IMPROVING THE STATUS OF WOMEN THROUGH FAMILY LAW REFORM: THE TANZANIAN EXPERIENCE

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I. Introduction

In 1971 the United Republic of Tanzania enacted the Law of Marriage Act which had as one of its major goals the improvement of the status of women by protecting their rights in matrimonial affairs. In a country dedicated to the equality of individuals, it was seen as an anomaly that women enjoyed an inferior status to men in marriage and divorce matters.[1]

In Papua New Guinea the problems and conflicts arising from the dual system of customary marriage laws and Western-based non-customary marriage laws are similar to those faced in Tanzania prior to the enactment of the Law of Marriage Act.[2] There are parallels between the marriage customs observed in Tanzania and in Papua New Guinea, as well as between the imported matrimonial law in the two nations.[3] With respect to the status of women in marriage, both countries have followed beliefs and practices which relegate women to a subordinate position.[4]

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1. Government Paper No. 1 of 1969, *Government's Proposals on Uniform Law of Marriage,* (1969) 2 E. Africa L. Rev. 319, para. 28 (hereinafter called the White Paper).

2. No attempt has been made in this paper to relate the specific provisions of the Tanzanian Law of Marriage Act to the laws of customary and non-customary marriages in effect in Papua New Guinea. For detailed discussion of Papua New Guinea family law and conflicts arising from the dual system of laws, see McRae, *Cases and Materials on Family Law in Papua New Guinea, Parts I and II* (1978).

3. See Law Reform Commission Occasional Paper No. 5, *Customary Marriage and Divorce Laws in Selected Areas of Papua New Guinea.* This paper summarizes the customary law in various parts of the country.

4. For discussion of the legal status of women in matrimonial matters in Papua New Guinea, see Dianne D. Johnson,'Aspects of the Legal Status of Women in Papua New Guinea: A Working Paper,' (1979)7 Mel. L.J. 5, 31-53.

Reform of family laws is currently being considered in Papua New Guinea. The Law Reform Commission was given a reference in 1975 to review the laws in force relating to family matters. A Working Paper, and draft Family Law Bill were produced in March 1978 to be circulated for comment before preparation of a final report.[5] The Working Paper states that the draft bill is a consolidated written law which attempts to balance customary practices with the National Goals and Directive Principles and the Basic Rights and Social Obligations in the *Constitution*.[6]

The key directive in the Papua New Guinea *Constitution* with regard to the position of women in matrimonial matters is found in National Goal and Directive Principle 2(12) which calls for:

> Recognition of the principles that a complete relationship in marriage rests upon equality of rights and duties of the partners and that responsible parenthood is based on that equality.[7]

Section 55(1) of the Constitution mandates that 'all citizens have the same rights, privileges, obligations, and duties irrespective of ... sex'.[8]

In Tanzania the lawmakers sought to enact a marriage law which was based on 'the equality of husband and wife as human beings ... equality in the form of human dignity and mutual respect' but which respected traditional customs and religious beliefs 'except where grossly incompatible with national goals and policies.[9]

An analysis of those sections of the Tanzanian law which are designed to promote the equality of women in marriage is significant because it illustrates the difficulties in legislating social change, both in drafting laws which can produce the desired change and in their implementation, particularly in areas where there is resistance or apathy towards that change. As Papua New Guinea considers family law

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5. Law Reform Commission Working Paper No. 9, *Family Law*, (1978).

6. *Ibid*, 2.

7. Although the National Goals and Directive Principles are non-justiciable by virtue of section 25(1) of the *Constitution*, s. 25(2) places a duty on all governmental bodies 'to apply and give effect to them' and s. 25(3) states that they are to be applied in the interpretation and enforcement of any law.

8. Section 55(1) is qualified by s. 55(2) which allows the enactment of laws for the 'special benefit, welfare, protection or advancement of females' and by s. 55(3) which states that the general principle in s. 55(1) does not affect the operation of a pre-independence law.

9. 'The Nationalist', 27 Jan. 1971, 8, reporting on a speech by Second Vice-President Kawawa to Parliament.

reform, the legislation of Tanzania should be examined as one model where the government attempted to unify the multiplicity of existing matrimonial laws and to improve the legal status of women.

II. *General Background*

Tanzania is a predominantly rural country. Less than ten percent of its population lives in urban areas. It has 16 million people from over 120 tribal groups. Approximately 30 percent of the people are Christian, 30 percent are Moslem, and the remainder follow traditional religious practices. About one percent of the population is non-African, consisting of Asians, Arabs, and Europeans.[10]

The mainland of Tanzania became a colonial territory of Germany in 1884. After the defeat of the Germans in World War I, it was administered by Great Britain as a Mandated Territory under the League of Nations and later as a Trust Territory under the United Nations. It became an independent nation in 1961.[11]

In Tanzania, as in other former British colonial territories, several different systems of family law were recognized. Customary law, religious law, and the imported law of the colonial power governed the various communities in the country in matrimonial matters. Persons could be married according to Islamic, Hindu, Christian, civil, or customary law.[12] The rights and obligations of spouses depended, in general, on the form of marriage which they entered. Matters such as minimum marital age requirements, consent to marriage, procedures and grounds for divorce, and acceptance or prohibition of polygyny varied.

Court jurisdiction over matrimonial matters depended on the form of marriage and the race of the parties involved. The primary courts had jurisdiction in disputes relating to customary law marriages and marriages between African Moslems. Where the marriage was contracted in civil or Christian form, or involved Asians, whether Moslem or Hindu, only the High Court had jurisdiction.[13]

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10. See *A Yearbook of the Commonwealth 1978,* 444; *The World Almanac and Book of Facts 1978,*579-580. See also James, *Land Tenure and Policy in Tanzania* (1971) 4-11 for a discussion of the people and patterns of settlement.

11. The United Republic of Tanzania comprises the mainland of Tanganyika and the islands of Zanzibar and Pemba. Tanganyika became independent in 1961, Zanzibar and Pemba in 1963. A union between them was formed in 1964 and this union was renamed the United Republic of Tanzania. See James, *op.cit.,* 1.

12. The relevant laws in force prior to the Law of Marriage Act were: Marriage Ordinance, Cap. 109 and Matrimonial Causes Ordinance, Cap. 364 governing Christian and civil marriages; the Judicature and Application of Laws Ordinance, Cap. 453 governing Islamic and customary marriages of Africans; and the Marriage, Divorce, and Succession (Non-Christian Asiatics) Ordinance, Cap. 112 governing Asian marriages.

13. *Ibid.*

A brief review of the characteristics of the various matrimonial regimes will illustrate the major differences in the concepts of marriage among the groups.[14]

Customary law marriages, while varying from tribe to tribe, in general have the following characteristics:[15] (1) Polygyny, the marriage of a man to two or more wives, is permitted and encouraged. (2) Marriage is seen as an alliance between two family groups. The families usually select the partners to be married and then conduct negotiations over the marriage agreement. Child bethrothal is not uncommon. In those areas where the persons to be married choose their own mates, consent of the families to the choice is essential. Likewise, divorce is a family matter since it involves the break-up of links established between the two families. Marriages are dissolved extra-judicially through arbitration or agreement between the families. (3) The payment of bridewealth by the groom or his family to the bride's family is essential for the existence of the union. Refund of bridewealth, in whole or part, is a necessary condition for the dissolution of a marriage. (4) The most important function of a customary union is to produce children. The social status of a woman increases with the number of children she bears. A barren woman is subject to humiliation and divorce. (5) A wife's status in the marriage relationship is inferior to that of her husband. This subordinate position is evidenced by institutions such as polygyny, bridewealth, and widow-inheritance, by the unimportance of a wife's consent to marriage and the limited rights of a wife over children or ownership of property.

Islamic marriage laws as observed in Tanzania[16] allow a man to have more than one wife, but not more than four. Bridewealth is paid by the groom to the bride and her family. Marriage is less of an alliance of two families than under customary law, though deference is given to parents' wishes concerning choice of a marriage partner. It is usual for a girl to give her consent to a marriage. A wife is bound to obey orders of her husband. If she does not, she is disobedient and not entitled to food or clothing which her husband is otherwise required to provide for her.

A marriage may be dissolved under Islamic law by the husband's unilateral action of repudiating the marriage by pronouncing *talaka*, which is a written or oral statement meaning 'I divorce you'; by the mutual consent of the parties, often after the husband agrees to accept payment from his wife for the divorce; or by decree of court. Divorce

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14. Discussion of Hindu religion marriages is omitted here because of the very small percentage of the Tanzanian population following that religion.

15. See Cotran, 'The Changing Nature of African Marriage' in Anderson, (ed.), *Family Law in Asia and Africa* (1968), 15-33. See generally Phillips (ed), *Survey of African Marriage and Family Life* (1953); Phillips, 'Marriage and Divorce in East Africe' (1959) 3 J.A.L. 93.

16. Most African Moslems in Tanzania are governed by the Shafi'i school of Islamic law. See Anderson, *Islamic Law in Africa* (1970), 7, 68.

by *talaka* is the most common. A wife is not allowed to marry for three months after divorce to assure that if she is pregnant, the child will be identified as belonging to her ex-husband.[17]

Persons entering a Christian or civil marriage were bound by the Marriage Ordinance and Matrimonial Causes Ordinance which were based on English matrimonial law. Marriage is monogamous and seen as a union of two individuals, rather than an alliance of family groups. A marriage had to be dissolved in court after the petitioning party proved a specific matrimonial offence such as adultery, cruelty, or desertion for three or more years.[18] Many Africans entering Christian or civil marriages continued to follow traditional ways with respect to the payment of bridewealth, the dissolution of marriages extra-judicially and the practice of polygyny.[19] Conflicts resulting from the intermingling of the requirements of the imported law and the adherence to customary ways caused substantial social problems.[20]

Recognizing the wide variations in marriage laws and the consequent inequality of rights based on religious and ethnic background, the government of Tanzania was anxious to pass legislation bringing the marriage laws into a unified code. However, it did not want to extinguish all practices based on religious and customary laws and thus sought to enact a law which would allow persons to continue to marry in a customary or religious way, but subject to certain restrictions applicable to all marriages. Many of these restrictions were designed to remove the inequalities faced by women in matrimonial matters, even where such were based on customary or religious laws.

The first step towards the unification of marriage and divorce laws came in 1963 when the Declaration of Customary Law was adopted.[21] The Declaration was an attempt at codification of the customary law of all patrilineal tribes in Tanzania with respect to bridewealth, customary unions, divorce, and the status of children.[22]

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17. Sheikh Ali Hemedi El Buhiry, *Nikahi* (translated by Allen) (1959); Anderson, 'Comments with Reference to the Moslem Community' (1969) 5 E. African L.J. 5.

18. Marriage Ordinance, Cap. 109; Matrimonial Causes Ordinance, Cap. 364.

19. Rwezaura, 'New Cases and Conflicts: A Short Study of the New Tanzania Divorce Law' (1977)6 DSM Univ. L.J. 15; Kassam, 'Comments on the White Paper ', (1969) 2 E. Africa L. Rev. 329, 330.

20. See Kassam, 'Report of the Kenya Commission of Marriage and Divorce: A Critique' (1969) 2 E. African L. Rev. 179, 181-184.

21. Government Notice 279 of 1963.

22. The Declaration was not only a codification of existing customary law, but in certain areas it attempted reform of the law as well. For example, paragraph 86(a) requires that marriages be legalized by the issuance of a marriage certificate, stating that 'the traditional ceremonies which formerly legalized the customary union may continue but they have no legal validity'. See Cotran, *op. cit.*, 27-28. See also Tanner, 'The Codification of Customary Law in Tanzania' (1966) [cont.]

In 1969 the government issued a White Paper proposing a uniform law of marriage which was presented to the public for comment prior to submission of legislation to Parliament.[23] The proposals closely followed the findings and recommendations of the Commission on the Law of Marriage and Divorce in Kenya, published the preceding year.[24] The Kenyan Commission had reviewed in depth the problems created by the multiplicity of laws governing matrimonial matters, taking into account public opinion gleaned from meetings, answers to questionaires and memoranda submitted to it.[25] As the social and legal structures and legacy of British colonial rule were similar in Kenya and Tanzania, the Tanzanians were able to make use of the Kenyan report without repeating the extensive exercise carried out in Kenya. The Tanzanian bill was submitted to Parliament early in 1970. After lengthy and at times heated debate, the Law of Marriage Act was passed and came into effect in May 1971.

III. The Contracting of Marriage.

In this section and the following two sections, provisions of the Law of Marriage Act are analyzed in detail to determine in which areas it has made changes for the protection of women and in which it falls short of its goal of bringing about equality of the sexes. Attention is given to the difficulties in enforcing the requirements of the Act and the lack of implementation of many of the Act's provisions in the Tanga Region of Tanzania where primary court magistrates were interviewed and court records examined in this regard.[26]

A. Minimum Age

In Section 13 of the Act, a minimum age for marriage is established. A male must be 18 years old and a female 15 years old to marry. The only exception to this rule is that a court may permit a marriage where each party is at least 14 years old and special circumstances exist making the proposed marriage desirable. This power is given to the courts to enable an under age pregnant girl to enter into marriage, thereby relieving the families from the distress and humiliation of a child born out of wedlock.[27] A marriage is void if either party is below the minimum age (s.38(1)(a)).

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    2 E. African L.J. 105; Nicholson, 'Change Without Conflict: A Case Study of Legal Change in Tanzania', (1973) 7 Law and Society Rev. 747.

23. White Paper, *op. cit.*, para. 30.

24. Republic of Kenya, *Report of the Commission on the Law of Marriage and Divorce* (1968) (Hereinafter called the Kenya Report). A similar effort was undertaken in Uganda.

25. Kenya Report, *op. cit.*, paras. 1-5.

26. Magistrates were interviewed in urban and rural areas of Tanga Region. The registers of civil court cases from 1971-1978 were analysed in 20 primary courts to determine the amount and types of matrimonial litigation in the primary courts. Over 70 divorce case files were reviewed in an effort to evaluate the extent of compliance with the Law of Marriage Act.

27. Kenya Report, *op. cit.*, para. 64.

These age requirements were enacted on the basis that they were the minimum ages at which persons could manage the responsibilities of marriage. The White Paper noted that the United Nations had recommended 15 years as a minimum marriage age for girls to protect their health and their children's health. The White Paper further stated that with such limitations parents would not be tempted to remove their young daughters from school to be married. A girl would have enough maturity to take care of her children and the household. A boy at 18 years would have completed primary school, or, if not, should have adequate skills and knowledge needed for marriage.[28]

The minimum age provision of the Act clearly does not treat males and females on an equal basis in that it permits girls to marry at a younger age than boys. It implies that a girl needs less training and education than a boy before entering marriage and thus, in effect, for life since it is unlikely that most girls would continue education after marriage. While it is laudable that minimum age requirements are included in the Act so as to prevent child betrothal, the legislation fails to go the further step of mandating that each spouse must reach an equal age before entering marriage. By so doing, it fails to meet the overall goal of providing the framework for equality in the marriage relationship.

When a man marries a younger woman, as is envisaged by the Act, the potential for his domination in a marriage is increased. Because of his greater experience in life, as well as his educational and economic advantage, he is likely to be in a superior position to his wife. Once such a pattern is established, it is hard for a woman to assert her equality.[29]

Implementation of the minimum age requirements will be difficult until such time as all births are recorded so that persons' exact ages are known. Enforcement requires registration of all marriages. Further, in order to assure that girls can benefit from delayed marriage, there must be educational and employment opportunities for them. If these do not exist, girls cannot be expected to delay their marriages. Providing more school places, vocational training and employment opportunities must necessarily accompany the higher minimum age requirement if it is to be helpful to girls.[30]

B. Consent

The Law of Marriage Act section 9(1) defines marriage as 'the voluntary union of a man and woman, intended to last for their joint lives'. Each party to a marriage must give consent 'freely and voluntarily' (s. 16(1)). The consent of the parent or guardian of the bride and groom is not necessary except that a girl must have the consent of a parent or

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28. White Paper, *op. cit.*, para. 7. See Hansard (Minutes of Parliament), Meeting 20 of 17-23 March 1970, 174: Hansard, Meeting 2 of 19-27 Jan. 1971, 70, 257. (hereinafter called Hansard 1970 and Hansard 1971 respectively.)

29. Maina, Muchai and Gutto, 'Law and the Status of Women in Kenya' (1977) 8 Col. Human Rts. L. Rev. 185, 189.

30. Piepmeier, 'Changing Women's Status Through Law', unpublished paper prepared for International Planned Parenthood Federation (1976), 9.

guardian when she is below the age of 18 years (s. 17(1)). A marriage to which free and voluntary consent has not been given is void (s. 38(1) (e)).

Under customary law, consent of a girl to marriage was not mandatory.[31] Because marriage was seen as an alliance of two families, agreement between the families, rather than the individuals to be married, was essential. The requirement of the Act that a girl give her consent was a 'revolutionary new concept'.[32] Though most of the Act does not radically change social customs, this was one area in which commentators felt that 'ethical considerations' took precedence over 'social mores'.[33]

The White Paper explains that the provisions requiring free consent of the parties were designed to remove inequities in existing marriage laws which did not allow a woman to 'decide anything in respect of her marriage'.[34] In the debates in Parliament over the bill, the hope was expressed that this provision would stop the undesirable practice of parents forcing their daughters to marry men whom they do not choose, so that the parents would receive large amounts of bridewealth.[35]

In High Court decisions, the practice of forced marriages has been strongly criticized. For example in *Chacha v. Wambura*[36] the High Court had to decide whether to dissolve a marriage where at the time of bethrothal the girl was about 20 years and her husband 60 years. The Court explained the facts as follows:

> Her father, like most parents in her tribe was greedy about cattle, he was therefore too glad to receive 56 cows and 2 goats from the respondent in exchange for his young daughter. He commanded her on pain of death to go to the respondent and be obedient wife to him. She complied but she remained there for only a few days and escaped from this slavery euphemistically called marriage by her father and old husband. If ever there was a case of extreme unjust treatment to a woman this is one.

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31. White Paper, *op. cit.*, para. 4. *The Declaration of Customary Law* para. 86 provides that a customary union can be the result of arrangements between the father-in-law and son-in-law or between the two persons to be married.

32. Kassam, *op. cit.*, 189.

33. Kahn-Freund, 'Law Reform in Kenya', (1969) 5 E. African L.J. 54.

34. Para. 4.

35. Hansard 1970, *op. cit.*, 174; Hansard 1971, *op. cit.*, 80.

36. (Matr.) (PC) Civil Appeal 25 of 1976 (Mwanza) (Unreported).

In another case, *Mayayi v. Mbotemkwaya* [37] the High Court stated that it hoped parents would stop 'forcing their daughters into marriages they did not want'.

The Act remedies this situation by requiring a girl's consent to a marriage. However, one must ask in many instances how 'free and voluntary' the consent of a girl actually will be. She may be subject to pressure from her parents, be too young, immature, or uneducated to make an independent decision, or she may be persuaded to consent to a suitor who will provide her with economic security.[38] It will not be until women have sufficient educational and economic opportunities so that they are not subject to pressure to marry for monetary reasons that this provision will have real meaning for many Tanzanian women. This is one area where the law can only provide the framework for equality between the sexes but social and economic changes are necessary to implement the goals of the law.

C. Bridewealth

Section 41 of the Act provides that a marriage is valid for all purposes notwithstanding 'any non-compliance with any custom relating to dowry or the giving or exchanging of gifts before or after marriage'. There is no statutory provision requiring return of bridewealth upon dissolution of a marriage. This provision of the Act is contrary to the practices of most tribes in Tanzania but indicates a direction of change which the lawmakers wished to follow.

The giving of bridewealth has traditionally been essential to the validity of marriages in Tanzania. As defined by the Declaration of Customary Law, it is the 'payment of domestic animals, money or other commodities made by the bridegroom to the father or his heir of the bride whom he intends to marry.'[39] Should the spouses divorce, repayment of bridewealth is required. The amount to be repaid will depend on which spouse is responsible for the breakdown of the marriage, the length of the marriage, and the number of children that the woman has borne.[40] Issues concerning the payment or return of bridewealth have been extensively litigated in Tanzanian courts.[41]

The payment of bridewealth in many tribes was seen as conclusive evidence of a marriage. It served to stabilize marriages by ensuring that each family had an interest in seeing that a marriage remained intact. It also was the means of legitimizing children born to the couple. It was not traditionally viewed as the buying and selling of a woman, but part of the whole social transaction of marriage between two groups. To

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37. (PC) Civil Appeal 203 of 1975 (Mwanza) (Unreported).

38. Maina, Muchai, and Gutto, *op. cit.*, 189.

39. Para. 1.

40. *Ibid*, para. 37-61. See Nsereko, 'The Nature and Function of Marriage-Gifts in a Customary African Marriage', (1973) 6 E. African L. Rev. 89.

41. See cases cited in Nsereko, *ibid*.

some extent, the husband was paying for the woman's services and reproductive capacity and also giving thanks to her parents for her upbringing and training.[42]

While the payment of bridewealth may have been an important binding agent between two kinship groups in the past, its function in present day Tanzania must be questioned. With changes in life style of the urban and, to a lesser extent, the rural population, there has been a weakening of the extended family system. Consequently the extent to which marriage, as legitimised by the payment of bridewealth, serves as a link between two families, is decreasing.

With the development of the cash economy, the nature of bridewealth payments has changed from being primarily that of cattle and other domestic animals to that of cash. The main reason given by the government for removing the requirement that bridewealth be paid to validate a marriage centered on the problems created by the large demands being made by families of marriageable girls. It was recognized that many young men could not marry because they did not have the required cash and cattle. In many instances old men were able to purchase young girls from unscrupulous parents who cared more about receiving bridewealth than about their daughters' futures. During Parliamentary debates on the Act, the possibility of curbing this problem by placing maximum limits on the amount of bridewealth was discussed. It was rejected, however, because of the difficulty of setting standards applicable throughout the country and more importantly, of enforcing them. [43]

Very little debate in Parliament dealt with the issue of the subordination of women in the marriage relationship resulting from the payment of bridewealth. Tanzanian President Julius Nyerere stated the problem as follows:

> Equality between men and women will continue to be impossible if dowry is still going to be demanded ... because the mere fact that the man was required to pay something to get married to the women spelled out inequality in a union that was supposed to be between equals. The former becomes the buyer and the latter the commodity.[44]

Because it may take several years for a man to accumulate enough wealth to marry, while a woman has no such need, it is likely he will be several years older than she, thereby adding to the inequality of the spouses.[45] She is bound to feel inferior and like a servant because her

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42. *Ibid.* See also Molnos, *Attitudes Towards Family Planning in East Africa* (1973), 52.

43. Hansard, 1970, *op. cit.*, 181,184,194; Hansard 1971, *op. cit.*, 244, 274-375.

44. Nyerere, I.W.Y. Inauguration Speech. 'Sunday News', 9 Mar. 1975.

45. See Maina,Muchai, and Ghutto, *op. cit.*, 191.

husband has paid for her.[46] Further, she may feel pressure from her family not to seek a dissolution of a bad marriage because her father will be required to return some or all of the bridewealth.

Recognizing that the law must have some relationship to social conditions, it is understandable why the government chose not to prohibit bridewealth altogether. Yet, if there is to be real equality between the sexes in a marriage, it is a custom which must be discouraged. At a time when kinship ties were strong, bridewealth undoubtedly served many important functions. However, with the breakdown of the role of the extended family, it becomes questionable if this custom should be preserved to the detriment of improving the position of women in the family.

D. Registration of Marriages

Registration of all new marriages is required by the Law of Marriage Act. When a marriage is contracted in the presence of a minister of religion or a registrar, it is his duty to register it in a prescribed register book. Monthly reports of all marriages are to be sent to a central registry. The parties to the marriages must register within 30 days of their marriage if neither a minister nor registrar is present (s. 42-55).

At least 21 days prior to the marriage, the man and woman must give notice of their intention to marry to a registrar with particulars indicating that the marriage does not contravene any provisions of the law (s. 18). The registrar must then make the intention to marry known locally. Procedures are set out in the Act for persons to make objections to the marriage and for those objections to be scrutinized by a court or Marriage Conciliation Board (s. 19-22). The Board is a local body of 3 to 6 appointed members which is established to resolve matrimonial disputes before they are brought to court (s. 102-104).

The provision for notice and registration are essential to assure compliance with sections of the law such as minimum age requirements, free and voluntary consent, free choice of the parties to a monogamous or potentially polygynous marriage and the right of a wife to make objections to her husband's choice of a subsequent wife.

The key issue of importance to women is the extent to which there is compliance with these provisions. The District Registrar in Tanga town, the second largest city in Tanzania, estimated that about 90 percent of marriages were registered. It is unlikely that this number is as high in rural areas, particularly where marriages are contracted according to customary law and no registrar is present. Indeed, in Parliament it was suggested that the procedure for giving notice and for registration be simplified and that registrars be located in places close to villages so that people would be able to comply with the law.[47]

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46. Koda, *Emancipation of Women in Tanzania and the Role of the U.W.T.*, unpublished Master's Dissertation, Univ. Dar es Salaam (1975).

47. Hansard 1971, *op. cit.*, 83, 162.

E. Polygynous and Monogamous Marriages

Marriages under the Law of Marriage Act may be either monogamous (one man and one woman) or potentially polygynous or polygynous (man may marry or marries more than one woman) (s. 9-10). The practice of polyandry (woman marries more than one husband) is not permitted.[48] The parties to a marriage must state in the notice of intention to marry given to the registrar whether it is intended to be monogamous or polygynous. (s.18(2))[49]

A marriage may be converted from monogamous to polygynous or, if the man has only one wife, from polygynous to monogamous. Such a change can only be made by the free will of the husband and wife, as declared to a Judge, resident magistrate, or district magistrate and verified in writing by the parties and the court. (s. 11).

Once a wife has agreed to a polygynous marriage, she cannot object to her husband's choice of a subsequent wife except on two narrow grounds which are:

(a) having regard to the husband's means, the taking of another wife is likely to result in hardship to his existing wife or wives and infant children, if any; or (b) the intended wife is of notoriously bad character or is suffering from an infectious or otherwise communicable disease or is likely to introduce grave discord into the household. (s. 20)

If the wife wants to object for one of these reasons, she gives a notice of her objection to the registrar who transmits it to the Marriage Conciliation Board. The Board must hold a hearing with the parties to the marriage, the objecting wife, and any relevant witnesses for the purposes of determining if the objection is a valid impediment to the marriage. (s. 20-22).

Most communities in Tanzania have traditionally permitted polygyny. Justifications for its practice have included the economic and social benefits received by a wife by providing additional hands to work in the family fields and to assist with household chores and by giving companionship to her in having another woman in the family. Also it allows a barren wife to remain in the household rather than being divorced.[50]

These justifications, however, are insufficient in present day Tanzania to permit the continuation of an institution which relegates women to an inferior status. President Nyerere has stated:

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48. The term polygamy is used throughout the Act. This is a misnomer since polygamy includes both polygyny and polyandry. Hereafter, in this paper the phrase polygynous marriage shall include polygynous and potentially polygynous marriages.

49. If the marriage is Islamic or a customary law union, it is assumed to be polygynous unless the contrary is proved. Otherwise it is assumed to be monogamous (s. 10(2)). Christian marriages are monogamous and cannot be changed to polygynous unless one or both parties leave the Christian faith (s. 11(5)).

50. Molnos, *op. cit.*, 50; Kenya Report, *op. cit.*, para. 73-78.

> Equality and polygamy could not go together because if a person is allowed to marry more than one woman, those women cannot by any stretch of logic or imagination claim to be equal to him. He actually becomes a master in the real sense of the word.[51]

The national women's organization also condemned polygyny stating that 'the practice of polygamy brings financial embarrassment in a family and in most cases causes unnecessary divorce.'[52]

It was apparently the intention of the drafters of the Act to place restrictions on the right of men to enter polygynous marriages in order to provide protection for women rather than outlaw the practice altogether. This was the approach taken by the Kenya Commission which recognized that an attempt to prohibit polygyny would cause 'considerable social disruption, without being really effective.[53] It was felt that polygyny would eventually die out due to changing social and economic conditions.

Out must question, however, the extent to which the provisions of the Act are adequate to give women protection to exercise their free will in matters concerning polygyny. The following issues must be considered:

1. How free would the consent of a girl be to a polygynous marriage? She will often be under tremendous pressure to agree to polygyny. Given that she is likely to be younger, less educated, and less economically secure than her intended husband, her bargaining power on this issue is hardly equal to his. The fear of losing a potential husband may be more significant at the time than the threat of her spouse taking a subsequent wife sometime in the distant future.

2. A wife may be subject to pressure from her husband to agree to change their marriage from monogamous to polygynous. The Kenya Report recognized that if a husband is anxious to marry a second wife, he may bring pressure against his first wife to agree. If she refuses, she may imperil the marriage as her husband will see her as an obstacle to his happiness.[54]

3. The reasons for which a woman may make an objection to a subsequent wife are limited and the procedure for doing so fairly complicated. A woman may be very reluctant to make formal objections to her husband's choice of a second wife for fear of retaliation if she exercises this right. In public discussions on the White Paper, it was argued that as

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51. Nyerere, *op. cit.*

52. 'Nationalist', 6 September 1969, 8; accord Letter, 'Nationalist', 3 October 1969, 4.

53. Kenya Report, *op. cit.*, para. 79.

54. *Ibid.*, para. 84.

long as a wife is economically dependent on her husband, she will be forced to consent to his taking a second wife, knowing that a refusal could hurt the security of her children.[55] Several Members of Parliament recognized that many husbands would divorce their first wife or bring discord into the home if the wife refused to consent to a subsequent wife.[56]

Serious questions, thus, arise as to the effectiveness of the provisions of the Act in limiting the practice of polygyny and in giving women a voice to raise objections to polygynous marriages. Acknowledgement must be made of the fact that historically there have been justifications for the practice of polygyny, but these functions do not today outweigh the fact that polygyny makes women second class citizens and in this regard the Law of Marriage Act supports that discrimination.

IV. *Rights and Duties During Marriage*

At the outset of the discussion in this section of the provisions of the Act relating to property ownership and maintenance, it must be noted that the Act reflects Western notions of individual land ownership and the nuclear family as an independent economic unit. To the extent that a large part of the rural Tanzanian population still adheres to traditional communal land tenure rules or is involved in communal farming villages and that economic support comes through extended family ties, the rules set out in the Act will have little impact.

A. Property Ownership

A married woman has the same rights as a man to acquire, hold, and dispose of property (s. 56). Marriage does not change the ownership of any property held by the spouses except by agreement and subject to provisions of the law concerning the matrimonial home (s. 58). Property which is acquired in either the husband's or the wife's name is presumed to belong to that person absolutely, while property in their joint names is presumed to be equally owned. (s. 60). If the matrimonial home is owned by one spouse, he or she cannot dispose of it without the other spouse's consent nor evict the non-owning spouse, should that spouse desert the home. (s. 59).

The drafters of the Law of Marriage Act, in accord with the recommendations made by the Kenya Commission, accepted the principle of separate property ownership, rather than joint ownership of all matrimonial assets under community property rules. The Kenya Commission argues that community property would be practically and theoretically unwise for the following reasons: (1) Even if ownership is joint, management is likely to be in the husband's hands, so equality is not realized; (2) community property laws are too complex to be introduced in Kenya; (3) injustice results if either party is lazy, extravagant, or irresponsible; (4) land might be subject to passing out of clan control; and (5) injustices might occur in polygamous households.[57]

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55. Comment by Mrs. V. Chirwa, State Attorney, 'Nationalist', 17 September 1969, 8.

56. Hansard 1970, *op. cit.*, 185, 189-99, 235, 237; Hansard 1971, *op. cit.*, 129.

57. Kenya Report, *op. cit.*, 180.

These arguments do not deal with the fact that separate ownership may work very serious hardship on married women who do not have the opportunity to acquire property because of domestic duties or other restraints. Often the woman's contribution at home in terms of savings or releasing the husband to earn a living may be most significant in the husband's ability to acquire property. Because the property is in the husband's name, it is presumed to be his. The wife would have no right to object to the husband's disposal of the property and use of the money for his own ends unless she could convince a court that the presumption of the husband's sole ownership is rebutted by her contribution. For uneducated and even most educated women, these technical legal arguments are likely to be too difficult to be of benefit. With some form of community property, a potential buyer would have to gain consent of a spouse before purchasing any property. Further, the wife's contribution to the economic success of the marriage would be recognized and rewarded.

B. Maintenance During Marriage

Under s. 63 of the Act, a husband has a duty to maintain his wife or wives and to provide them with accomodation, clothing and food as is reasonable to his means and station in life. This duty exists except when the parties are separated by agreement or by decree of court. A similar duty is placed on a wife to maintain her husband *if* she has the means to do so and he is incapacitated, physically or mentally, from earning a living. A court may order a husband (or wife) to meet this obligation (s. 115).

The law concerning maintenance is obviously unequal in its treatment of men and women. A husband has a duty to maintain his spouse, but this duty is not reciprocally placed on a wife unless her husband is incapacitated. One M.P. asked in the Parliamentary debates how these provisions of the Act could build equality.[58] The Kenya Commission considered whether a wife should have a corresponding duty to her husband's. It was noted that while this seemed logical, it ignored the fact that generally in all communities in Kenya the primary responsibility for supporting the household is placed on the husband. Therefore, the Commission recommended that a wife have a duty of maintenance only when her husband is incapacitated.[59] The same reasoning was followed in Tanzania.

A wife has a right to maintenance even if she is living apart from her husband. In the High Court case *Ndege v. Mohamed*[60] the parties had separated after the husband gave his wife *taleka*, the Moslem statement of divorce. Under the Act, the giving of *talaka* is insufficient to dissolve a marriage without a subsequent court decree. The Court held that as the marriage had not been dissolved in court, its legal existence continued. With the continuation of the marriage, the wife was entitled to maintenance from her husband, including food, clothing and accommodation.

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58. Hansard 1971, *op. cit.*, 180.

59. *Ibid.*, para. 172, recommendation 58.

60. (PC) Matr. Civil Appeal No. 15 of 1977. (DSM) (Unreported).

However, in *Ombeni v. Alen* [61] the High Court came to the opposite conclusion, holding that the wife who had gone to live with her parents was not entitled to maintenance. In this case the husband and wife began quarreling and the husband blamed his wife for breaking up the marriage. This led her to leave the matrimonial home to live with her parents. She came to court seeking maintenance for herself and four children. That Court held that as the parties still claimed to love one another, the wife was entitled to be maintained by her husband only if she returned to the matrimonial home.

That the outcome of these two cases is different seems to turn on whom the Court finds responsible for the separation of the parties. In the second case, the Court appears to blame the wife for the separation and therefore refuses to assist her, while in the first case it is more likely that the husband chased out his wife by giving her *talaka* and can not avoid his legal duty by attempting an extra-judicial and thus unrecognizable divorce.

For the Moslem woman, the relationship between obedience to her husband and her right to maintenance are spelled out clearly. A disobedient wife who does not carry out her husband's orders and does as she pleases is said to be *nashiza*. She is not entitled to food, clothing, or sex.[62]

Although the concept of *nashiza* as an exception to a wife's right to maintenance is not written into the Law of Marriage Act, it is still accepted by the courts. In a case decided by the High Court after the enactment of the Act, the Court held that a Moslem woman who left her husband because of alleged cruelty was *nashiza* and therefore not entitled to maintenance 'until she ceases to disobey her husband's lawful order that she should return to the matrimonial home'. The Court explained that Islamic law allows chastisement of a wife. Here, the petitioner wife had failed to prove that the alleged cruelty exceeded the limits of permissable chastisement. Thus the wife had disobediently deserted her husband and was not entitled to maintenance.[63]

The price for the Moslem woman of being maintained by her husband is obedience to him and subservience in the marriage relationship. Both economic and social sanctions militate against a wife asserting equality with her husband.

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61. (PC) Matr. Civil Appeal No. 19 of 1975 (DSM) (Unreported).

62. Sheikh Ali Hemedi El Buhiry, *op. cit.*, para. 50. The *Nikahi* further explains that a wife who is *nashiza* should be warned that she is not obeying the law of marriage which requires that she obey her husband. If she persists in her delinquent ways, her husband may strike her but not cause actual harm. Then he may take her to the *kadhi* to explain the problem.

63. *Assi v. Yusufu* 1972 H.C.D. 127. As another example of the concept of *nashiza* , consider *Dinya v. Dawa* 1971 H.C.D. 30 in which the facts were that the wife left the matrimonial home because of quarreling. She was *nashiza* and not entitled to maintenance. Later she agreed to go back to her husband, but he was indecisive. Thus she stopped being *nashiza* and he was obligated to maintain her.

Along with the duty to maintain a wife and children comes the right of the husband to be the power in the family. To many M.P.'s it was very important that the equality given to women through the Law of Marriage Act should not be interpreted to mean that the husband would lose his traditional position as head of the household.[64] By retaining the husband's obligation to provide financial support, the law assures his position as 'master'. In return for economic security, a wife must submit to his authority. She must do the domestic work, raise the children, care for her husband, and yield to his decisions.

Until women have equal economic opportunities, their economic dependence and subservient position within the household will continue. This is reinforced by the husband's legal duty to provide for his wife and children. A vicious cycle operates. Because educational and economic opportunities are limited for women, they are dependent on their husband's support. But because of the man's obligation to maintain his wife, it is argued that women have less need for education and equal employment. Thus the cycle continues, without giving married women the opportunity to be economically independent.

C. Corporal Punishment

For 'the avoidance of doubt', s. 66 of the Act declares that 'notwithstanding any custom to the contrary, no person has any right to inflict corporal punishment on his or her spouse'. No sanctions are provided in the Act for the violation of this section, but charges could be brought pursuant to provisions of criminal law.

The White Paper states that this provision was necessary 'in order to remove the injustices inflicted upon a wife'.[65] The Kenya Report further explains that in rural areas it is believed that a husband has the right to beat his wife and 'that the beating of wives is all too common, not infrequently with tragic consequences.'[66]

There can be no doubt that traditionally in most parts of Tanzania a husband could inflict corporal punishment on his wife. The Declaration of Customary Law is instructive. It states that only severe injuries inflicted upon a wife are grounds for her to be awarded a divorce. The following acts of violence are *not* regarded as grounds for divorce: 'minor blows, beating with a stick (even when causing bruises or swelling), pushing, kicking, throwing household goods at the wife'. Injuries severe enough for granting a divorce include: 'any wound inflicted by a sharp instrument, fractures, permanent maiming, permanent disfigurement, continuous maltreatment'.[67]

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64. Hansard 1970, *op. cit.*, 197; Hansard 1971, *op. cit.*, 88, 92, 214, 222.

65. White Paper, *op. cit.*, para. 18.

66. Kenya Report, *op. cit.*, para. 170.

67. Declaration of Customary Law, *op. cit.*, para. 163-64. For the benefit of a wife she is entitled to compensation for her injuries which varies from 10 shillings for minor injuries to 500 shillings for permanent injuries. In bad cases of mutilation, a husband may be ordered to maintain his wife after divorce until she dies: para. 167.

On the other hand, if a woman hits or hurts her husband, the court has discretion to consider this a ground for divorce.[68]

In the Parliamentary debates, the proponents and opponents of this section were divided generally on sexual lines. The female MP's favored s. 66, pointing out the fear of many women of being beaten. Male MP's raised a variety of objections to it, including the opinion that women liked to be beaten. The right to inflict corporal punishment on the wife was seen as necessary to uphold the husband's position as head of the household and the wife's duty to obey his authority.[69]

The explanation of one MP on this point bears repeating. He acknowledged that severe maiming was inappropriate, but felt that a wife needs to be slapped when she offends her husband. He gave en example of when the husband brings a friend to the house and the wife refuses to make tea for them, she should be slapped because she has done a wrong. If she is beaten, she will mend her ways and the marriage will prosper. Beating a wife, he continued, is similar to providing maintenance to a car. It corrects the problem, at least for a time. Further, if it is permissible to beat a child for discliplinary reasons, why shouldn't one be allowed to beat a wife?[70]

It is likely that the views of the male MP's reflect the attitudes of many men in Tanzania, even today. Several primary court magistrates commented in interviews that wife beating remains common practice.

With such attitudes prevalent among the male population, it is questionable how much impact the law prohibiting the practice can have. For many women, the security of their position in the household may be jeopardized if complaints are made to the police. A wife must face the fact that an irate husband may divorce her, cut off maintenance for her and her children, or ignore her. Even if she does accuse her husband in court, the penalties he may incur may be as damaging to her as to him, in that he may be jailed and/or fined, both of which could effect his economic contribution to her well being.

The problem of wife battery is worldwide. As of yet, no legal solutions have been adequate to protect women from this assault to their human dignity and danger to their physical well-being.

D. Adultery

Equal rights are given to a husband and to a wife to bring a suit for damages against any person with whom his or her spouse has committed adultery (s. 72). Also a suit may be brought by either husband or wife against any person who has enticed or induced the spouse to desert him or her (s. 73).

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68. *Ibid.*, para. 150.

69. Hansard 1971, *op. cit.*, 140, 191, 193, 222, 241-242, 249, 293-94.

70. *Ibid.*, 293-295.

The White Paper explained that no valid reasons exist for the law allowing a man to claim damages for his wife's adultery, but a woman not having a reciprocal right against a woman with whom her husband commits adultery.[71] Under the Declaration of Customary Law, a wife's adultery is a ground for her husband obtaining a divorce. A schedule of fines is set forth when a husband brings a claim for damages against another man for adultery or enticement. However, traditionally adultery by the husband was not a ground for divorce by the wife.[72] There is no mention in the Declaration that a wife has a right to sue for damages for her husband's adultery.

This provision is another where the law provides equality between the sexes, but it will be most difficult for a woman to exercise her rights, given that it is not traditional for women to have a right to sue for adultery. For the reasons discussed under the previous section, it is questionable how many women would have the courage to bring suit against another woman for adultery. Also a wife would have to be concerned that if the woman whom she is suing is married, then that woman's husband could sue her husband. Since the amount of damages is to be based in part on the customs of the community and there is no custom for women getting damages for adultery, her husband is likely to be fined at a higher rate than the woman she has sued, resulting in an overall financial loss to her household. A review of primary court records in Tanga Region indicated that no adultery actions had been brought by women since the Act's commencement in 1971.

IV. *Dissolution of Marriage*

A. Procedure and Grounds for Divorce

Prior to the enactment of the Law of Marriage Act, few Tanzanians sought divorces in court. Customary marriages could be dissolved extra-judicially, usually based on agreements between the two families involved and dependent on the return of bridewealth. In Moslem communities marriage was normally dissolved out of court by the husband's unilateral act of pronouncing *talaka* or by consent of the parties. Only Christians or others who married under the Marriage Ordinance were required to seek divorce in court and establish a matrimonial offence.[73] In fact few Christians or persons married under the Ordinance sought judicial divorce.[74]

With the enactment of the Law of Marriage Act, extra-judicial divorces are no longer valid. Persons from all communities must obtain a court order to dissolve a marriage (s. 12).[75] The procedure for obtaining a divorce decree involves two steps. First the parties must appear before a Marriage Conciliation Board, composed of religious and/or community

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71. White Paper, *op. cit.*, para. 20.

72. Declaration of Customary Law, *op. cit.*, para. 106, 107, 115, 144, 157.

73. See Footnotes 14-18 and accompanying text, above.

74. Rwezaura, 'Is the Matrimonial Offence Doctrine Dead?' (1976) 9 E. Africa L. Rev. 119; *Kenya Report, op. cit.*, para. 73.

75. Marriage would, of course, also be dissolved by the death of one of the parties. If the parties are divorced extra-judicially in a country which recognizes such divorces, it will be recognized in Tanzania (s.92).

elders who will investigate the problems and attempt reconciliation (s. 101, 104). If the Board fails to reconcile the parties, either husband or wife may petition a court for a divorce (s. 99, 101). In order to grant a divorce, a court must be satisfied that the marriage has irreparably broken down (s.99). Evidence that one party committed a matrimonial offence may establish breakdown of the marriage, but a finding of fault is not essential for a court to hold that the marriage has broken down (s. 107).[76] A court must find that a marriage between Moslems has irreparably broken down where the Marriage Conciliation Board certifies its failure to reconcile the parties and subsequently the husband gives his wife *talaka* (s. 107(3)).

Requiring that marriages be dissolved by a court was a major change from the operation of customary and Islamic religious laws. The government felt this change necessary due to the considerable consequences of divorce on the parties to the marriage and their children.[77] It is difficult to ascertain the extent to which this requirement is met, but it has been suggested that in some parts of the country, compliance is not high as persons continue to dissolve marriage in traditional ways.[78]

In the majority of divorce cases in Tanga Region, the parties consent to the divorce and their agreement is accepted by the primary courts without presentation of any evidence of irreparable breakdown. This practice has been criticized by the High Court. In *Hassanali v. Abdallah*[79] the High Court held that no divorce could be granted based on consent of the parties, stating:

> These provisions of the law have one important basis, and that is to protect the status of married life, which is the essence and foundation of our society. So marriage is not something that one can enter into lightly and get out of lightly.

The Act can, however, be construed to allow a court to dissolve a marriage when there is agreement between the parties that the marriage has irretrievably broken down and therefore a divorce decree is sought. When this is the basis of a petition for divorce, in order to protect women who may not be in a position in the marriage to assert their rights, it is important that magistrates make inquiries to assure that the agreement of the wife is not coerced and is genuine. She should be advised that she does have a right to object to a divorce.

The provisions of the Act in regard to Islamic divorce preserve the right of a husband to dissolve unilaterally the marriage by giving *talaka* to his wife, except that he must first refer the matter to the Marriage Conciliation Board, and subsequently get a court decree certifying

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76. Rwezaura, *op. cit.*, note 74, 122-123.

77. White Paper, *op. cit.*, para. 23-24.

78. Rwezaura, *op. cit.*, note 19.

79. (PC) Misc. Civil Appeal, No. 4 of 1976 (Tanga) (Unreported).

that the marriage has been dissolved.[80]

By requiring the parties to go to the Board before the husband gives *talaka*, it was hoped that the Board would ensure that the parties could not be reconciled and that wives would not be victims of unilateral action of husbands based on capricious reasons. However, the operation of the Act casts doubt on whether this objective is being met. In some parts of the country, it is common practice for the Boards to ask the parties if *talaka* has been pronounced. If the answer is yes, the Board makes no attempt to reconcile the man and woman and issues a certificate that reconciliation has failed.[81]

When the parties later arrive at primary court, the Board's recommendation that a divorce certificate be issued is often automatically followed without looking into the facts of the case. In a large number of cases reviewed in Tanga Region, no reason was given for a divorce other than the fact that *talaka* had been given. Thus the possible protection to women which the law intended in requiring a hearing before the Marriage Conciliation Board and the court is not achieved. For Islamic women the operation of the Law of Marriage Act gives little actual protection from the traditional domination of men in divorce matters.

B. Post-Divorce Remedies

In hearing a petition for divorce, a court is under a duty to satisfy itself that reasonable arrangements have been made between the parties concerning maintenance and the division of matrimonial property and that arrangements regarding custody and maintenance of infant children are in the best interests of the children (s.108). If not satisfied, the court may make orders as it sees necessary, in compliance with the relevant sections of the Act. By requiring judical dissolution of all marriage, the Act attempts to ensure that questions relating to these matters are adequately resolved. To the extent that persons continue to divorce extra-judicially, this aim is defeated.[82]

(i) Maintenance

Section 115 of the Act provides that a court may order a man to pay maintenance to his wife during the course of matrimonial proceedings or upon a decree of separation. A court must find 'special reasons'

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80. Section 107(3) does not specifically mention the pronouncement of *talaka* but rather states that if, after the Board has failed to reconcile the parties, 'either of them has done any act or thing which would, but for the provisions of this Act, have dissolved the marriage in accordance with Islamic law, the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce.' In the case of *Rattansi v. Rattansi*, 1975 L.R.T. 55, the High Court interpreted 'an act or thing' to include the pronouncement of *talaka* but not the initiation of divorce proceedings in court.

81. Rwezaura, *Islamic Divorce in Tanzania: A Study of Tension Between Law in the Books and Living Law*. (Mimeo, Univ. DSM).

82. Kassam, 'Comments on the White Paper', (1969) 2 E. Africa L. Rev. 329, 336.

exist for ordering maintenance after divorce. The only guidelines given in High Court decisions indicate that the trial court must act judiciously[83] and that the party responsible for the breakup of the marriage should not receive maintenance.[84] The Act is less vague on how the court should decide the amount of maintenance to award. The court must consider primarily the means and needs of the parties, but also look at the customs of the community and the responsibility of each party for the breakdown of the marriage (s.116).

It is clear that payment of maintenance after divorce is meant to be the exception rather than the rule, given the need for the party seeking it to prove 'special reasons.' In the primary courts in Tanga Region it is rare for a magistrate to order the payment of maintenance to a wife. When awarding it the court is most likely to order one small lump sum to be paid, rather than periodic payments to be made until remarriage.[85]

Due to the provisions of the Act, as well as community customs,[86] most divorced women go without support from their former husbands, at least as obtained through court proceedings. Even those who do receive some maintenance do not get more than a token settlement which is unlikely to be sufficient to meet their long-term needs should they remain unmarried. The assumption seems to be that a divorced woman will be supported by someone, such as her own family, a new husband, or a boyfriend or that she will be able to support herself in a wage-earning capacity or through farming. To the extent that this assumption is rebutted, as it is in many cases, the law relating to maintenance does not serve to adequately protect women on divorce.

Admittedly the payment of monthly amounts of maintenance is not ideal. It tends to perpetuate the economic dependence of women on men. Yet receipt of periodic maintenance payments in cash or kind may be the only way a woman can survive economically. If a woman has

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83. *Athumani* v. *Mohamed*, Misc. Civil Appeal No. 2 of 1976 (Tanga) (Unreported).

84. *Sitihege* v. *Jaseli*, Misc. Civil Appeal, No. 1 of 1976 (Unreported).

85. Maintenance was ordered in less than ten percent of divorce cases reviewed. The amounts awarded ranged from 100 to 1000 shillings (8-80 kina). There were no cases in which a magistrate ordered a husband to provide his ex-wife with food, clothing or money on a continuing basis.

86. The Declaration of Customary Law, Para. 71-72, states the rules for maintenance of a divorced woman: The wife of a peasant is to receive one-fourth of the crop harvested in the year of the divorce; the wife of a trader, contractor, or other self-employed man is to receive not less than 150 shillings (12 kina); and the wife of a permanent wage-earner shall receive one month's salary. These rules apply only when the husband is the sole guilty party.

worked in the home during marriage, she may not have acquired skills needed for the labor market. Her limited education may also hinder her in this respect. It may be difficult to combine child care responsibilities with regular employment. If she is a peasant, she is likely to lose the land to which she has no right on divorce. With the breakdown of the traditional practice of divorced women returning to live with their parents, especially for women living in cities distant from their families, some form of outside economic support is necessary. A court should look at the circumstances of a wife when dissolving a marriage to determine if she has the capability and access to opportunities to support herself. If not, the court should hold that she has proved 'special reasons' and order an appropriate amount of maintenance to be paid to her.

(ii) Division of Matrimonial Assets

Section 114 of the Act provides that a court may order the division of assets acquired by the parties during the marriage by their joint efforts. In exercising this power a court must consider:

(a) the customs of the community to which the parties belong:

(b) the extent of the contributions made by each party in money, property or work towards acquiring the assets;

(c) any debts contracted for their joint benefit;

(d) the needs of any infant children of the marriage.

Subject to these considerations the court shall incline towards equality.

As the provisions of s.114 cover only assets acquired during the marriage by the parties' joint efforts, any wealth owned by either party prior to the marriage remains under the ownership of that party. However, assets owned by one party which are substantially improved during the marriage by the other party or by joint efforts are considered matrimonial assets.

A court is mandated by the Act to incline towards equality in the division of assets subject to four considerations, two of which may significantly limit the wife's share in any assets. It states that the only property a wife is entitled to take from the marriage is her private property which includes property brought with her from her father's house, inherited by her, or received by her as a gift.[87] Division of matrimonial property was unknown in Moslem law.[88]

Considering these rules of customary and Islamic law, it is probable that when the customs of the community are relied upon in assessing the division of assets, the rights of a wife to a share are limited.

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87. Para. 76.

88. Anderson, 'Comments with Reference to the Muslim Community,' (1969). 5 E. Africa L.J. 5.

Since she is only allowed to take her personal property under customary law, some courts may reject her claim for other assets of the marriage despite the clear intention of the Act to give women a share in jointly acquired property.

Consideration of the contribution of each party towards acquiring any assets is probably the most important factor and yet the most difficult in terms of securing equality for women in the division of matrimonial assets. The key issue involves determination of what nature of work may be counted as contributing to the acquisition of an asset. It is clear that where both the husband and wife are wage-earners, the wife's wages must be considered a contribution towards the purchase of assets. However, the majority of Tanzanian women are peasants who farm small gardens for domestic consumption and are responsible for the care of the household. Should their work which does not, in itself, bring in cash be counted?

High Court cases indicate the view that the wife's performance of domestic duties is not considered a contribution in 'money, property, or work towards the acquiring of the assets' within the ambit of s.114. In *Hamid Amir Hamid* v. *Maimuna Amir*,[89] the wife sought a distribution of assets acquired during the marriage. The Resident Magistrate ordered a lump sum of 10,000 shillings (800 kina) and two houses worth 18,000 shillings (1440 kina) be transferred to the wife. On appeal, the High Court reversed the Resident Magistrate, holding that there was insufficient evidence to prove that the wife had contributed to the acquisition of the assets. Patel, J. stated:

> With due respect, I am unable to agree with [the wife's advocate's] submission that because a wife runs a household, washes, cleans, cooks and saves money each month, this should be termed as her contribution and joint effort towards acquisition of property during the subsistence of a marriage. I feel this is stretching it too far and had that been the intention of the legislature, it would have been so specifically stated within the provisions of section 114 of the Law of Marriage Act 1971. But it is not.

The Court further found no evidence of the customs of the parties or that the wife had earned any money during the marriage which she had contributed to the purchase of any assets. The case was returned to the Resident Magistrate with directions to divide the property or proceeds from its sale on the basis of contribution of each party 'that is, labour by the [wife] and finance by the [husband]'.

The result is similar in *Masalu v. Ng'walabu*,[90] where the wife claimed division of a house worth 3000 shillings (240 kina). The court

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89. 1977 L.R.T. 55.

90. (PC) Civil Appeal No. 37 of 1974 (Mwanza) (Unreported).

found that the only contribution she had made was cooking for the carpenter who built the house and watering the foundation so it wouldn't crack. This, the High Court said, did not contribute to the construction of the building. Had the wife not performed these tasks, the house would still have been built. The cooking 'of course was part of her wifely duty and she could not be compensated for that.'

The reasoning of the High Court in these cases on the significance of the wife's contribution through domestic work has not changed with the passage of the Law of Marriage Act. In a pre-Act case, *Iddi d/o Kungunya v. Ali s/o Mpate*[91] the wife sued her former husband for shares of four gardens which were developed by their joint efforts. The evidence showed that the wife had not invested her own money in the gardens, but had worked on them during the marriage. The Court held that her work in the gardens was part of normal wifely duties and thus did not entitle her to a share upon divorce, stating that 'a wife can not be counted as a partner in property earned when she fulfills her wifely duties by helping her husband in his employment, whether it be cultivation, shopkeeping or any other lawful engagement'.

The principle of equality between husband and wife cannot be upheld, so long as the wife's labour at home is not recognized as having economic value. By doing the household work, the wife frees the husband to engage in gainful employment. With money earned, the husband acquires property in his name. The fact that he would not have had the opportunity to earn that money had the wife not done the domestic duties or saved enough if she were not frugal in household expenses must be considered by the courts.

There can be no doubt that it is difficult to determine the value of the wife's domestic services or help she provides her husband in his work. Yet, it is clear that all aspects of the wife's contribution to the economic well-being of the family during a marriage must be taken into account in determining her contribution.

Although the principle of equality is embodied in this section of the Act, its implementation is limited by consideration of customary practices and the High Court's restrictive interpretation of the contribution a wife makes. The Tanga Region primary courts ordered a division of matrimonial assets in less than five percent of the cases reviewed.[92] If women are to receive the financial protection envisioned by the Act, the customs of the community should not be followed to the extent that they are based on a notion of inequality of the sexes and thereby deprive a wife of her interests in marital property. The contribution of each spouse towards the acquisition of assets should include all aspects of a wife's participation in the marriage which leads to the financial success of the household, including her domestic duties.

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91. (1967) H.C.D. 49.

92. In 15 percent of the cases, the wife was instructed that she could take her personal property with her.

(iii) Custody of Children

The Law of Marriage Act provides that a court may, at any time, make an order placing a child in the custody of his or her mother or father or in exceptional circumstances where it is undesirable to be with either parent, with a relative or child welfare association (s. 125(1)). It is the father's duty to maintain his children, unless he is unable to do so in which case it becomes the mother's duty (s. 129).

The Act mandates that the welfare of the child is the paramount consideration in deciding in whose custody he or she shall be placed. A court must also consider: (a) the wishes of the parents; (b) the wishes of the child, if he or she is old enough to express an independent opinion; (c) the customs of the community to which the parties belong (s. 125(2)). If a child is below the age of seven years, there is a rebuttable presumption that it is for the good of the child to be with the mother (s. 125(3)). In most cases in the primary courts, the age of the child is the sole factor in determining which parent will get custody. If the child is below 7 years, he or she goes to the mother and above 7 years to the father. Although the Act does not provide a presumption that it is for the good of a child above 7 years to be with the father, most courts operate under such an assumption.

By requiring that a court consider the customs of the community, the lawmakers assured that in most parts of Tanzania a father would continue to have a greater right to the custody of the children than the mother. The Declaration of Customary Law is clear on this: 'The children belong to the father and he has the right to insist that they live with him or his family'.[93] Only if the child has not been weaned may he remain with his mother.[94]

In *Nyamrundi v. Okanda*[95] a pre-Act custody case, the District Court awarded custody of two children to the mother based on the welfare principle in that the father was poor and had not remarried, whereas the mother's new husband had means. The High Court reversed, holding that the Declaration of Customary Law gave the father absolute right to custody of these two children who were born in wedlock notwithstanding the fact that in custody matters the paramount consideration is the welfare of the child. In a recent case, *Mwanza v. Mwanza,*[96] the High Court applied Sukuma customary law in awarding custody to the father, which says that custody of children is the right of the father who has paid full dowry for his wife.

The fact that primary courts almost automatically order custody of children under 7 years to mothers and over 7 years to fathers indicates

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93. Para. 104.

94. Para. 105.

95. 1968 H.C.D. 83.

96. (PC) Marr. Civil Appeal No. 6 of 1978 (DSM) (Unreported).

that the interests of children are not being considered on a case by case basis nor is the intention of the Act followed that parents are to have equal rights and duties in matters relating to their children. Moreover, when customary law with its preference for custody by a father is applied by the courts, the principle of equality of parental rights is repudiated.

V. Conclusion

The improvement of the status of women was a major goal of the Law of Marriage Act. Analysis of its provisions indicates that in some areas it has provided equality of rights between men and women while in other areas it has failed to mandate equal treatment of the sexes or it has qualified the general principle of equality by reliance on the customs of the community when such customs are based on the inferior position of women.

Even if the law provided for equal rights and duties of men and women in all aspects of matrimonial matters, this would not be sufficient to assure that those rights would be exercised. Two significant factors which have hindered implementation of the Act have been the lack of knowledge of the law on the part of the female population and the continuing dependency of women on men for economic support. With regard to the first factor, inadequate efforts have been made to educate women as to their rights under the Act. Magistrates and other officials indicated in interviews that few women are aware of their rights in matrimonial affairs. To remedy this, communication and education are crucial, so that the benefits of the law reach those it was intended to serve.

As long as women are economically dependent on men they will be unable to exercise their rights fully. With the threat of divorce or desertion confronting her, a woman will fear to exercise her rights during marriage to object to a subsequent wife, to complain about corporal punishment or adultery and so on. To the extent that she may be without maintenance or property on divorce, a woman will be reluctant to seek dissolution of her marriage. In almost all areas of matrimonial law, women may be fearful to exercise their rights because of economic and social sanctions they see themselves facing if they do so. Provision of economic opportunities for women in both rural and urban areas is an essential precondition to the full exercise of rights granted in the Act.

Finally efforts must be made to change widely-held attitudes and practices which continue to see women in a subservient role in the marriage relationship. While the law can play a role as an agent for social change it can not do all. As one author has stated:

> If a social movement rests content with legal changes without making as strong an effort to change the social institutions through which they are expressed, it will remain a hollow victory.[97]

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97. Rossi, 'Equality between the Sexes: An Immodest Proposal,' (1964) 93 Daedalus 607, 609-610, quoted in Glendon, 'Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies,' (1975) 23 Am. J. Comp. L. 1.

There can be no doubt that the Law of Marriage Act was a significant step forward in many respects. Its implementation in those areas where it promotes equal rights of women must be considered of paramount importance. It should be regarded as a model for other countries, such as Papua New Guinea, seeking to change their family laws. Further reform is necessary in those parts of the law where full equality of the sexes is not presently mandated. Women, themselves, must strive together to change attitudes, customs, and social institutions which accord them less than complete equality with men.