases of trademark infringement is further enhanced by a presentation to the court of samples of both infringing goods and goods protected under trademark. This presentation of samples to court facilitates a practical assessment of the way a non-authorized use of signs that are confusingly similar to the registered trademark took place. In the situation where trademark consists of a combination of different signs as provided by art 133 (4°) of the IP Law, an infringement of trademark doesn't need necessarily to reproduce the entire signs used in a registration of that trademark. Only a use of some of the registered signs is enough provided that this use led or can lead to a confusion between goods protected under the registered trademark and goods bearing signs used without authorization of a trademark holder.

It can happen for the right holder not to have access to the infringing goods to get samples to use in the hearing as evidence for trademark infringement. However, the IP Law provides for solutions that need to be implemented as such. For goods suspended from release into free circulation at the customs office, the IP Law provides for a right of inspection of goods by the right holder to have samples to substantiate the claim, among others.[67] For goods that are on the market, the same law provides for conservative measures to be granted by a competent court.[68] Despite this, the practice shows that these remedies are not put into practice as it should be. In the WILD OLIVE case involving MADAKA in which the

[66] CCLAP, 'Law No 22/2018 of 29/04/2018 Relating to the Civil, Commercial, Labour and Administrative Procedure', 2018., art 9.

[67] Rwandan IP Law., art 278.

[68] Ibid, art 255.

claimant requested provisional measures for conservation of evidence on goods that were in the warehouses of the defendant, both the Commercial Court and the Commercial High Court didn't grant the sought provisional measures aiming at having evidence in an ultimate case in substance referring to the common procedure whereby it is up to the claimant to provide evidence of the case.[69] However, a conservation of evidence is a common remedy provided not only by the Rwandan law, but also a remedy recommended by TRIPS Agreement[70], and which is available in different jurisdictions.[71],[72]

An overall review of cases of trademark infringement decided by Rwandan courts as seen below (see 3.3. infra) shows a hard task to prove infringement in cases of similar trademark where infringing goods have been given a distant name with regard to the name of the trademark compared to other cases of similar trademark or cases of identical mark. In the FRANCAFLA case, the court decision in favor of the right holder at the first level was confirmed at the level of appeal. Moreover, it was easy to prove infringement in cases of similar mark where infringing goods consisted of the same construction in terms of syllables and the number of letter. Judgments rendered by the Commercial Court in the KANFA and the KANTO cases that were in favor of the right holder were confirmed by the Commercial High Court. However, concerning cases of similar trademark involving a distant name, courts were hesitant in deciding in favor of a right holder in the beginning. WILD OLIVE cases were decided in favor of the defendant thrice in the Commercial Court[73] and once in the Commercial High Court.[74] A change of that position was in 2017 and it took place for the first time in the case R.com 000236/2017/CHC/HCC involving DRESOCECO at the Commercial High Court[75]. A decision of the Commercial High Court in that case was later confirmed by the Court of Appeal and it helped in ultimate cases that include the WILD OLIVE case involving Rex Gloria at the level of appeal and

[69] R.com 00315/2018/TC/NYGE, R.com A 00160/2018/CHC/HCC.

[70] TRIPS Agreement., art 50.

[71] Anton Piller orders in UK (Ref.' *Chappell* v. *United Kingdom* [1990] 12 EHRR 1, cited in: Harms., p 125.

[72] The role of a seizure judge, a court expert in this field in Belgium. Ref: ICC, 'International Guide to IP Rights Enforcement', First, 2006., p 16.

[73] R.com 1105/15/TC/Nyge, R.com 000385/2017/TC/Nyge and R.com 02124/2018/TC.

[74] R.com A 0194/2016/CHC/HCC.

[75] The claimant had strengthened its team of counsels and the court involved expertise from RDB on the issue of similarity between products with name WILD OLIVE and products protected under trademark KANTA. The side of the claimant provided a clear understanding of the provision of art 133 (4°) and presented a case law and doctrinal texts from other jurisdictions that are in favor of the right holder (Claimant submissions). As to RDB expertise, this explained that a dominant test of similarity shows that WILD OLIVE signs are similar to a higher degree to those of KANTA (RDB expert witness report: see 3.3.).

the SMART SHINE case (see 3.3. infra). Evidence in the substance of the case for trademark infringement is the same whether for goods that are on the market and for imported goods halted at the customs and suspended from release into free circulation.

3. BORDER MEASURES AGAINST TRADEMARK INFRINGEMENT THROUGH THE IMPORTATION OF GOODS

Customs authorities play an important role in the protection of trademark through the importation of goods. They can prevent infringing goods to enter the market where trademark is protected. An involvement of customs authorities in a prevention of infringing goods to enter the market implies a close collaboration with a trademark holder and at the same time a respect of the rights of the importer. This applies both in jurisdictions where the customs authorities involve alone in a border protection of trademark and in jurisdictions where border protection measures adopted by customs authorities are supplemented by the role of the court. In jurisdictions where courts intervene to supplement the customs authorities, customs authorities take only provisional measures that may consist of a suspension of release of goods into free circulation. The court takes also provisional measures that may consist of an extension of suspension of release of goods. They take also final measures on whether imported goods consist of infringing goods or not.

There are challenges in the whole process of border protection of trademark with regard to the court intervention. This section will highlight those challenges through a systematic discussion that consists of the suspension of release of goods into free circulation (3.1.), an extension of the suspension of release of goods (3.2.), and a case in substance on trademark infringement through the importation of goods (3.3.).

3.1. A SUSPENSION OF RELEASE OF GOODS INTO FREE CIRCULATION

3.1.1. A suspension decided upon request by the right holder

TRIPS Agreement recommends member states to provide for a suspension of release into free circulation of imported goods, whenever those goods are suspected to be infringing with regard to an existing registered trademark.[76] In Rwanda, the IP Law authorizes the owner of IPRs to proceed for a request for

[76] TRIPS Agreement., art 51.

suspension of release into free circulation of imported goods whenever those goods are suspected to be infringing the right owner's registered trademark.[77] A suspension is decided upon a payment of a security of 20% of the value of goods by the right holder.[78] A big issue for the right holder is to have information on an arrival or imminent arrival to customs of imported infringing goods in order to proceed for a request of suspension of release of those goods. There are situations where the right holder gets information on an importation of infringing goods when clearance formalities have ended, and it happens that the rights holder gets an information on an importation of infringing goods at their sight when they are already on the mark. Trademark owners proceed with a request for suspension of release of goods into free circulation whenever there are aware of imminent infringement of their rights and through the cooperation with the customs services that can take an initiative for a suspension of release of infringing goods.

3.1.2. A suspension decided upon the customs authority initiative

A suspension of release into free circulation of goods suspected to infringe a registered trademark can be decided by the Customs Authority on its initiative. An initiative to suspend suspected goods from release into free circulation is recommended by TRIPS Agreement[79]. For an informed decision to initiate a suspension of release of goods into free circulation, TRIPS Agreement provides for possibility of the competent authority to seeks at any time from the right holder any information that may assist them to exercise these powers. According to TRIPS Agreement, customs can suspend a release into free circulation of suspect infringing goods[80] in the situation where the right holder has previously provided in advance "a sufficiently detailed description of the goods to make them readily recognizable by the Customs Authority"[81]. The Rwandan IP law incorporated this provision and provides for a submission to the Customs Authority of all information that can help this institution to exercise its prerogatives as provided by the same law.[82]

[77] Rwandan IP Law., art 273.

[78] Ibid, art 276.

[79] TRIPS Agreement., art 58.

[80] Ibid, art 51, 52.

[81] Ibid, art 52.

[82] Rwandan IP Law., art 275.

An initiative by the customs to suspend a release of goods into free circulation in the EU relates to a close cooperation between the customs authorities and IP right holders. In EU, customs authorities can take initiative for suspension of suspected infringing goods and proceed for identification of the right holder for the later to fulfil the formalities within 4 days for a maintenance of the suspension.[83],[84] A similar procedure applies in New Zealand[85]. In this jurisdiction, a law provides for a written notice and documents accompanying the notice concerning a border protection of IPRs a right holder submits to the customs services, as well as the time frame the notice will last[86]. Moreover, it provides for a publication of accepted notices on the website of the customs services to alert potential infringers that whenever they involve in an importation of infringing goods, these will be suspended from release into free circulation[87]. This way of enforcement of IPRs by means of border measures in New Zealand whereby accepted notices from the right holder for a border protection of their rights is made public enables importers to have a prior information of goods forbidden from importation in the context of avoidance of IPRs infringement. That publication protects IP right holders at the border, it can help importers with good faith not to involve in illegal activities and it saves time for the customs services in terms of involvement in the suspension of release of goods into free circulation. A suspension of goods from release into free circulation last for a limited period of time, and this period can be extended.

3.2. EXTENSION OF THE SUSPENSION OF RELEASE INTO FREE CIRCULATION

3.2.1. Extension decided by the customs services

In jurisdictions that provide for a sole involvement of the customs services in the whole process of border protection of IPRs, it is upon the customs services to involve not only in a suspension of release of goods into circulation but also in an extension of that release. Concerning an extension of suspension of the release into free circulation in particular, this is decided by customs authorities in situations that include a failure by the right holder to start proceedings leading

[83] European Commission, *Report on the EU Customs Enforcement of Intellectual Property Rights*, 2019., p 8.

[84] ICC., Ibid, p 13, 53.

[85] Jessica C. Lai, 'Border Enforcement of Intellectual Property Rights: A Look at New Zealand', *IIC International Review of Intellectual Property and Competition Law*, 50.7 (2019), 792–822 ‹https://doi.org/10.1007/s40319-019-00842-9›., p 798.

[86] Ibid, p 796.

[87] Ibid, p 797

to the decision of the case in substance within a reasonable time period[88] or a need of additional time for inspection of goods by the customs.[89]

Moreover, as per the ICC International Guide to IP Rights Enforcement dated 2006, there are some clear solutions in these jurisdictions on an issue of how long a suspension of goods from release into free circulation will last when a trademark infringement case is filed within the competent court. In Austria, a right holder has up to twenty working days to file a civil court case in substance or to initiate a criminal case for trademark infringement and to inform the customs services. In this situation, the customs services still hold the suspected infringing goods.[90] In Finland, when a right holder introduces a civil suit or initiates a criminal case and provides evidence to the customs, these hold a suspension of release of goods into free circulation until the case is decided by the competent court.[91] Equally in in India, the decided interim measures are still maintained until the case is decided in substance.[92] These examples can inspire in terms of the length of extension of suspension of release of goods in jurisdictions in which the extension of suspension of release of goods is decided by courts.

3.2.2. Involvement of the competent court and the length of extension

In Rwanda, the role of the court in the context of border protection of IPRs starts with an extension of suspension of release of goods into free circulation. Concerning a border protection of trademarks in particular, the IP Law provides that "If considered necessary, the period of suspension [.....] shall be extended by the competent court respectively for a new period not exceeding twenty (20) working days [.....]"[93]. Therefore, when the court is satisfied that a suspension of release into free circulation can be extended, it extends the suspension for a period of time provided by the law. The practice shows that the right holder requests for 20 working days and when the court finds the request justified, it grants an extension for the requested period of 20 working days[94]. An involvement

[88] TRIPS Agreement., art 50, para 6, art 55.

[89] Lai., Ibid, p 797.

[90] ICC., Ibid, p 14.

[91] Ibid, p 59.

[92] Ibid, p 74.

[93] Rwandan IP Law., art 277, para 4.

[94] R.com 00023/2017/CHC/HCC, para 7.

of courts early at the level of extension of release of goods as provided by the Rwandan law is an option that falls within the provision of TRIPS Agreement. However, there is an issue of how many times a court can extend the suspension of release of goods into free circulation.

There is an issue of what happens after expiry of the period of extension of suspension of release of goods decided by the competent court. An involvement of the court in the case in substance concerning trademark infringement may start later following the court agenda that covers all cases the court received. The IP Law provides that at the expiry of 20 working days or 30 calendar days of extension decided by the Customs Authority, the court may extend the suspension for an additional period of time of 20 working days or 30 calendar days.[95] However, it doesn't provide for how many times the court can extend an extension of release into free circulation of the suspected goods. Art 277 para 4 of the Rwandan IP Law is silent on what follows at the expiry of an extension of suspension of release of goods decided by the competent court. It doesn't provide whether goods should be released or not. This silence of the law led the right holder of trademark KANTA to always apply for additional 20 working days of extension of suspension of release of goods into free circulation each time after expiry of 20 working days even for cases that had started to be heard in substance. From 2017, this practice started changing with the decision of the Commercial High Court in the WILD OLIVE summary proceeding case involving DRESOCECO[96] and upon the understanding by the parties.[97] In the WILD OLIVE summary proceeding case involving DRESOCECO, the court observed that the right holder had always requested for an extension of the period of suspension of release of goods into free circulation for 20 working days since the case in substance has been filed within the Commercial Court. Requests for extension of suspension of release into free circulation have been addressed to the Commercial Court when the case in substance was still in that court, and appeals against decisions extending the suspension were applied for to the Commercial High Court. After the case was appealed in substance to the Commercial High Court, the same requests of extension of suspension of release into free circulation were addressed to the Commercial High Court, and there

[95] Rwandan IP Law., art 277, para 4.

[96] R.com 00023/2017/CHC/HCC.

[97] In a summary proceeding of the SMART SHINE case at the Commercial High Court, parties told the court that they convened on a permanent suspension of release into free circulation for the period covering both a period of an amicable solution they had just started and a period of an ultimate return to court in the situation of failure of amicable solution, and that this was a ground for a withdrawal of the case. This was approved by Commercial High Court (R.com A 00614/2018/HCC).

is an appeal against the decision of the Commercial High Court extending the suspension of release into free circulation that was appealed to the Supreme Court.[98]

In the hearing of the case R.com 0023/2017/CHC/HCC where the right holder was also requesting for an additional extension of suspension of release into free circulation of goods, the Commercial High Court observed that the same parties had always come to court each 20 working days whereby the claimant requested always for the same thing and whereby the defendant always presented the same defense and that the court had granted the same remedy. The claimant requested for extension of suspension of release into free circulation for 20 working days, and the defendant opposed the extension. Moreover, the court had always taken the same decision and granted the requested extension. The Commercial High Court requested the parties point of view on a possibility of extension of the suspension not just for 20 working days but until the case is decided in substance in the situation the court finds again the requested extension of suspension to be justified. While the right holder supported an extension until the case is decided in substance, the defendant opposed the extension for the proposed time period. The Commercial High Court decided that the requested extension goes until the case is decided in substance on whether the suspended imported goods constitute an infringement of trademark KANTA or not. According to the Court, this was to ease other activities of the Court instead of a constant repetition of receiving the same parties repeating the same things whereby the court took the same decision after each 20 working days.[99] This decision was not appealed by any of the parties. Moreover, after the case was decided in substance by the Commercial High Court, no additional extensions of suspension of release of the goods into free circulation was raised until the case was definitely decided in substance by the Court of Appeal. In terms of the time management, a decision of the Commercial High Court to extend the suspension of release into free circulation of goods suspected to be infringing was also in the interests not only of the right holder but also those of the importer that were both obliged to come to court each 20 working days repeating the same thing and having the same remedy. An extension of the suspension of release of goods into free circulation aims at a fair trial in the substance of the case especially as not only it ensures a conservation of evidence on trademark infringement, but also it enables the court to take any remedy including a destruction of the goods in the situation where these are found to be infringing in the substance of the case.

[98] See: 4.1.2.(a) infra.

[99] R.com 00023/2017/CHC/HCC.

3.3. A CASE IN SUBSTANCE AGAINST TRADEMARK INFRINGEMENT THROUGH THE IMPORTATION OF GOODS

Rwandan courts had the opportunity to decide in substance cases of infringement of trademark that arose out of importation of goods. These consisted of cases of trademark infringement in terms of identical marks, similar mark and unfair competition. Cases of trademark infringement in terms of identical marks that arose out of importation of goods include the FRANCAFLA case.[100] This case consisted of infringing black hair dye products that copied every sign appearing on the packaging of goods protected under trademark KANTA including the name "KANTA" itself. In this case, the Commercial court found goods imported by the defendant to be infringing, and the judgement was confirmed by the Commercial High Court.[101] A trademark infringement in terms of identical mark requires paying much attention to be able to detect an infringement, what is not always the case in the situation of infringement that consist of similarity between a registered trademark and signs used on the packaging of infringing goods.

Cases of trademark infringement in terms of similarity of the sign used on infringing goods compared to the registered trademark include cases in which a given name to the infringing goods had the same construction in terms of syllables and the number of letters and that differ from the name of the registered trademark only in terms of one letter. Cases brought to courts with a change of just one letter consisted of infringing goods with a name KANFA hair dye[102] and infringing goods with a name KANTO.[103] In the KANFA case, the infringer had replaced the letter T by F (KANTA › KANFA) in the name given to the product, and in the KANTO case, the infringer had replaced the last letter A with the letter O (KANTA › KANTO). In addition to the changing of only one letter in the name given to the infringing goods compared to the name of goods protected under trademark KANTA, an infringement in these cases lies in a copying of all other signs appearing on the packaging of goods protected under trademark KANTA. In all of these cases, the Commercial Court found an infringement of a registered trademark KANTA, and judgments were confirmed at the level of appeal. In the

[100] R.com 00148/TC/NYGE.

[101] R.com A 0215/14/HCC.

[102] Joint cases R.com 0020/14/TC/NYGE and R.com 0074/14/TC/NYGE.

[103] R.com 00149/2017/TC/NYGE.

reasoning of the Commercial Court, a changing of only one letter in the name of a registered trademark could lead to a confusion among consumers who could buy infringing goods thinking that there are acquiring goods protected under a registered trademark.[104] Cases of trademark infringement in terms of similarity decided by Rwandan courts were not only those relating to a same construction of syllables with a change of just one letter in the name given to the infringing goods.

There are cases of infringement of trademark in terms of similarity between the sign and the registered trademark that had a distant name given to the product compared to the name of the trademark. Those decided by Rwanda courts that arose out of importation of infringing goods consist of cases in which infringing goods were given a name WILD OLIVE. There is also the SMART SHINE case. In the WILD OLIVE case involving DRESOCECO, as it is in other WILD OLIVE cases where a right holder of trademark KANTA litigated with different importers, a debate referred not only to a distant name compared to the name "KANTA", but also to the logo. Concerning a distant name, the right holder demonstrated that a trademark doesn't consist only of a name given to the product, but to everything including the name and accompanying signs that were registered together as trademark at the IP office. As to the logo, and whereas the logo for trademark KANTA consists of a balance and that the logo for WILD OLIVE consisted of two olive fruits, the right holder demonstrated that an imitation of trademark KANTA for the purpose of confusion of the right holder's clients consisted of the way the two olive fruits were arranged and where they were put on the packaging of the products. The two olive fruits in the logo of WILD OLIVE appeared confusingly the same as for the balance for KANTA. Moreover, the place of the logo was the same for both the packaging of hair dye products protected under trademark KANTA and for infringing hair dye products with a given name WILD OLIVE. The two olive fruits for WILD OLIVE were in the upper middle of the carton as it is for the balance for KANTA. In the WILD OLIVE case involving

DRESOCECO in particular, infringement was argued upon, in addition, by means of expertise in terms of a dominant text of similarity. In its report to the Commercial High Court, RDB showed that a test of similarity for WILD OLIVE

[104] Ibid, para 16.

in terms of colours, drawings and other signs with those that help to distinguish trademark KANTA for black hair dye products was very high.[105] The Commercial High Court took a decision in favor of the right holder MININTCO[106], and the decision of the Commercial High Court was confirmed by the Court of Appeal.[107] A similar court decision in the WILD OLIVE case was taken later by the Commercial High Court on appeal in the case involving Rex Gloria. In the same context, a court decision against an infringement based on similarity that involved distant names was taken in the SMART SHINE case by the Commercial Court and it was confirmed by the Commercial High Court.[108] This Rwandan jurisprudence on trademarks infringement in terms of similarity between a sign and the trademark shows that when examining a likelihood of confusion in trademark infringement cases, courts consider the general appearance of the trademarks in their entirety and not simply the minor differences. In all of these above mentioned cases, the right holder joined an unfair competition claim to the trademark infringement claim.

In cases of trademark infringement, Rwandan courts referred not only to a similarity between a registered trademark and a signs non-registered as trademark but also to unfair competition practices. This took place in the SMART SHINE case in particular. In this case, the Commercial Court referred to article 177 of the IP Law and found out that the fact for the defendant to proceed for importation of goods with confusingly similar signs as those for goods protected under a registered trademark KANTA which was not a first importation of the kind, had no other purpose than the misleading of consumers of those products.[109] A defense for most of businesses that engage in unfair competition practices is that the trademark may be creating monopolies. However, as per the Glaxo group Ltd v. Dowelhurst Ltd [2000] EWHC Ch 134 [UK], "trademark rights don't create monopolies in the true sense. Although trademarks give rise to exclusive rights as an indication of the source and quality of goods, it is only when relating to

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[105] RDB, 'Expert Witness Report'.

[106] R.com A 00236/2017/CHC/HCC, interpreted by interpreted by RS/INTERT/R.com 00008/2017/CHC/HCC.

[107] R.com AA 00086/2018/CA.

[108] R.com A 00450/2019/HCC.

[109] Joint cases R.com 01607, R.com 01751, and R.com 01862/2018/TC, para 16, 19, 24 corrected by RS/RECT/R.com 00023/2019/TC.

goods that they have life or value".[110] The issue of monopoly as a defense in cases of trademark infringement was raised in some cases decided by Rwandan courts. In the WILD OLIVE case involving DRESOCECO, the court of Appeal rejected allegations from defense that trademark KANTA would be creating a monopoly upon the appellant demonstration that it has no problems with other traders on the Rwandan market who also involve in a trade of hair dye products using their own marks that have no relationship in terms of confusion with a registered trademark KANTA.[111] A trademark infringement that constitutes in addition a case of unfair competition should be sorted out by court remedies aligned with the IP system.

4. REMEDIES UPON DETERMINATION OF TRADEMARK INFRINGEMENT

Remedies existing upon trademark infringement include remedies existing at the level of customs procedures and there are remedies applied by courts when they find goods to be infringing. Remedies existing at the level of customs procedures include customs simplified procedures that exist in jurisdictions that involve only customs authorities in a border protection of trademark. Customs simplified procedures enable customs authorities to put an end to a situation of trademark infringement and this may involve a destruction of infringing goods upon the customs services decision. Remedies existing at the level of customs procedures include, in addition, a possibility of release of goods before a hearing of the case in substance or a maintenance of the suspension of release of goods. These remedies exist both in jurisdictions that involve only the customs authorities in a border protection of trademark and jurisdictions that involve in additions courts in that process.

Concerning remedies applied after courts find goods to be infringing, these remedies exist mainly in jurisdictions that involve courts to supplement the role of customs authorities. A possibility of both a release of goods or a maintenance of goods in suspension before a hearing of the case in substance requires a balance between rights of the importer and those of the right holder, and remedies applied by courts after they find goods to be infringing need to take into account the seriousness of the case.

This section will systematically analyze all the above mentioned remedies and related challenges starting with remedies against trademark infringement at

[110] Harms., Ibid, p 22.

[111] R.com AA 00086/2018/CA, para 29, 38, 56.

the level of customs procedures (4.1.), and afterwards, remedies existing upon determination of trademark infringement in the substance of the case (4.2.).

4.1. REMEDIES AT THE LEVEL OF CUSTOMS PROCEDURES

4.1.1. Customs simplified procedures

Customs simplified procedures in the context of enforcement of IPRs enable the customs services to take measures that put an end to the infringement without delays or unnecessary costs. According to TRIPS agreement, procedures concerning the enforcement of IPRs should not be unnecessarily complicated or costly, or entail unreasonable time-limit or unwarranted delays.[112] With simplified procedures, customs services can proceed with a destruction of goods after their suspension from release into free circulation "without the need for further intervention or participation by the holder of the rights".[113] This is possible whenever those goods are prohibited from importation, and in particular, whenever the goods amount in an infringement of trademark in jurisdictions that provide for the sole involvement of customs authorities in the whole process of border protection of IPRs[114] In the EU, the customs authorities have powers in terms of a release or a suspension of release of goods into free circulation. They have powers to extend the suspension of release of goods, the possibility for destruction of goods and a disposal of goods out of channels of commerce, all without any court intervention.[115],[116],[117]

The Rwandan IP law doesn't provide for simplified procedures for IPRs enforcement at the level of the customs. It involves courts in border measures for the protection of IPRs from the stage of extension of suspension of release of goods decided by the Customs Authority. However, in the context of EAC integration, the Commissioner for Customs has powers to take any measures

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[112] TRIPS Agreement., art 41.2.

[113] Alan Towersey, 'Simplified Procedures for Customs Intellectual Property Rights Enforcement', 11.2 (2011), 49–60., p 51.

[114] TRIPS Agreement., art 59.

[115] The European Parliament and The Council of the European Union, 'Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003', 608, 2013, 15–34., art 23, 24, 15, 26.

[116] See also the CJEU judgment of 1 Dec. 2011, in Joined Cases C-446/09 and C-495/09, *Koninklijke Philips Electronics NV v. Lucheng Meijing Industrial Company Ltd* and *Nokia Corporation v. Her Majesty's Commissioners of Revenue and Customs*, cited in: Laurent Ruessmann and Francesca Stefania Condello, 'The CJEU Judgment in Nokia and Philips Clarifies the Intellectual Property Rights', *Global Trade and Customs Journal*, 7.4 (2009), 183–190.

[117] European Commission., Ibid., p 8.

that include a destruction of imported prohibited goods.[118] Rwanda is a Member of EAC since July 2007, and according to the hierarchy of norms that provides for precedence of conventions to which Rwanda is party over ordinary laws[119], the EAC Customs Management Act as amended to date takes precedence to the Rwandan IP Law. In this respect, a use of simplified procedures for enforcement of IPRs at the level of customs is legal in Rwanda. A non-application of customs simplified procedures in the context of border protection of trademark could be interpreted to some extent as a means of weighing the right of the importer and that of a trademark holder.

4.1.2. Balancing between rights of the trademark holder and rights of the importer before a court determination on trademark infringement

a. A release of goods upon no-compliance with formalities to involve the court in the case

Suspended goods can be released into free circulation by the Customs Authority out of determination whether they are infringing or not. This is possible when a right holder doesn't file a court case for extension of suspension of release of goods and for determination of trademark infringement in the substance of the case within a reasonable time frame. This may take place if after 10 working days of the suspension, the Customs Authorities are not informed either of the court proceedings for the case in substance concerning infringing of trademark, or they are not informed of provisional measures prolonging the suspension of the release into free circulation.[120] A release of goods by a lack of filing a court case by a right holder is a way of release of goods which doesn't cost anything to the importer. However, an importer can pay a security of 10% of the value of goods and have them released into free circulation. A payment of 10% of the value of goods and have them released into free circulation doesn't put an end to a court process for determination in substance whether goods are infringing or not. In this respect, a payment of 10% of the value of goods and have them released into free circulation can prevent a right holder a chance to discuss a remedy of a destruction of goods in the situation where the goods are later found to be infringing by the court deciding the case in substance (4.2.2.). The same is the situation when goods are

[118] 'East African Community Customs Management Act, 2004 (revised edition 2018)', 1, 2018., section 16 (3); second schedule, 1.

[119] 'The Constitution of the Republic of Rwanda of 2003 reevised in 2015', *Official Gazette*, March, 2013, 1–99., art 95.

[120] Rwandan IP Law., art 277, para 3.

released without a payment of that security of 10% by the importer.

There are situations in which goods were released before a determination on trademark infringement out of the two conditions of non-filing of a court case by a right holder and a payment of 10% by the importer to see goods released into free circulation. In a summary proceeding process initiated by Rex Gloria before the Commercial High Court, this court decided a release of goods whereas the case in substance aiming at a determination whether those goods were infringing or not was still pending before the same court. Among the motivations of the court, the right holder could claim damages if the goods were later found to be infringing during a court case in substance.[121] However, the Supreme Court had decided in favor of maintaining a suspension of release into free circulation of goods before a determination of the case in substance on trademark infringement. In an appeal against a previous summary proceeding process where the Commercial High Court had equally decided a release of goods before a hearing of the case in substance[122], the Supreme Court had stressed that a release into free circulation of goods suspected to be infringing a registered trademark prevents a discussion on the destruction of those goods in the substance of the case. For the Supreme Court, a suspension of release into free circulation of goods suspected to infringe a registered trademark is to protect the reputation of goods of the right holder especially as suspected goods can ultimately be found to be infringing in the court case in substance[123]. This decision of the Supreme Court is aligned with the rationale for payment of a security by the right holder to have the goods suspended from release into free circulation.

The Rwandan IP law provides for a deposit of 20% of the value of goods by a right holder to have the suspected goods suspended from release into free circulation. This security is to serve, among others, in a payment of damages to the importer in the situation where after a suspension of release of the goods, these are later found not to be infringing.[124] A percentage of 20% can appear to be a huge amount if the imported goods are of a great value and given the period of just 3 days for their payment, especially if the rights holder is still in the beginning of the business. However, worries that this percentage can be huge and be a burden for certain right holders should be balanced with possible worries that this percentage can be little to compensate an importer. Goods suspended from release into

[121] R com 00003/2019/HCC', para 7, 12.

[122] R.com A 0017/2017/CHC/HCC.

[123] R.com A 00004/2017/SC, para 22, 23, 24.

[124] Rwandan IP Law., art 276.

free circulation can take long in customs warehouses before a final decision on whether they are infringing or not, and at the end of the process they can be found not to be infringing. In jurisdictions in which customs authorities involve in the whole process of border protection of trademark, these two opposing kind of worries are likely not to arise. In those jurisdictions, customs authorities use a short period to take a final decision compared to the period it takes to have a final court decision in the substance of the case on trademark infringement (see 4.1.1). A good balance would come from a decision a right holder can take to stop or to go on with the case after a visit of the suspended goods.

b. A right to visit the suspended goods by the right holder as a remedy

There is a need of balancing between a release into free circulation of imported goods and rights of the trademark owner to maintain a suspension of goods thinking of the situation in which the goods are later found to be infringing in a court case in substance. A payment of 10% of the value of goods by the importer and have the goods released into free circulation can prevent an enforcement of some remedies provided for infringing goods in the situation where the court finds goods to be infringing during a court case in substance. When goods are released, they immediately enter the channels of commerce and a court remedy directing from their removal from the channels of commerce or a remedy directing for their destruction would have no effect[125]. However, a provided payment of 20% of the value of goods by the right holder and have the goods suspended from release into free circulation can serve both the right holder and the importer. From the perspective of the right holder, a payment of 20% is to have the goods suspended from release into free circulation and an ultimate enforcement of any court remedies protecting the existing trademark in the situation where the court finds the goods to be infringing in a court case in substance. From the perspective of the importer, 20% of the value of imported goods can be a basis for payment of damages by the claimant in case the suspended goods are proved not to be infringing.

It is possible that a security of 20% be insufficient to compensate the loss that can arise, if after in the case in substance, it appears that goods were not infringing, and especially if at the end of a possible long process, goods have reached their expiry date or cost for their maintenance in the customs warehouses have highly increased. The fact that it can be burdensome to the claimant to indemnify the importer in the situation where the goods come to the expiry date or in the

[125] R.com A 00004/2017/SC, para 22.

situation where the decision in substance of the case comes after a long period of time and that goods are found not to be infringing would make a right holder to think twice before requesting a suspension of release into free circulation of imported goods or an extension of the decided suspension. A right holder has possibilities to limit possible damages he/she can be condemned to.

The Rwandan IP law authorizes the right holder to inspect the goods suspended from release into free circulation.[126] At the time of request of suspension, the right holder just suspects the goods to be infringing. With a right to inspect those goods, it is an opportunity for the right holder to check whether the imported goods constitute an infringement to his/her trademark rights or not, before the period of suspension granted by the Customs Authority expires. Therefore, if it appears to the right holder that the suspected goods are not infringing, the right holder could request the Customs Authority to release them. The right holder can also desist from requesting the competent court to proceed for extension of the suspension. In this situation, a deposit of 20% can be used for the compensation of the importer. Therefore, the right holder could request for extension of suspension of release into free circulation whenever there is high probability that the court will declare goods to be infringing. A balance between a paid 20% by a right holder for a suspension of goods and a payment of 10% of their value by the importer for a release of the goods shows that a payment of 20% and have the goods suspended from release into free circulation is likely to provide a solution which can safeguard the rights of both a right holder and those of the importer. This solution is in conformity with the Intellectual Property System. A good balance between the rights of the importer and those of the trademark holder is likely to lead to remedies aligned with the IP system after the court finds goods to be infringing in the substance of the case.

4.2. REMEDIES UPON DETERMINATION OF INFRINGEMENT IN THE SUBSTANCE OF THE CASE

4.2.1. Injunctions

When a court finds goods to be infringing in an assessment of the case in substance, it can provide injunctions to stop the undergoing infringement and to protect from an ultimate infringement. According to TRIPS Agreement, an effective action against any act of infringement of IPRs includes expeditious remedies to prevent infringements and remedies that amount in deterrence from

[126] Rwandan IP Law., art 278.

further infringement.[127] An injunction directs a party to desist from infringing and prevents the entry into the channels of commerce in their jurisdictions of imported goods that involve the infringement of IP right.[128] When infringement of IPRs is established in a court case in substance, injunctions are discretional to courts in some jurisdictions. However, this should not be a basis for denial of adequate remedies against trademark infringement.[129] Injunctions in the context of enforcement of IPRs should refer to a previous knowledge of the infringer that the activity he/she undertakes consists of infringement of IPRs.[130]

Rwandan courts have provided injunctions to the defendants to desist from ultimate importation of infringing goods. However, an enforcement of this measure by courts has not stopped such ultimate importation, what may lead to question the effectiveness of this kind of injunction. Besides an order to the defendant to desist from ultimate importation of infringing goods, other remedies for trademark infringement in general include a destruction of infringing goods and a disposal out of the channels of commerce of infringing goods.

4.2.2. A destruction of infringing goods

A destruction of infringing goods is a measure available under TRIPS Agreement in the situation of infringement of trademark. A destruction of infringing goods is possible in the context of simplified procedures in jurisdictions that apply the simplified procedures, and it is a measure that can be decided by courts after they find goods to be infringing in the court case in substance. TRIPS Agreement provides for a destruction of infringing goods as a means for disposal of infringing goods outside the channels of commerce. Moreover, it considers a destruction of infringing goods as a primary remedy that can provide deterrence against infringement of trademark unless in the situation where this remedy would be contrary to constitutional requirements.[131] In this context, a destruction of infringing goods should be a preferred remedy compared to other remaining remedies in principle in the situation where the court finds goods to be infringing. TRIPS Agreement recommends a destruction of infringing goods upon the seriousness of the case and taking into account interests of third parties.[132] A

[127] TRIPS Agreement., art 41.1.

[128] Ibid.

[129] Harms., Ibid, p 127.

[130] Ibid, p 122.

[131] TRIPS Agreement., art 46.

[132] Ibid.

seriousness of the case may be the situation in which a trademark infringement consists at the same time in counterfeiting. According to TRIPS Agreement, the meaning of "counterfeits trademark goods" covers:

> "any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation".[133]

According to L.T.C Harms, counterfeiting is a crime[134] committed for commercial purposes[135], and counterfeiting goes beyond a simple trademark infringement.[136]

In Rwanda, a destruction of infringing goods is a measures that can be decided by courts in their discretion after they found goods to be infringing in the case in substance,[137] and a seriousness of the case[138] can be a good basis for a court decision granting or refusing a destruction of infringing goods when this remedy is sought by the right holder. A seriousness of the case can be a situation of re-infringing. In the SMART SHINE case, the court found out that it was not the first time that the defendant involved in an importation of black hair dye products that constitute an infringement to a registered trademark KANTA. The Commercial Court pointed out that in the previous KANTO case, the court had not granted a sought destruction of goods as the defendant convinced the court that it didn't know that the involved importation of black hair dye products with similar sign to an existing trademark consisted of an infringement of IPRs. A new importation of black hair dye products with a given name SMART SHINE led the court not to hesitate in deciding a destruction of infringing goods.[139]

There are cases in which when the right holder requested for a destruction of infringing goods, the defendants objected saying that infringing goods cannot be destroyed as long as they are not proven to be dangerous to consumers. This was the situation in the WILD OLIVE case involving DRESOCECO mentioned

[133] TRIPS Agreement., art 51, Footnote 14 (a).

[134] Harms, L. T. C., *A Casebook on the Enforcement of Intellectual Property Rights, 2nd edition, 2008*, p392 (18.1).

[135] Ibid, p 397 (18.11).

[136] Ibid, p 392 (18.2); p398 (18.12).

[137] Rwandan IP Law., art 284.

[138] TRIPS Agreement., art 46.

[139] Joint cases Rcom 01607/2018/TC, Rcom 01751/2018/TC and R.com 01862/2018/TC', para 16, 19, 24 corrected by RS/RECT/R.com 00023/2019/TC.

above. Even though nothing shows that this could have influenced court decisions refusing a destruction of infringing goods, it has to be recalled that a trademark case as well as any other intellectual property court case aims at private rights of the right holder. It differs from a consumer protection case that aims at the protection of interests of consumers or the general public. As mentioned above, the purpose for a destruction of infringing goods is to provide an effective deterrence to the infringer.[140] A consumer protection case in terms of industrial products refers to sub-standards whereas for a trademark case, infringing goods or counterfeits can consist of sub-standards or not. Sub-standard goods may arise out of a manufacturing process which is not in conformity with the standards set by a competent authority. Moreover, they may refer to a non-proper use of the patent information in the manufacturing of goods. However, as the patent information is easily accessible for infringers not only upon its disclose at the time of application for patent or upon its availability into the public domain for expired patents, infringers of trademark can manufacture goods which are up to the standards but which still are infringing or counterfeits for the simple fact not to belong to the true channel of distribution of goods set by the right holder.[141] A destruction of infringing goods prevents those goods to enter the market, and as per TRIPS Agreement, this is one of the means for a disposal of infringing goods out of the channels of commerce.

4.2.3. A disposal out of the channels of commerce of infringing goods

A court may decide a disposal of infringing goods outside the channels of commerce as a remedy for a case in substance on trademark infringement. A disposal out of the channels of commerce of infringing goods in the context of trademark enforcement is recommended by TRIPS Agreement in the same legal provision as for the destruction of infringing goods.[142] TRIPS Agreement recommends that in deciding an adequate means for disposal of infringing goods out of the channels of commerce, which should be without any compensation to the right holder, and conditions should be a seriousness of the case and interests of third parties.[143] The Rwandan law that provides for a disposal of infringing goods out of the channels of commerce didn't provide for details on how this

[140]. Supra at note 132, 133.

[141] TRIPS Agreement., art 51.

[142] Ibid, art 46.

[143] Ibid.

measure should be operated. It just provides for a discretion of the court.[144] However, in the light of other jurisdictions, a disposal of infringing goods out of the channels of commerce can be operated via other lawful means. As mentioned above, a destruction of infringing goods is one among these lawful means. Moreover, a consideration of interests of third parties which is recommended by TRIPS Agreement may consist of a donation of goods which are not sub standards to charities[145]. It can consist of a recycling of the goods for which a recycling is possible provided that in the adopted measures, the goods are disconnected from the importer, and that they can't be returned to the market.[146] Concerning donations, this is a measure that takes place in jurisdictions that include the UK whereby the customs authorities have first to consult with the right holder and after a testing with safety standards.[147] A disconnection of an importer from infringing goods by means of donation to charities can also provide relief to a right holder and this measure can be complemented by an award of damages to the right holder.

4.2.4. Damages

In cases of trademark infringement as it is for other cases of infringement of IPRs, damages can serve as compensation for the occurred suffering arising out of the infringement. According to TRIPS Agreement, damages are to be paid by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity[148]. Infringers should also pay the right holder expenses, and in appropriate cases, a recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engages in infringing activity.[149] In the context of border protection of trademark, a right holder can request and be paid damages upon a court decision at the occasion of the hearing of the case in substance. A payment of damages is a standalone legal remedy in the situation of infringement of trademark and it should not be considered as an alternative to a disposal out of the channels of commerce of infringing goods or the destruction of goods found to be infringing during the court process in the substance of the case.

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[144] Rwandan IP Law., art 284.

[145] Judith Soentgen, "Disposing of counterfeit goods: unseen challenges", in: *WIPO Magazine*, November 2012, available at https://www.wipo.int/wipo_magazine/en/2012/06/article_0007.html, April 7, 2021.

[146] Ibid.

[147] Ibid.

[148] TRIPS Agreement., art 45.1.

[149] Ibid, art 45.2.

A payment of damages instead of enforcing other legal remedies provided in counterfeits cases could lead to the applying of "different standards for those capable of paying damages as opposed to the impecunious".[150] This should not be the case especially in cases where the claimant "has established that damages cannot be an adequate remedy"[151] considering the way he/she "has invested heavily in its intellectual property".[152] According to the court in Kenya, "no award of damages [...] can compensate [....] if the infringement is not halted".[153] Therefore, not only courts should not think of awarding damages as an alternative to other remedies provided by the Intellectual Property System in situations of trademark infringement, but also, the Customs Authority or courts ceased with a request for suspension of release of goods into free circulation or an extension of that suspension should not release the suspected goods before a decision of the case in substance takes place, unless in the situation where the suspected goods are likely not to be found infringing. As seen above (4.1.2 (a)) the Commercial High Court released goods that were suspended by the Customs Authority and for which a suspension of release into free circulation was extended by the Commercial Court, and one of the motivations for a release of goods was that the right holder could be paid damages if after the court deciding the case in substance finds the goods to be infringing.[154] Here, the court didn't take into account that a payment of damages can't replace other remedies provided by the Intellectual Property System, and a destruction of infringing goods in particular.[155] A court decision to release the goods that were found after to be infringing[156] deprived the right holder a chance to discuss a destruction of goods during a hearing of the case in substance. A destruction of infringing goods and other legal provisions relating to a border protection of trademark in a whole are in conformity with the provisions of TRIPS Agreement, but challenges relating to their implementations suggests to question the way forward to that situation.

5. WAY FORWARD

Challenges relating to a whole process of border protection of trademark can

[150] Re Strategic Industries Limited Civil Case No 333 of 2010, cited in: Bracxides Shaluma Ongola, 'Efficacy of anti-counterfeit laws in Kenya,' LL.M Thesis, October, 2014., p 41.

[151] Ibid, p 41.

[152] Ibid.

[153] Ibid.

[154] R. com 00003/2019/HCC, para 7, 12.

[155] TRIPS Agreement., art 46, 59.

[156] R.com A 00004/2019/HCC.

be ranged into two. The guiding research questions set in the beginning of this analysis (1) leads to observe that there are challenges relating to the content of the IP Law and challenges relating to the enforcement of the law by competent organs. Concerning the content of the law, some provisions are not clear enough to provide the needed guidance. There are also situations where the law is silent concerning a conduct to be adopted. As to the enforcement of the law, the practice reveals a need of capacity building for a comprehensive understanding of this technical field. A recommended way forward for these challenges goes for amendment of the IP Law and administrative review (4.1), and it points out training needs and awareness raising activities in this domain (4.2).

5.1. AMENDMENT OF THE IP LAW AND ADMINISTRATIVE REVIEW

5.1.1. A number of times a court can extend a suspension of release of goods

There is a need of clarity on a number of times a court can extend a suspension of release of goods into free circulation once this suspension was decided by the Customs Authority. The IP law provides for an extension of suspension of release into free circulation of suspected goods for 20 working days or 30 calendar days. This led to a practice of filing a court case for extension of suspension of release of goods each 20 working days, what led to a repetition of the same thing each 20 days by the right holder, the importer and courts. The right holder and the importer were obliged to return to court each 20 working days repeating the same thing, and courts were obliged to hear the same thing and take the same decision each 20 days.[157] As seen above, some jurisdictions provide for a suspension of release of goods until the case is decided in substance (see 3.2.1. supra). In this respect, and referring to both the rights of a trademark holder and those of the importer as well as the role of the court to involve in other cases, the law should be amended and provide for a request of extension of suspension of goods into free circulation until the case is heard in substance and during ultimate recourse procedures until the final court decision (res judicata). This solution should contribute to enabling parties to use effectively their time in their daily business activities. This solution was premised by the decision of the Commercial High Court in the case R.com 00023/2017/CHC/HCC[158], and it should be supplemented by other administrative measures at the level of the court.

[157] R.com 00023/2017/CHC/HCC, para 5. 6, 7.

[158] Ibid, para 11.

TRIPS Agreement recommend a short time period concerning provisional measures in the context of border protection of IPRs to avoid unnecessary delays and costs. A proposal for law amendment to enable a suspension of release of goods into free circulation until the case is heard in substance and decided definitely should be supplemented by administrative measures that can enable to keep this spirit of a short time frame recommended by TRIPS Agreement. In this context, the President of the competent court should use his/her discretional powers and provide always for closer dates for a hearing in substance of cases arising out of implementation of border measures for the protection of trademark.

5.1.2. Clarity on a disposal of infringing goods out of the channels of commerce

The Rwandan law does not provide how a disposal of infringing goods out of the channels of commerce should be operated, and this needs more clarity. As per TRIPS Agreement, a disposal of infringing goods out of the channels of commerce should put forward the rights of the trademark holder, and it should take into account other aspects that include interests of third parties[159]. As seen above, there are jurisdictions in which infringing goods can be donated to charities or be recycled. In this respect, the law should be amended and enable a disposal out of the channels of commerce of infringing goods which are not sub standards by means of donation.

Taking into account the situation of the population in need in Rwanda, a donation of goods that are up to standards and that are not yet expired should go to charities depending on the nature of the goods and the field of activities for those charities. Therefore, the law should be amended to enable courts to authorize the Customs Authority to grant goods that are not sub standards to charities. In this context, goods that consist of school material could be granted to charities supporting schools in need or be granted directly to schools in need of the material. A disposal of infringing goods out of channels of commerce should not lead to other unexpected problems including the cost for maintenance of infringing goods within the customs services and possible environmental issues whereas those goods can serve positively in answering other existing problems at the local level. A donation to charities of infringing non-substandard goods is an efficient measure that can disconnect the goods from their importers and it

[159] TRIPS Agreement., art 46.

is aligned with a deterrence TRIPS Agreement recommend to member states[160]. However, for the sub standards infringing goods and goods that reached their expiry date, a court remedy should only be a destruction of the goods. A choice leading to an appropriate remedy should be guaranteed by a capacity building for enforcing organs.

5.2. TRAINING NEEDS AND AWARENESS RAISING

Challenges relating to the enforcement of border measures and those that exist since the court starts to hear the case in substance can be mitigated by means of capacity building for enforcing organs and awareness raising to the business community. A capacity building could provide solutions to challenges that exist in the whole process of border protection of trademark whether at the level of the customs whether at the level of the court intervention. A capacity building could be premised by an introductory training on intellectual property in general to set the stage for a comprehensive analysis of challenges pointed out by this article. In this context, and considering the fact that the Rwandan IP Law provides for both a civil and a criminal enforcement of intellectual property rights, a capacity building should go to judges, prosecutors, investigators, legal counsels and the customs staff members.

A sustainable outcome of the capacity building for enforcing organs should be supplemented by awareness raising to the business community. The business community needs to stop involving in an importation that can make their business collapse. In particular, importers of industrial products should be made aware of a possibility for destruction of their goods once these are found to be infringing a registered trademark. The business community should be made aware of prerogatives arising out of intellectual property rights in general and this should awaken them to join a true channel of distribution of goods set by intellectual property right holders whenever they engage in an importation of industrial products protected under the Intellectual Property System.

6. CONCLUSION

There are several challenges in the context of border protection of trademark in Rwanda. Challenges exist at the level of provisional measures taken before a hearing of the case in substance, and there are challenges relating to the period that starts with the hearing of the case in substance. A challenge which is cross-cutting refers to how long trademark border protection cases should take in

[160] Ibid, art 46.

courts. This refers to a number of times a court should hear cases for extension of suspension of release of goods once a suspension that was decided by the Customs Authority and extended by the competent court expires before the case is heard and determined in substance. This challenge needs a two-fold answer. The law should be amended to enable a suspension of release into free circulation until the case is heard and decided in substance at the final instance, and this measure should go hand in hand with a use of discretional powers by the President of the competent court to provide closer dates for a hearing of border protection cases in substance. This could reduce a number of court sessions in terms of requests for extension of suspension of release of goods into free circulation. It could ease doing business by limiting a number of times parties go to court requesting the same thing and expecting the same solution. Moreover, it could limit damages that can arise out of a suspension of goods for long especially in the situation of perishable goods. This two-fold solution should apply as long as a number of trademark border protection cases and intellectual property court cases in general has not yet become huge to inspire other solutions that can include an introduction of specialized chambers in intellectual property matters in commercial courts.

Challenges relating only to the level of provisional measures exist at both the level of the customs and at the level of the court. These include a challenge relating to the balancing between the rights of the importer and those of the right holder concerning a release of goods or a maintenance of suspension of release of goods before a hearing of the case in substance. These challenges should find a sustainable answer through a capacity building of enforcing organs in terms of trademark border protection, and that of enforcing organs for intellectual property rights in general. Another challenge that could find an answer in capacity building of enforcing organs is that of providing adequate remedies that take into account the seriousness of the case and interests of third parties in the situation where goods are found to be infringing. A capacity building could enhance the enforcing organs knowledge and skills in terms adequate remedies with a sound reasoning on the decision they take. A capacity building for enforcing organs should be supplemented by awareness raising for the business community for this community to boost innovative commercial ideas instead of fueling imitation that can lead to a collapse of imitating businesses. An amendment of the law, a use of discretional powers by Presidents of courts to provide closer dates for trademark border protection cases, a capacity building for enforcing organs and

awareness raising for the business community could ensure a border protection of trademark, and a respect of IPRs in general, and this could promote the role of intellectual property for economic growth.

7. REFERENCES

Bone, Robert G., 'Taking the Confusion out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement', Northwestern University Law Review, 106.3 (2012), 1307–78.

Buydens, M., L'application des droits de propriété intellectuelle: Recueil de jurisprudence, OMPI, 2014.

CA, 'R.comAA 00086/2018/CA', 2019.

Catherine W. Ng, 'The Law of Passing Off – Goodwill Beyond Goods', 2016, 817–42 ‹https://doi.org/10.1007/s40319-016-0510-9›.

CCLAP, 'Law No 22/2018 of 29/04/2018 Relating to the Civil, Commercial, Labour and Administrative Procedure', 2018.

Corgill, Dennis S, 'Measuring the gains of trademark infringement,' Fordham Law Review 65, no. 5 (April 1997): 1909-1986.

EAC, 'East African Community Customs Management Act, 2004 (revised edition 2018)', 1, 2018.

EUIPO, 'The Likelihood of Confusion and the Likelihood of Association in Benelux and Community Trade Mark Law : Concepts , Interpretations and Evolutions'.

European Commission, Report on the EU Customs Enforcement of Intellectual Property Rights, 2019.

Harms, L. T. C., A Casebook on the Enforcement of Intellectual Property Rights, 2nd edition, 2008.

Harms, L. T. C., A Casebook on the Enforcement of Intellectual Property Rights, 4th Editio, 2018.

HCC, 'R. com 00003/2019/HCC', 2019.

———, 'R.com 00023/2017/CHC/HCC', 2017.

———, 'R.com A 00004/2019/HCC', 2019.

———, 'R.com A 00450/2019/HCC', 2020.

———, 'R.com A 0017/2017/CHC/HCC, 2017.

———, 'R.com A 00160/2018/CHC/HCC', 2018.

———, 'R.com A 00236/2017/CHC/HCC', 2017, interpreted by RS/INTERT/R.com 00008/2017/CHC/HCC, 2018.

———, 'R.com A 0194/2016/CHC/HCC', 2016.

———, 'R.com A 0215/14/HCC', 2014.

———, 'R.com A 00614/2018/HCC, 2018.

ICC, 'International Guide to IP Rights Enforcement', First, 2006.

Judith Soentgen, "Disposing of counterfeit goods: unseen challenges", in: WIPO Magazine, November 2012, available at https://www.wipo.int/wipo_magazine/en/2012/06/article_0007.html, April 7, 2021Lafrance, Mary, '10 . Passing off and Unfair Competition Regimes Compared', 2011, 195–223.

Lafrance, Mary, '10 . Passing off and Unfair Competition Regimes Compared', 2011, 195–223.

Lai, Jessica C., 'Border Enforcement of Intellectual Property Rights: A Look at New Zealand', IIC International Review of Intellectual Property and Competition Law, 50.7 (2019), 792–822 ‹https://doi.org/10.1007/s40319-019-00842-9›.

Madi, Ramzi, Colour and Sound Marks: A Brief Overview of Civil Protection in Light of Jordanian Legislation, Arab Law Quarterly, 2010, xxiv ‹https://doi.org/10.1163/157302510X12607945807232›.

MININTCO, 'Warning Letter of 12 July 2012', 2012.

New Zealand IP Office, Relative grounds - Identical or similar trade marks, available at https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/relative-grounds-identical-or-similar-trade-marks/, April 14, 2021.

NISR, 'Formal External Trade in Goods Fourth Quarter', March, 2020, 1–26.

Ongola, Bracxides Shaluma, 'Efficacy of anti-counterfeit laws in Kenya,' LL.M Thesis, October, 2014.

RDB, 'Expert Witness Report'.

Ruessmann, Laurent, and Francesca Stefania Condello, 'The CJEU Judgment in Nokia and Philips Clarifies the Intellectual Property Rights', Global Trade and Customs Journal, 7.4 (2009), 183–190.

Rwandan IP Law, 'Law N° 31/2009 of 26/10/2009 on the Protection of Intellectual Property', Official Gazette N° 50 Bis of 14 December 2009, Deember, 2009.

S.C., 'R. com A 00004/2017/SC, 11 July 2017', 2017.

TC, 'Joint Cases R.com 0020/14/TC/NYGE and R.com 0074/14/TC/NYGE', 2014.

———, 'Joint Cases R.com 01607/2018/TC, R.com 01751/2018/TC and R.com 01862/2018/TC', 2019, corrected by RS/RECT/R.com 00023/2019/TC, 2019.

———, 'R.com 00148/2014/TC/NYGE', 2014.

———, 'R.com 00149/2017/TC/NYGE', 2017.

———, 'R.com 02124/2018/TC', 2018.

———, 'R.com 00315/2018/TC/NYGE', 2018.

———, 'R.com 1105/15/TC/Nyge', 2016.

———, 'R.com 000385/2017/TC/Nyge', 2017.

The Constitution of the Republic of Rwanda of 2003 revised in 2015, Official Gazette, March, 2013, 1–99.

The European Parliament and The Council of the European Union, 'Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003', 608, 2013, 15–34.

Towersey, Alan, 'Simplified procedures for customs intellectual property rights enforcement', 11.2 (2011), 49–60.

WIPO, 'Paris Convention for the Protection of Industrial Property' ‹https://doi.org/10.1007/978-1-137-35471-6_5›.

WTO, 'Agreement on Trade-Related Aspects of Intellectual Property Rights (as Amended on 23 January 2017)', January, 2017.

WTO, Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, available at https://www.wto.org/english/docs_e/legal_e/03-fa_e.htm, , accessed on May 29, 2021.

WTO, Members and observers, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm#observer, accessed on May 29, 2021.

WTO, WTO legal texts, available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm, accessed on May 29, 2021.

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