THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA

REPORT OF THE COMMISSION ON LAW OF MARRIAGE ACT, 1971 (No. 5 OF 1971)

PRESENTED TO THE MINISTER FOR JUSTICE
AND CONSTITUTIONAL AFFAIRS
DAR ES SALAAM

APRIL, 1994

COMPOSITION OF THE COMMISION

The Law Reform Commission of Tanzania was established under section 3 of the Law Reform Commission of Tanzania Act, 1980, to take and keep under review all the law of the United Republic with a view to its systematic development and reform.

The Commissioners are:-

Hon. Mr. Justice Raymond Jumbe Mwaikasu	-	Chairman
Mr. Damian Saleka Meela	-	Full Time Commissioner
Ms. Julie Catherine Manning	-	Full Time commissioner
Hon. Mr. Pius Msekwa (MP)	-	Part Time Commissioner, Speaker
National Assembly of Tanzania		
Mr. Mohamed Ismail	-	Part Time Commissioner, Advocate of the High Court and Court of Appeal of Tanzania
Mr. Harold Reginald Nsekela	-	Part Time Commissioner, Chief Corporation Counsel,
Tanzania Legal Corporation		
Ms. Stella Longway	-	Part Time Commissioner, Principal Resident Magistrate, The Judiciary
Mr. Stephen E.N. Ihema	-	Secretary to the Commission.

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THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA

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P.O. Box 3580,
DAR ES SALAAM

4th July, 1986

The Hon. Mr. Justice D.Z. Lubuva, M.P.
The Attorney General and Minister for Justice
Ministry of Justice,
P.O. Box 9050,
DAR ES SALAAM

Dear Minister,

RE: INQUIRY AND REPORT ON THE LAW OF MARRIAGE ACT, 1971

Section 9 (1) of Law Reform Commission of Tanzania Act, No. II of 1980 provides;-

"The Commission may, subject to informing the Attorney General in that behalf, undertake the examination of any matter without for a reference on it by the Attorney General."

THE COMMISSION BEING COGNIZANT OF the public concern on the application and effectiveness of our Law of Marriage Act, No. 5 of 1971, that the law is impaired and in some respect is difficult to comply with.

IN PARTICULAR:-

1. **The Law on Family Property**
   The concept of "separate ownership of property" as embodied in the Act needs clarification which is important for certainty and predictability of the law on family property and its division when the union breaks down.

2. **Registration of Customary Law Marriages.**
   Registration requirements provided for under s. 43(4) and (5) do not provide for effective control and administration of customary law marriages.

3. **Custody and Maintenance of Children.**
   The law on Custody and Maintenance of children is clouded with apparent uncertainty.

4. **Minimum Age for marriage.**
   The age of 15 which is minimum for marriage has been criticized as being discriminatory of female members. It has also been argued that to a girl of the age of 15, marriage is unhealthy and dangerous to her life as well as to her issues.

5. **Celebration of Marriage and Divorce procedures.**
   That the effectiveness of the Law of Marriage Act, as far as celebration and divorce procedures are concerned call for evaluation and reform where necessary.

NOW THE COMISSION notifies you that it has decided to enquire into and report to the Government any desirable changes, legislative or otherwise on the Law of Marriage Act, No. 5 of 1971 and any matter related to it.

Yours faithfully,

Justice H.A. Msumi
CHAIRMAN
(Signed)

A. Saidi
COMMISSIONER
(Signed)

P. Msekwa
COMMISSIONER
(Signed)

Prof. J.L. Kanywanyi
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COMMISSIONER
(Signed)

ACKNOWLEDGEMENT

This research has been partly supported by the Ford Foundation grant to whom the Commission would like to express its appreciation.

May individuals as well as public offices, especially regional and district authorities in which the Commission visited to meet "Wananchi" had done a great deal to facilitate this work. The Commission also wishes to acknowledge the interest and the enthusiasm of all those people in and outside the country who sent in their written submissions and all those who made their views known in public meetings for their interest and open-ness

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CHAPTER ONE

REPORT ON THE LAW OF MARRIAGE ACT, 1971 (ACT NO. 5 OF 1971)

1.0 INTRODUCTION

1.1 BACKGROUND TO THE REFERENCE

The Law of Marriage Act, 1971 (LMA, 1971) was enacted by Parliament in 1971, the enactment of the law was preceded by a country wide discussion on Government recommendations for the new law as underlined in a Government Paper No. 1 of 1969.

1.2 The law was enacted with the view of unifying and harmonizing the then existing multiple regime of Law of Marriage. It aimed at bringing the Law of Marriage into accord with TANU aspirations of fostering equality, individual dignity, freedom and equal recognition of all marriages however celebrated, whether it be a Christian, Islamic, Civil or Customary.

1.3 All the Government recommendations were translated into the new law.

1.4 The Law of Marriage Act, 1971 has been in force for twenty years now and during all this period of time the natural forces of social and economic developments have been also taking their course in the society. As a result some of the provisions of the law are now considered as being oppressive in some respects and others as completely outdated, that is to say that some provisions of the law have long outlived their usefulness in some respects.

1.5 What is stated above is the sum total of "sweeping" allegations which are being leveled against the provisions of the LMA, 1971 in meetings, seminars, workshops and reported through media. Some of the complaints on the law have been received by the Commission from Organised groups, such as Umoja wa Wanawake wa Tanzania (U.W.T) as well as individuals since inception of the Commission (1983).

1.6 In July, 1986 the Commission on its own initiative in terms of Section 9 of the Law Reform Commission of Tanzania Act, No. 11 of 1980 (the Commission's Act) initiated this reference to examine the LMA, 1971 with the view of recommending its reform to the Government.

1.7 As required by the Commission's Act,, the Attorney General was duly informed of the Commission's intention to "enquire into and report to the Government any desirable changes, legislative or otherwise on the Law of Marriage Act, No. 5 of 1971 and any matter related to it."

1.8 In August, 1986 an eight member Committee headed by Commissioner H.R. Nsekela, the Chief Corporation Counsel of the Tanzania Legal Corporation was duly constituted (see Appendix A).

2.0 TERMS OF REFERENCE

2.1 Examination of the problem has revealed that it is not the whole of the Law of Marriage Act, 1971 which is objectionable, as alleged in some quarters by commentators on the law. Research has revealed that most of the complaints concern the following issues:

1. The Law on division of family property when marriage breaks down;
2. Registration of Customary law marriages;
3. Custody and Maintenance of Children;
4. Minimum age for Marriage;
5. Celebration of Marriage and divorce procedures and in particular the following:
   a) Notice of intention to marry (including a provision of certificate of no objection to marry);
   b) Presumption of marriage;
   c) Marriage Conciliatory Boards.

2.2 Terms of reference for the project were drawn along those line, (see Appendix "B").

2.3 This is the commission's report to the Government on the LMA, 1971 projects. The report is in three parts: How the research was conducted, Findings and the Commission's recommendation for Reform.

3.0 RESEARCH METHODOLOGY

3.1 LITERATURE REVIEW AND PROFESSIONAL CONSULTATIONS

The study was mainly conducted by a Committee appointed by the Commission, and co-ordinated by the Secretariat of the Commission. All worked as a team.

3.2 Various methods of data collection were employed in this project. In the first place there was an extensive library search (see References) on the subject. Secondly, professional consultation were made (especially) with Prof. B.A. Rwezaura of University of Dar es salaam, Faculty of Law.

3.3 Through the Commission's exchange programme with other Law Reform Agencies, a number of reports on the subject were received on request from the Law Reform Commission of Saskatchewan. Also Papers from other Law Reform Commission of Canada, The Family Law Committee of Jamaica and the Law Commission (UK). The Commission would like to thank all these agencies for use of their works to enrich this Report.

4.0 DISCUSSION PAPER AND QUESTIONNAIRE

4.1 In November, 1986 a Background Paper; "Law of Marriage, 1971 (Issue for Reform)" was issued. Circulation of which was limited for internal consumption. It was sent to selected number of people for the purpose of soliciting more technical views on provisions of the law that required an in-depth study.

4.2 This Paper was followed by a more detailed and elaborate Discussion Paper and a Questionnaire for public consumption. The Discussion Paper was issued in August 1986.

4.3 The Discussion Paper and the Questionnaire were first issued in English. This Paper was sent to selected group of people and institutions with direct interest on the subject such as administrators of the law or otherwise as well as interested academicians. Over 100 copies of these Discussion Papers and Questionnaires were distributed.

Unfortunately only 6 responses were received (see Appendix "C" names with asterisk).

4.4 In September, 1986 a Kiswahili Version of the Questionnaire was worked out and circulated to all members of the public. Over 200 questionnaires were circulated. These were used in soliciting views in all public hearings either conducted by the Committee's Research Teams or the Commission itself. This questionnaire was also published in local newspapers i.e. Uhuru; Mzalendo; Lengo; Kiongozi and Mfanyakazi. The publications were as follows:

- Uhuru; 6th October, 1988
- Mzalendo; 9th October, 1988
- Lengo; November, 1988 (Issue No. 187)
- Kiongozi; November, 1988 (Issue No.1)
- Mfanyakazi; 15th October, 1988.

4.5 Mfanyakazi newspaper carried the questionnaire as a news story and gave it a good exposure.

4.6 On 31st October, 1988 a Press Conference was held and was well attended. The Commission's Chairman addressed the meeting on the project. He urged the press to educate the people on the subject and launched the questionnaire. He urged the people to freely air their views on the subject.

4.7 Members of the public were given three months (up to 31st December, 1988) to send in their responses. A total of 61 individuals and institutions sent in written responses (See Table "I" for details and analysis of the responses).

5.0 REGIONAL TOURS AND PUBLIC HEARINGS

5.1 The Commission being aware of the sensitivity of the subject and the importance of involving the people in the deliberation of the proposals of the Commission as required by Section 10 of the Law Reform Commission of Tanzania Act, 1980 Regional Tours were undertaken by the members of the Committee as well as the Commission itself.

5.2 Initially the following regions were ear-marked to be visited:

- Dar Es Salaam, Morogoro, Dodoma and Singida
- Mwanza, Kagera and Mara
- Shinyanga, Tabora and Kigoma
- Tanga, Moshi and Arusha
- Rukwa, Mbeya and Iringa
- Mtwara and Lindi

5.3 All these regions, except Mara and Kigoma were visited (see table "II" for details).

5.4 The regional tours were of three categories:-

(1) Tours undertaking by the Committee's Research Teams with Questionnaires of Law of Marriage' Project. These teams were concerned only with collection of data on the Project;

(2) Regional tours undertaken by the Commission accompanied by the Secretary to the Committee. These tours were multipurpose but issues on the Law of Marriage Act, 1971 were extensively canvassed.

(3) Tours undertaken by the Commission in the Company of other Law Research Officers but issues on the Law of Marriage Act, 1971 were canvassed and recorded for the use for the Project.

6.0 ASSESSMENT OF PEOPLE'S REACTION

6.1 In order to be able assess objectively people's reaction on the subject the responses have to be grouped into two categories based upon methods used to collect the data. These are; opinion collected through written responses to the questionnaires and opinion collected through public hearings and meetings (mostly oral).

6.2 According to popular findings among Social Science Researchers the questionnaire method (especially those questionnaires whose responses are expected to be sent in by mail) is a difficult method. It is a considered opinion that with questionnaires not even 50% response is achievable, especially when the sample or the geographical area to be covered is wide. In any case, 61 responses out of a total population of 22.5 million (1988 Census) is extremely small. The population is inclusive of children and illiterates. In some Districts where questionnaires were sent to no responses were received at all.

This is true for questionnaires left in Mwanza, Kagera and Mbeya regions. In these regions more than 100 questionnaires were distributed but not a single response has been received by the Commission.

6.3 On the other hand public hearings and meetings have proved to be a more effective data collection method. These meetings were usually attended by the following Party and Government Officials:

1. District Commissioners
2. District Administrative Officers/District Officers
3. Division Secretaries
4. Ward Secretaries
5. Resident Magistrates
6. District Magistrates
7. Primary Court Magistrates
8. Religious Leaders
9. Social Welfare Officers
10. CCM Officials (mostly District Chairmen and Secretaries)
11. U.W.T. Officials (mostly District Chairperson and Secretaries)
12. Ten Cell Leaders.

6.4 Members of the public also attended and participated in the debate fully.

6.5 Through these meetings the Commission was able to reach over 8,000 people. (See Table 11) and most of them aired their views on the Law of Marriage Act, 1971. It is our opinion that this method is most effective.

CHAPTER TWO

PROBLEM WITH THE LAW OF MARRIAGE ACT. 1971 AND PROPOSALS FOR REFORM

1:1 DIVISION OF FAMILY PROPERTY WHEN MARRIAGE BREAKS DOWN:

1.2 SEPARATE PROPERTY SYSTEM

Property ownership in the Law of Marriage Act, 1971 is based upon the concept of "separate ownership of property" between spouses. Section 58 provides:

> "Subject to the provisions of section 59 and to any agree ment to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property."

1.3 Section 59 of the LMA, 71 provides for special provisions relating to matrimonial home. It prohibits a spouse having title to the matrimonial home to alienate the same, while the marriage subsists without the consent of the other. It also guarantees the interests of the non-owning spouse of the matrimonial home.

1.4 Section 108(b) provides that, any agreement as to division of matrimonial assets (including matrimonial home) under section 58 must be fair to both parties.

1.5 Separate ownership of property between spouses was first introduced into our legal system during the unification process of the law in 1969 when the Government made its proposals in Government Paper No.1 of 196. Paragraph 19 provides that:

> "Moreover, the proposed law should provide expressly that either spouse may own his or her own separate property which he or she owned before marriage or acquired after marriage."

1.6 This concept, popularly known as "separate property system" presupposes that whatever property, husband or wife had acquired before and after marriage remain his or her own property absolutely. As far as ownership of such property is concerned marriage changes nothing.

1.7 On the other hand section 60 of LMA, 1971 provides that: "where during the subsistence of marriage, any property is acquired:

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;

(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal."

1.8 This provision (S. 60 LMA, 1971) presupposes that, during subsistence of the marriage the spouses would each hold some sort of a "receipt" for his or her property. In real life this is not the case, especially where the wife is full time housewife with no other independent source of income.

1.9 In England the "separate property system" was introduced by the Married Woman's Property Act of 1882. The system was introduced to remedy the evils of the then existing Common law system of "unity of property", whereby upon marriage, a husband acquired by law all his wife's personal property as well as her income. Also, then husband enjoyed, at least for the duration of the marriage, certain rights in and control over her real property.

1.10 This concept was deliberately introduced into our legal system to cure or rectify similar mischief which, before the Law of Marriage Act, 1971 was entrenched in local customs and traditions.

1.11 After introduction of this system of property ownership in England many other countries such as Jamaica, Australia, New Zealand, Canada and many other Commonwealth countries have tried this system long before Tanzania did. Most of these countries have found this system faulty in practice and have set themselves out to change it completely or continue with a modified system.

1.12 The following are some of the criticisms levelled against the system:

1.12.1 The law on separate property does not provide adequate and fair solution to the property disputes between spouses because it is primarily concerned with the ownership of individual items of property. In many cases it is difficult to prove contribution to a specific property or improvements to the property without record. In the environment of subsistence economy in rural setting things are worse.

1.12.2 The law does not recognise housewifely efforts, care of the home and family as economic activities enough to be counted as contributing to acquisition of family assets within the ambit of the law.

1.13 Our position in this problem, especially when it comes to division of family assets is no better than those of other common law jurisdictions where separate property system operates.

2.0 DIVISION OF MATRIMONIAL ASSETS

2.1 In accordance with the provisions of section 114 of the LMA, 1971 when the marriage breaks down:

> "(1) The Court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale"
>
> (2) In exercising the power conferred by sub-section (1) the Court shall have regard
>
> a) to the custom of the community to which the parties belong;
>
> b) to the extent of the contribution made by each party in money, property or work towards the acquiring of the assets;
>
> c) .....
>
> d) .....
>
> (3) For the purposes of this section, reference to assets acquired during marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts."

2.2 The application of these provisions (s. 114 (1)(2)(a) and (b) has raised a lot of controversy.

2.3 The LMA, 1971 does not define the two concepts, namely; "joint efforts" and "contribution" which are the backbone of our separate property system. Judicial attempts to give interpretation to the two concepts have led into two extreme results and creating two schools of thought within the Judiciary; the "conservatives" and the "progressive."

2.3.1 In the case of ZAWADI ABDALLAH Vs IBRAHIM IDDI (Civil App. No.10/80 - unreported) a High Court judge supporting a decision of the lower court stated that: "I share his opinion that under section 114 the housework of a wife and looking after the children are not to be equated with the husband's work for the purpose of evaluating contributions to marital property. I hold as he did that such domestic services are not to be taken into consideration when the court is exercising its powers under the section." And further stated that:

> "...it was not written into section 114 that a wife's marital status and duties should per se make her a partner in the husband's economic enterprises or gains" and stated with finality that:
>
> "...if the legislature had intended that domestic services performed by a wife be regarded as contribution and joint effort it should have said so in a language clear and plain.

2.3.2 This represents the stand of the first school of thought.

2.3.3 The stand of the other school of thought is represented by another High Court decision in the case of RUKIA DIWANI KONZI Vs ABDALLAH ISSA KIHENYA (Matrimonial Cause No.6 of 1977 - unreported) where inter-alia it was stated that:

"There is a school of thought which says that domestic services a housewife renders do not count when it comes to acquisition and therefore the subsequent possible division, of matrimonial assets... I find this view too narrow and conservative and I must confess my inability to subscribe to it."

2.4 These two conflicting decisions of the High Court were the authority on the interpretation of Section 114 on "joint efforts" and "contribution." Lower courts were free to choose any of the two interpretations depending upon the temperament of the presiding magistrate, whether he or she wished to compensate the outgoing wife or not.

2.5 In 1983 the Court of Appeal of Tanzania dealt with the problem in the case of BI HAWA MOHAMED Vs ALLY SEFU (Civil Appeal No.9 of 1983 - unreported).

2.6 The Justices of Appeal considered both cases above and evaluated arguments for both schools of thought, and came up with a statement that:
"...we are satisfied that the narrow view is wrong and the broad view is correct."

2.7 The court went on to argue further that:
"The argument that the broad view of the law amounts in effect to judicial legislation, is not supportable since the court is not making or introducing a new rule in a blank or grey area of social relations but is interpreting existing statutory provisions - that is the words "the joint efforts" and "the contributions made by each party in money, property or work towards the acquiring of the assets" used under section 114."

"Undoubtedly, these provisions are not free from ambiguity. In such a situation the court has to be guided by the established rules of construction of statutes. Mapigano, J. used the report to the Kenya Commission on the Law of Marriage and divorce which, it is said, was the basis of our Law of Marriage Act, 1971.

We think such a report should be used only as a last resort upon failure to make sense of these statutory provisions on application of the normal rules of construction."

"One such normal rule of construction of ambiguous provisions is the MISCHIEF RULE. Under this rule, the court, in looking for the true meaning of ambiguous statutory provisions, is guided by the defect or mischief. Although certain features of traditional inequality still exist under the Act, such a polygamous marriages, these do not detract from the over-all purpose of the Act as an instrument of liberation and equality between the sexes."
"Guided by this objective of the Act, we are satisfied that the words "their joint efforts" and "work towards the acquiring of the assets" have to be construed as embracing the domestic "efforts" or "work" of husband and wife."

On the other hand section 114(2)(a) enjoins the court when granting or subsequent to a grant of decree of separation or divorce to have regard also to the custom of the community to which the parties belong. In some communities a wife is never entitled to any share of family property, however that property is acquired. Things are worse where she is proved to be the cause of breakdown of the marriage. Her parents are obliged to refund the dowry paid. There are Judicial authorities holding that a woman should not lose her right to a share of matrimonial assets simply because she is a cause to breakdown of the marriage. But according to the justices of Appeal in BI HAWA's case, one may lose that right in the following circumstances:

"there may be cases where a wife's misbehaviour may amount to failure to contribute towards the Welfare of the family and thus failure to contribute towards the acquisition of matrimonial or family assets: but this has to be decided in accordance with the facts of each individual case."

3.0 RECOMMENDATIONS FOR REFORM

3.1 Since 1971 there have been many changes in the country as well as in the world. There have been major constitutional changes in the country, i.e. a Bill of Rights and Duties has been introduced whereby one may go to court to enforce those rights when they are infringed. This Bill of Rights emphasises the whole question of individual freedom, equality and justice. Section 12(1) of the Constitution, guarantees equality of all persons and section 13(1) and (2) provide that:

(1) "All persons are equal before the .law, and are entitled, without any discrimination, to equal opportunity before and protection of the law."

(2) Subject to this Constitution, no legislative authority in the United Republic shall make any provision in any law that is discriminatory either of itself or in its effect."

3.2 Also there have been developments in judicial interpretation of section 114 of the LMA, 1971 as contained in BI HAWA's case. In addition to these improvements in the law, there have been drastic socio-economic changes in the international arena as well. A number of Conventions and declarations on Human Rights have been introduced and some of which we are signatories. Recently Tanzania has ratified a 1979 UN. "Convention on the Elimination of All Forms of Discrimination Against Women." A Convention which sets minimum standards for equal treatment and non-discrimination of women in all spheres of social, economic and political life. Also Tanzania has ratified a UN Convention on the Rights of the Child. As members of the UN system and signatories of these Human Rights Conventions and Declarations we are duty bound to observe the terms of these instruments.

3.3 It is our considered opinion that these developments have to some extent affected our law on property relations between husband and wife. Taking these developments into account the Commission makes the following recommendations:

3.3.1 That the separate property system as contained in section 58 of the LMA, 1971 should remain as part of our legal system.

3.3.2 That all the property acquired during the substistance of the marriage by joint efforts of the spouses should be treated as jointly owned by them.

3.3.3 When the court considers the issue of division of family assets when the marriage breaks down in accordance with section 114(1) of the LMA, 1971 the husband and wife will each be entitled to an equitable share of the value of those assets. The Court may take into account any wast age of development of the assets. Thus section 114(2)(1) of the LMA, 1971 should be deleted and sub-section 2(b) is to be amended to include wifely-duties of a house-wife as contribution enough to entitle her to a share of the family assets when the marriage breaks down.

3.3.4 It is the opinion of the Commission that sub-section 2(c) of section 114 has to be deleted from section' 114 and the issue of infant children is to be dealt under section 125 of the LMA, 1971 dealing with the issue of custody and maintenance of children.

4.0 CUSTODY AND MAINTENANCE OF CHILDREN:

4.1 PROBLEMS WITH THE CURRENT LAW

4.2 CUSTODY

At Common Law, "Custody" in its narrow sense means, a "right to physical control and possession of the person of the child" and in its widest sense includes the power to control education, the choice of religion and the administration of the infants' property until the years of discretion. The statutory meaning of custody in our law states in section 126(1) of the LMA, 1971 that:

> "An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, if any as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the infant."

4.3 This continues until the infant reaches the age of majority.

4.4 In terms of section 125(2) of the LMA, 1971 the paramount consideration for the custody of an infant is the welfare of that infant. Subject to this consideration the court, in making an order for custody of an infant, shall have regard to:

(a) the custom of the community to which the parties belong;

(b) the wishes of the parents of the infant;

(c) wishes of the infant, where the infant is of an age to express an independent opinion and;

4.5 In the cause of examination of custody disputes research has revealed that in some communities a child belongs to the father. Some even believe that the father has an exclusive right over the child. The mother has no say whatsoever on the child. Thus a custody given to the mother is an exception rather than a rule.

4.6 Our research has revealed that, more often than not, when considering an application for custody courts have tended to take as a mandatory rule the presumption under section 125(3):

> "There shall be a rebuttable presumption that is for the good of an infant below the age of seven years to be with his or her mother ..."

4.7 Sometimes no consideration at all is given before awarding custody of a child as to whether or not the mother or the father is capable of properly bringing up the child before custody is granted.

4.8 There are cases where the mother is given custody of a child below the age of seven years because of the presumption under section 125(3) of the LMA, 1971 and the father lays in waiting, as soon as the child gets to seven years the father claims custody of the child as a matter of right. This attitude is highly detrimental and incompatible with the principle of section 125(3) of the LMA, 1971.

4.9 The Commission has noted that voluntary agreements relating to custody and access to children are often more successful in practice than settlements imposed by court orders. This proposition is supported by many Child Psychologists who are of the opinion that custody agreements are much better than custody orders obtained by protracted and bitter disputes in court.

4.10 It is the opinion of the Commission that Custody agreements are more apt to be respected by both parents and minimize future problems for the child as well as the warring parents to make concession in the interest of the child.

5.0 MAINTENANCE OF CHILDREN

5.1 Child maintenance is provision of living expenses for the child, mostly by his or her parents when the parents separate.

5.2 The primary objective of the maintenance order on behalf of an infant is a regular flow of financial provision to cover the child's living expenses.

5.3 The present law on child maintenance is based upon the provision of section 129 of LMA, 1971 which states:

> "(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof."
>
> (2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her infant children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them."

5.4 On the other hand the mother's obligation to child maintenance or to its contribution arises only where, the father of the child is dead, or his whereabouts are unknown or where he is unable to maintain them.

5.5 These provisions are unlike those of section 130(1) and (2) where the court may make an order to a woman to pay or contribute towards maintenance of her infant children (in the same footing as the man could do) where the woman is of means and in the opinion of the court it is reasonable to do so, in the following circumstances:

(i) Where the father has refused or neglected to adequately provide for his infant children; or

(ii) Where the father has deserted his wife and the infant is in her charge; or

(iii) During the pendency of matrimonial proceedings; or

(iv) When making or subsequent to the making of an order placing the infant in the custody of any other person.

5.6 Section 129(1) places more emphasis on the maintenance of the child to the father alone without taking into the account of the mother's ability to maintain the child.

5.7 It is the opinion of the Commission that any child maintenance scheme to be meaningful to the child must be consistent in principle and effective in practice. Research has shown that in other jurisdictions child maintenance by parents is supplemented by public social assistance schemes. In Tanzania child maintenance is basically a parental affair and unassisted by the state (at least public child maintenance is not yet institutionalised).

5.8 The Commission has noted with concern that child maintenance orders made under the provisions of LMA, 1971 are ineffectual where:

(i) the paying parent is unable to pay; or

(ii) the paying parent may simply refuse to pay; or

(iii) the process of such payments to the child is cumbersome.

5.9 Where the paying parent cannot pay due to lack of gainful employment, the state cannot do anything about. Where the paying parent refuses to pay the court may enforce its order, as provided under section 124(4) of the LMA, 1971 but this does not usually guarantee any flow of provision to the child.

5.10 Normally where the court gives an order for child maintenance the paying parent is asked either to pay maintenance direct to the mother or whoever is in physical custody of the child or pay it to court. Payment to court usually cause undues delay for the person who is having custody of the child to receive such payments within good time. Matters become even worse where the court makes an order for attachment of the paying parent's salary. The employers usually do not bother to deduct the salary regularly and sent the cheque to court within good time. An uncooperative parent may even protest to the employer for deducting his salary (without his consent?). Some employers succumb to such objections and stop deductions to the detriment of the welfare of the child.

6.0 RECOMMENDATIONS FOR REFORM

6.1 After a through examination of the problems of law and practice relating to issues of custody and maintenance of children the Commission is satisfied that the law on the subject requires reform. The following are the recommendations for reform:-

6.1.2 That when the court makes an order for custody in terms of section 125(1) of the LMA, 1971 the paramount consideration should be the welfare of the infant. That is to say this principle should never be compromised at any time and for any other reason.

6.1.3 However, custody for an infant child, below the age of 14 or before completion of Primary Education, whichever is earlier, unless good cause is shown must always be with the mother. Once custody is granted to the mother review of the order may be sought by the father at any time before the child reaches the age of 14 years.

6.1.4 The maintenance of a child must be a shared affair, where both parents are able and/or of means to pay. This calls for amendment of section 129(1) and (2) of the LMA, 1971 to reflect the new thinking that both mother and father are responsible for maintenance of the infant children. Subsection 2 of that provision must be deleted.

6.1.5 Money for maintenance that is paid to court must be freed from unnecessary bureaucratic procedures so that the beneficiaries get the money with utmost speed. This may be sorted out by streamlining of the court's administrative section.

6.1.6 Employers should be educated on the importance and their responsibility to abide by court s orders on attachment of an employee's salary for purposes of maintenance of the employee's child or children. This may be done by drawing the attention of the employers to the law as well as to appeal to their sense of responsibility to promote the welfare of the children concerned.

6.1.7 Voluntary agreements between spouses on custody and maintenance should be encouraged. This task may be better carried out by the Marriage Conciliatory Boards as part of their advisory role when a marriage dispute is referred to them. Thus section 104 of the LMA, 971 should be amended to provide for this added role to the MARRIAGE conciliatory boards.

6.1.8 The Chief Justice should be requested to make rules under s.162 LMA, for better application and administration of s. 125 LMA, 1971.

CHAPTER THREE

1.0 REGISTRATION OF CUSTOMARY LAW MARRIAGES

1: 1 PROBLEMS WITH THE CURRENT LAW

1.2 Customary Law marriages are recognised by Law of Marriage Act, 1971 on an equal footing with other forms of marriages recognised under this law.

1.3 In terms of section 43 of the LMA, 1971 it is mandatory for all marriages, however celebrated to be registered with the Registrar of Marriages. Non-registration of a marriage is an offence under section 157 LMA, 1971 and registration of a marriage raises a rebuttable presumption that such a marriage is a valid one.

1.4 Unlike other forms of marriages, customary law marriages are registered through an agent, the Registration Officer. Section 43(4) and (5) LMA, 1971 provide that:

> "When a marriage is contracted in the presence of a registration officer... according to customary law rites, it shall be the duty of the registration officer to take necessary steps to register the marriage with the district registrar..."
>
> And where a registration officer is not present then;
>
> "it shall be the duty of the parties to apply for registration, within thirty days after the marriage to the registrar of registration officer to whom they gave notice of intention to marry."

1.5 Government Notice No.106 of 1971 provide for appointment of Secretaries for every Division (Katibu Tarafa) in a District, who is duly appointed to perform the function of Registration Officer, for the purpose of section 43(4) and (5) of LMA, 1971.

1.6 It is the opinion of this Commission that these registration arrangements are cumbersome. Research has revealed that most of customary law marriages are celebrated at a village level where presence of a Division Secretary may not be possible, for varied reasons; one the Division Secretary may not be living in the same village where the marriage celebration is taking place, two, most of the time the parties concerned do not give notice of their intention to marry in terms of section 18 of LMA, 1971. Thus these marriages more often than not become secret affair, as far as the state authorities are concerned.

1.7 It is also the opinion of this Commission that non-registration of customary law marriages is the major cause of abuse of this institution. Research has revealed that most of the problems that are blamed upon the institution of Customary Law Marriages are in fact caused by ineffective control of the practice stemming from non-registration and poor administration of these marriages.

1.8 The law requires that all marriages must be registered, however celebrated (s.43 LMA, 1971). Over the years registration of customary law marriages has been declining. Table III shows that where the total number of marriages registered was on the increase, registered customary law marriages were decreasing very fast. For example, when the total number of registered marriages was at its peak for the last 15 years, that is 1983/84 only 62 customary law marriages were registered compared to the total of 35,036 marriages registered that years. Other forms of marriages were; Christian marriages 14,447, Islamic marriages 17, 714 and Civil Marriages 2,788. While in the first year of operation of LMA, 1971 the scenario was as follows:

Total number of registered marriages	11,941
Christian marriages	8,778
Islamic law marriages registered	2,023
Civil marriages registered	768
Customary law marriages registered	219
Other forms of religious marriages registered	153

1.9 Our research has revealed that the customary law marriages are still being celebrated but they are not registered. The question is why is it so?

1.10 It appears to us that the registration arrangements for customary law marriages are cumbersome. The person with the mandate to assist in procuring registration of these marriages (the Division Secretary) is too far removed from where these marriages are normally celebrated.

1.11 It is our opinion that non-registration of customary law marriages deprive the parties concerned the benefits of marriages derived from the provisions of LMA, 1971.

2.0 RECOMMENDATIONS FOR REFORM

2.1 In order to improve the situation the Commission makes the following recommendation:

2.1.2 The spirit of the Law of Marriage Act, 1971 is to treat all marriages, however celebrated on equal footing. Thus, just like any other marriages registration of Customary Law Marriages should be effected as soon as they are celebrated.

2.1.3 A "Kadhi" who officiates an Islamic form of marriage is empowered to issue marriage certificate as soon as he has solemnised a marriage wherever that marriage is celebrated. Likewise the Commission recommends that a village/Branch Secretary (Katibu wa Kijiji au Tawi) should be given similar powers in respect of customary law marriages. This official should replace Division Secretary (Katibu Tarafa) in this function as Registrar of Customary law marriages.

2.1.4 This will entail amendment of section 43 of LMA, 1971 and GN No. 106/71 to accommodate the suggested changes.

CHAPTER FOUR

1.0 MINIMUM AGE FOR MARRIAGE

1.1 PROBLEMS WITH CURRENT LAW

1.2 Reasons for prescribing minimum age for marriage were clearly appreciated well before the LMA, 1971 was enacted. Minimum age for marriage was one of the issues which the Government put to be canvassed by the members of the public in its paper, Government Paper No.1 of 1969. Para 7 of the paper provided that:

> "Hence the Government recommends that a man should be allowed to marry when he attains the age of 18 years. In this connection it should be noted that the UN has recommended 15 years as the minimum marriage age for girls so as to protect their health, and the health of their children. One of the effects of prescribing the minimum marriage age would be to prevent the parents from removing their young daughters from school, because they cannot be married until they reach the prescribed minimum age. Moreover, the girls will be old enough to know how to take care of their children and look after their homes properly. On the other hand a boy of 18 years is allowed to vote, to become a member of TANU AND CAN ALSO ENTER IN ANY Contract. Most of the boys who attain the age of 18 years would be those who have completed their primary school education or if they did not go to school, they have already acquired the necessary skill or knowledge to enable them to help themselves."

1.3 These aspirations were translated into law under section 13 of the LMA, 1971. Twenty years now same issue of minimum age for marriage is being raised. Since enactment of the LMA, 1971 many socio-economic changes have taken place in our society as well as in the world at large. As of now the world is talking of the rights of women and children.

1.4 Several conventions on rights of women and children have been passed by the UN General Assembly and Tanzania is a party to these conventions. All these developments affect the thinking and outlook of the people towards women and children.

1.5 The minimum age for marriage under the Law of Marriage Act, 1971 is the apparent age of 18 years for males and 15 years for females.

1.6 This age structure has been criticised and various reasons have been advanced for change. These reasons are:-

1.6.1 MEDICAL REASONS

It has been argued that it is unhealthy and dangerous for a girl below the age of 20 years to give birth to children. The girl may become deformed and even lose life while giving birth. A child born by such a mother may be deformed and become a weakling. There is ample medical evidence that many mothers of tender age give birth by way of operation which is dangerous for the life of the mother.

1.6.2 **LEGAL REASONS**

Marriage contract has far reaching obligations than normal commercial contracts. The minimum age under the LMA, 1971 is far too low in comparison with other laws such as the Law of Contract or Election law.

1.6.3 The Law of Contract Ordinance, Cap. 433 section 11(1) and (2) provide that every person is competent to contract who is of the age of majority (that is 18 years) any agreement by a person who is declared incompetent to contract is void. According to this provision, a girl below the age of 18 years is incompetent to enter into any commercial agreements. She may only contract as an infant for necessaries.

1.6.4 On the other hand a responsible mother under *LMA,* 1971 who is below the age of 18 years is denied a right to vote or to be voted for under the Election Act, 1985 while her counterpart is free to contract as well as to participate in the electoral process of his community.

1.6.5 It has been argued that a girl below the age of 18 years may easily be coerced into a marriage by greedy parents and cause a lot of miseries to the girl in her married life.

1.6.6 **SOCIAL REASONS**

On one hand, it is being argued that, early marriage deprive girls of opportunities to learn a trade of their choice or to continue with other post Primary School training. On the other hand there are those who argued in favour of the present minimum age structure (15 years for girls and 18 years for boys), advancing the following reasons:

1.6.7 First, some traditional communities recognise that once a girl attains puberty (kuvunja ungo) is considered as a grown up woman and capable of being married. Most of the girls reach puberty between the age of 10 to 15 years.

1.6.8 Secondly, the statutory age for Primary School is at the age of 7 years he or she will complete compulsory Primary School education at the age of 14 years. If a girl does not continue with post Primary School training she will stay at home with her parents who argue that it is desirable to get such girls married off at the earliest possible moment to avoid embarrassments of child bearing out of wedlock.

1.6.9 Those who were calling for change of age structure have suggested the following new age structures:

Females			Males
(a)	18 years	-	18 years
(b)	18 years	-	20 years
(c)	20 years	-	20 years

2.0 RECOMMENDATIONS FOR REFORM

2.1 The Commission is of the opinion that change of the age structure for marriage is now necessary and makes the following recommendations:

2.1.2 That a new minimum age for marriage should be 21 years for both males and females. This will entail an amendment to section 13(1) of the LMA, 1971.

2.1.3 The provisions of section 13(2) of LMA, 1971 also should be amended. In place of 14 years there should be substituted for 18 years as the later conforms with the UN recommendation for minimum age for marriage.

2.1.4 Section 17 of the LMA, 1971 should be deleted.

CHAPTER FIVE

1.0 CELEBRATION OF MARRIAGE AND DIVORCE PROCEDURES

1.1 ON NOTICE OF INTENTION TO MARRY

1.2 Under section 18(1) of LMA, 1971 parties who desire to marry are required to give at least twenty one days notice of their intention to marry to the registrar of marriages or registration officer, as the case may be. This requirement facilitates any person with any objection for the intended marriage to raise such objections during that period of time. Thus is imperative that these notices reach as many people as possibly can. Research has revealed that this is not always the case.

1.3 Some religious Communities like the Christian (invariably this is true for all denominations) transmit copies of the notice of intention to marry to the Church community where the other party comes from when the notice is read, at least after every Sunday service at the place where the intended marriage is going to be celebrated, the same procedure is supposed to be followed at the other end. After these twenty one days of notice the Priest will only solemnise the marriage after receiving communication from his fellow Priests that there was no objection for the intending parties to marry.

1.4 On the other hand Muslims have been known only to affix these notices on mango trees near Mosques for Friday prayers or at the village square or sometimes not at all.

1.5 Similarly is the case with civil marriages. Normally notices are affixed at the DC's office notice board and only few people read these notices. Hence the efficacy of these notices is very poor. The way they are generally being handled does not adequately serve the purpose for which they are intended to serve.

1.6 It is the opinion of the Commission that this kind of mishandling of these notices may lead into disastrous results.

1.7 Section 23(1) of the LMA, 1971 provides that the Registrar General of Marriages and Divorce may give a licence to dispense with the notice requirements under section 18(1) of the LMA, 1971.

1.8 This provision has been introduced in the law to give relief to those person with genuine emergencies and for one reason or the other can not give twenty one days notice before they celebrate their marriage. Now this is not the case. These special licences have been subject of abuse by irresponsible individuals as to render the notice requirements under section 18(1) of the LMA, 1971 meaningless.

1.9 There are known cases that young girls have resorted to a quick marriage, sometimes with their own relatives using Certificate of Emergency to avoid or gain a transfer. Some other individuals have been known to marry some other people's wives because of these express marriages. There are also cases where husbands have married second wives without the knowledge of their first wives at home and many other mischiefs have been known to happen because of the abuse of this concession under section 23(1) of the LMA, 1971. (See Appendix "D" for reasons which are normally being advanced for emergency certificates to marry).

1.10 The Commission has noted that in some jurisdictions a foreign national who wishes to celebrate a marriage in their territory such person is required by law to produce a certificate of no objection to marry from his country of origin.

1.11 Tanzania has no comparable requirement in its law. This kind of procedure aims at curbing illegal or prohibited marriages.

1.12 Tanzania has no comparable requirement in its law. This kind of procedure aims at curbing illegal or prohibited marriages.

1.13 This omission in our law is dangerous and some individuals may turn our country into a forum of convenience and celebrate marriages otherwise prohibited in their own jurisdictions. May be this is the reason why among the top five reasons for request of special licences to marry (see Appendix "D") they are all mobility oriented.

2.0 RECOMMENDATIONS FOR REFORM

2.1 After a thorough evaluation of the problem on notice of intention to marry and a requirement for an introduction of a certificate of no objection to marry, the Commission recommends the following measures for reform:

2.1.1 Notice time is to be raised from 21 days to 28 days to enable transmission of the necessary information. The notice on intention to marry must be well publicised to reach as many people as possible, in particular to reach the respective people of the parties concerned. Newspapers may be used in places where daily or weekly newspapers are circulating.

2.1.2 Cathouse and District Administrative Officers or District Officers who solemnise marriages on behalf of the DCs as the case may be should be educated on the importance of wide publicity of these notices. The present practice of displaying these notices by way of affixing them on mango trees or notice boards at the DC's office have to be improved. The Registrar-General of Marriages or his agent should give instructions on where these notices are to be displayed and periodic inspection should be done to see that those instructions are followed.

2.1.3 "Special licences" for marriage under section 23(1) of LMA, 1971 cause a lot of concern to administrators of the Law of Marriage, 1971 because they are being abused by mischievous individuals. The Commission is of the opinion that these "Special licences" are a necessary evil and so they should remain with tough conditions to prevent their abuse:

(a) Fees should be increased from the present shs.100/- per licence to Tshs. 1,000,000

(b) Before one is granted a special licence under s. 23(1) he/she must first produce two Sureties to execute the required bond.

2.1.4 When foreigners wish to celebrate a marriage in the country, either between two foreigners or one party a foreigner and another is a Tanzanian, the foreigner or foreigners as the case may be should first produce a certificate of no objection to marry from his or her country's office responsible for administration of marriages and divorces.This requirements should be introduced in our law to prevent some foreign nationals from using our jurisdiction as forum of convenience.

3.0 ON PRESUMPTION OF MARRIAGE

3.1 The idea of a presumed marriage was introduced in the LMA, 1971 with the aim of protecting women who live with men for a long period of time and bear children with them without legally being married. Also to remedy the injustice such men inflict upon such women when the union fails. Such women could not sue the man for maintenance and their children were being treated as illegitimate.

3.2 The Government proposed in Para 13 of GN NO.1 of 1969 that: "...if a man cohabits with a woman for a period of more than two years then he would be presumed to have married that woman, and if they have children such children would be deemed to be legitimate children of such spouses as long as that man at the time he started cohabitation with such a woman was legally capable of being married".

3.3 This was translated into legislation in 1971. Section 160(1) of the LMA, 1971 provides: "Where it is proved that a man and a woman have lived together for two years or upwards, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married."

3.4 Majority of the people consulted on this provision have criticised it and called for its removal from the LMA, 1971 advancing several reasons for its abolition. Those reasons may be summarised as follows:

3.4.1 Section 160 is superfluous and contradictory to the whole spirit of the marriage institution as promoted by the LMA, 1971.The presumption of marriage diminishes the sanctity of marriage institution and a mockery or those who marry according to established rites, religious or otherwise.

3.4.2 Religious leaders have criticised it as promoting sinful cohabitation between unmarried men and women.

3.4.3 If the state wishes to protect interest of children born out of such relationships why it should not enact a law to facilitate such protection without referring the sinful relationship between men and women as "marriage"?

3.5 The Commission has noted that section 160 of the LMA, 1971 raises a number of issues of judicial interest as well.

3.5.1 Misconstruction of the section itself. Does the presumption refer to the existence of a lawful marriage between parties arising out of their reputation as husband and wife. Courts have been mixing up the two when interpreting section 160 and sometimes came out with disastrous results. The centre of the confusion is the statement appearing at the end of section 160(1) "Where duly married". The problem is clearly demonstrated in a High Court decision in the case of; FRANCIS LEO Vs PAS CHAL SIMON MAGANGA (1978)LRT.n.22 "The first point that comes very clearly out of sub-section (1) is that this section does not automatically convert concubines into wives at the end of two years or more of cohabitation. All that this section does is to provide for a presumption which is rebuttable, that such people were 'duly married' and this 'being duly married' surely must refer to the form and procedures for marriage provided for under the Law of Marriage Act.

Therefore all that is required to rebut the presumption is to establish that the two never went through a ceremony of marriage recognized under Act. . Once this is established the two can no longer be regarded as husband and wife even if they have lived together for hundreds of years". (Emphasis provided by court).

3.5.2 Save for the fact that this provision does not automatically convert concubines into wives at the end of two years or more of cohabitation, it is the opinion of this Commission that this construction of s. 160(1) of the LMA, 1971 is erroneous. This construction does not take into account whether or not the cohabitants are capable of getting married to each other in terms of the LMA, 1971. Further it legalises illicit cohabitation between a legally married husband or wife, that is to say a woman who cohabits with some other woman's husband for two years or more gets the protection envisaged under section 160 according to this interpretation.

3.5.3 Another problem which comes out of this provision is whether or not the protection accorded extends to women who cohabit with men who are incompetent to get married with such women?
The answer supplied in the case of FRANCIS S/O LEO is yes. With due respect the Commission is of a different opinion. This provision does not protect women who cohabit with men who are incompetent by subsisting monogamous marriage with another woman or in any other way provided for in the LMA, 1971.

3.5.4 More often than not parties who lived together under circumstances provided for under section 160 do find themselves in a bureaucratic tangle where they are asked to produce evidence of marriage and they happen to have none. There is no provision in the law for issuing of any form of document to signify parties living in such relationship. Should the law now do so, even for a limited purpose?

3.5.5 In the case of THERESIA MSIWAO Vs MW AMBA MOHAMED (Civ. App. No. 10/78 - unreported) among other things it was held that where the presumption of marriage under s. 160 has not been rebutted the parties remain married until either one takes "the necessary steps to bring the relationship to an end. This would mean that if the parties wish to end their relationship must file a petition for divorce in a like manner as if the union was a marriage celebrated according to marriage rites recognised under section 25(1) of LMA, 1971. The Commission is not certain whether or not this is the correct interpretation of this presumption of marriage as contemplated in the Government Paper No.1 of 1969.

4.0 RECOMMENDATIONS FOR REFORM

4.1 After serious consideration of the presumption of marriage under section 160 and critically evaluating views of the people consulted on this issue, the commission now makes the following recommendations:- .

4.1.1 The presumption of marriage under section 160 of the LMA, 1971 is an unnecessary encroachment of the sanctity of marriage and contrary to spirit of the Law of Marriage Act, 1971. This provision has no place here. Cohabitation should never be mixed up with issues of marriages. Defacto arrangements may be considered elsewhere such as in Affiliation law and not in the LMA, 1971.

4.1.2 The Commission strongly feels that those who chose to live in a defacto arrangements should not be supported by law.

4.1.3 For these reasons, section 160 should be deleted from the Act.

5.0 MARRIAGE CONCILIATORY BOARDS

5.0 Section 101 of the LMA, 1971 provides that:
"No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a Board and the Board has certified that it has failed to reconcile the parties".

5.1 There are conflicting views on this provision. There are those who argue that this provision is unnecessary, the requirement for reconciliation before divorce equates matrimonial difficulties with trade disputes in labour relations. It was further argued that these Boards are an unnecessary prolongation of matrimonial cases which require quick solution. The ideal machinery for getting matrimonial disputes resolved is that which will provide solutions without imposing extra suffering on the parties. Those who hold this view call for the abolition of the reconciliation process before marriage is formally dissolved. On the other hand others are those who hold that the idea of reconciliation is necessary. It is an amicable settlement between husband and wife.) When either of them errs must be reconciled and advised to continue with their marital relationship. It is argued further that the process is simple, inexpensive and easily accessible to either party in difficulties. Traditionally husband and wife do not refer their disputes to court but to a council of elders for reconciliation.

5.2 In 1969 when the Government was canvasing for establishment of these Boards there were two ideals to be reconciled:

(a) to ensure that divorces are not treated lightly, as was the practice then, and

(b) at the same time parties should not be forced to live together as husband and wife when the marriage has completely broken down.

5.3 From the people consulted and those who gave their views on this issue (see Table I) and from our own observation during regional tours, it would appear that these Boards have an important role to play in saving marriages. However, it is generally considered that they are ineffective and in some places they are not accorded the respect they deserve.

5.4 The Marriage Conciliatory Boards are established under Section l02 of the LMA, 1971 by an order of the Minister responsible for Legal Affairs. Sub-section (1) provides that:
"The Minister shall establish in every Ward a Board to be known as a Marriage Conciliatory Board and may, if he considers it desirable so to do, establish two or more such Boards in any ward".

5.5 As soon as the LMA, 1971 came into force a number of such Boards were established for the purpose of section 101 of the LMA, 1971. Most of the Boards established were religious Boards for different religions and denominations. These Boards for different religions and denominations. These Boards operate down to the grassroots level. The Ward Tribunals established under Ward Tribunals Act no. 7 of 1985 also have jurisdiction to resolve marriage disputes down to Ward level.

5.6 A thorough examination of the function of these Boards has revealed that the Board under the Commissioner for Social Welfare deals with all kinds of marriage disputes. Many people use this Board irrespective of their religious and forms of marriage in dispute. Between 1984 and 1989 a total of 323,737 references were attended to by this Board at Dar Es Salaam (the number of cases reported have been rising steadily from 383 in 1984 to 576 references in 1989). During this period 2,945 references were reconciled and only 292 were referred to court.

5.7 There is a problem of the composition of these Boards. Section 10 (1) provides that, every Board should consist of a Chairman and not less than two and not more than five other members. Some members of the public have called for legislative guarantee of women representation to these Boards. Another problem is that at the moment the law does not fix a time limit within which a Board may reconcile the parties and if it fails to reconcile them refer the matter to court. It has been suggested that there must be time limit within which the Board may deal with a matrimonial difficulty. Yet another problem has been pointed out on Section 103(2) (a) in that this provision favours husbands as far as the jurisdiction of the Board is concerned, that is the Board may exercise jurisdiction over a dispute where the husband resides. This procedure has been criticised as being unfair to women.

6.0 RECOMMENDATION FOR REFORM

Having carefully evaluated all the arguments for and against the maintaining Marriage Conciliatory Boards, the Commission now makes the following recommendations:

6.1.1 The Commission still supports the Government ideas to make marriages voluntary and divorces not a simple matter. The majority of the people who gave their opinion on the Marriage Conciliatory Boards are of the view that they play useful role in resolving matrimonial difficulties. The Commission recommends that these Boards must be maintained.

6.1.2 Considering the success of Marriage Conciliatory Board in Dar Es Salaam under the Commissioner for Social Welfare, it is now recommended that in every Region and District offices of the Social Welfare Department to be established a Marriage Conciliatory Board for the purpose of LMA, 1971.

6.1.3 As far as the composition of Marriage Conciliatory Boards are concerned the Commission recommends an amendment to section 103(1) of LMA, 1971 to provide for a guaranteed representation of women on these Boards. The law should also provide that the persons eligible for appointment to these Boards must be mature enough and not young men and women with no family experience in order to win the confidence of the parties with matrimo nial difficulties before them.

6.1.4 Members of the Marriage Conciliatory Boards must be well informed of their roles when they first assume office. It should be emphasized to them that their role is to reconcile the parties and not to find who is the party to blame in the dispute.

6.1.5 It is recommended that when exercising jurisdiction the Board should, as much as practicable conduct their proceedings in camera to avoid embarrassment to the parties concerned.

6.1.6 The Board should within 6 months of receipt of the complaint finalise their proceedings and give their opinion on the same. This calls for an amendment of section 101 of the LMA, 1971.

6.1.7 It is recommended that Section 103(2)(a) of the LMA, 1971 be amended to provide that a Board established at a place where a Petitioner resides or whenever convenient for both parties may exercise jurisdiction for the purpose of the LMA,1971 and not necessarily where the husband resides.

6.1.8 Courts also should try to reconcile the parties in marital difficulties before they adjudicate upon those cases.

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Appeal No.9 of 1983 (Unreported)
Hamid Amir Vs Maimuna Amir, 1977 LRT No. 55
Rukia Diwani Konzi V s Abdallah Issa Kihenge
HC Matl. Cause No.6 of 1977 (Unreported)
Francis s/o Leo Vs Paschal Simon Maganga
(1978) LRT No. 22
Pettit.Vs Pettit (1969) 2 All ER 385
Gissing Vs Gissing (1970)3 WLR 255
Button V s Button (1968) 1 All ER 1064
Nixon Vs Nixon (1969) 3 All ER 1133
Hower V s Bryant (1969) 3 All ER 578
Re. S (An Infant) (1967) All ER 202
Johnstone Vs Realtie (1943) 10 Cl-Fin. 42

APPENDIX' A'

COMMITTEE MEMBERS OF THE LAW OF MARRIAGE PROJECT

1. Mr. Harold Reginald Nsekela - CHAIRMAN
2. Mr. D. M. Mwita
3. Mr. S. B. Salula
4. Mrs. N. L. Tenga
5. Prof. C. K. Omari
6. Ms. Stella Longway
7. Mr. Dominic Kashumbughu
8. Mr. W. L. Kapinga
9. Mr. S. M. Sadallah

APPENDIX 'B'

TERMS OF REFERENCE

1. **THE LAW ON FAMILY PROPERTY.**

   The concept of "separate ownership of property" as embodied in the Act needs clarification which is important for certainty and predictability of the law on family property and its division when the union breaks down.

2. **REGISTRATION OF CUSTOMARY LAW MARRIAGES.**

   Registration requirements provided for under s. 43(4) and (5) do not provide for effective control and administration of customary law marriages.

3. **CUSTODY AND MAINTENANCE OF CHILDREN.**

   The law on Custody and Maintenance of Children is clouded with apparent uncertainty.

4. **MINIMUM AGE FOR MARRIAGE.**

   The age of 15 which is minimum for marriage has been criticised as being discriminatory of female members. It has also been argued that to a girl of the age of 15, marriage is unhealthy and dangerous to her life as well as to her issues.

5. **CELEBRATION OF MARRIAGE AND DIVORCE PROCEDURES.**

   That the effectiveness of the Law of Marriage Act, as far as celebration and divorce procedures are concerned call for evaluation and reform where necessary.

APPENDIX 'C'

Table 1:

RESPONSES:

LIST OF PERSONS AND INSTITUTIONS TO WHOM THE DISCUSSION PAPER WITH QUESTIONNAIRE ON LAW OF MARRIAGE ACT. NO.5 OF 1971 WAS SENT

1. The Hon. Chief Justice
2. Dr. Stephen Mbwana
3. The Hon. Jaji Kiongozi
4. The Hon. Mr. Justice Makame, Justice of Appeal.
5. The Hon. Mr. Justice Mustafa, Justice of Appeal.
6. The Hon. Mr. Justice Omari, Justice of Appeal.
7. The Hon. Mr. Justice Kisanga, Justice of Appeal.
8. The Hon. Mr. Justice Chipeta, High Court of Tanzania.
9. The Hon. Mr. Justice Katiti, High Court of Tanzania.
10. The Hon. Mr. Justice Lugakingira, High Court of Tanzania.
11. The Hon. Mr. Justice Rubama, High Court of Tanzania.
12. The Hon. Mr. Justice Sisya, High Court of Tanzania.
13. The Hon. Mr. Justice Maina, High Court of Tanzania.
14. The Hon. Mr. Justice Kazimoto, High Court of Tanzania.
15. The Hon. Mr. Justice Bahati, High Court of Tanzania.
16. The Hon. Mr. Justice Mwaikasu,* High Court of Tanzania.
17. The Hon. Mr. Justice Mapigano, High Court of Tanzania.
18. The Hon. Mr. Justice Mtenga, High Court of Tanzania.
19. The Registrar, Court of Appeal of Tanzania .
20. The District Registrars, High Court of Tanzania: Dar es Salaam, Tanga, Arusha, Tabora, Mbeya, Dodoma and Mtwara.
21. The Chief Parliamentary Draftsman.
22. The Dean, Faculty of Law, University of Dar es Salaam.
23. The Dean, Faculty of Arts and Social sciences, University of Dar es Salaam.*
24. National Social Welfare Training Institute, Dar es Salaam.
25. The Tanganyika Law Society. *
26. Umoja wa Wanawake Tanzania (UWT Headquarters).
27. Chama cha Mapinduzi (CCM Ofisi Ndogo Dar es Salaam).
28. Department of Social Welfare, the Ministry of Labour, Culture and Social Welfare, Dar es Salaam.
29. Baraza Kuu la Waislam Tanzania (BAKWATA Headquaters, Dar es Salaam).
30. The Catholic Church of Tanzania (TEC Headquarters).
31. The Lutheran Church of Tanzania.
32. The Anglican Church of Tanzania.
33. The Mass Media: Uhuru/Mzalendo, Mfanyakazi, Daily News/Sunday News, Lengo and Kiongozi Newspapers, Shirika la Habari Tanzania (SHIHATA), MAELEZO and Radio Tanzania Dar es Salaam (RTD).
34. Regional Development Director, Arusha. *
35. District Commissioners: Iringa, Nzega, Kahama, Shinyanga, Maswa, Meatu, Tanga, Lushoto and Mbeya.
36. District Secretaries (CCM): Bariadi, Hanang, Mbulu, Babati, Ngorongoro, Arusha and Arumeru.
37. District Administrative Officers (DAOS): Arumeru, Moshi, Mwanga, Tanga, Muheza, Lushoto and Ileje. *

38. District Magistrates i/c: Mbeya, Rungwe, Mtwara, Newala, Masasi, Lindi.
39. Resident Magistrates i/c: Arusha, Tanga, Mbeya, Tabora; Mtwara, Mwanza and Kilimanjaro
40. UWT District Secretaries: Arumeru, Moshi, Mwanga, Tanga, Muheza, Lushoto, Korogwe, Arusha, Mbeya, Rungwe, Mwanza, Sengerama, Bukoba and Lushoto.
41. Ms. Bigeye (MS) - T.LC. Arusha .
42. Mr. Mono - State Attorney i/c Arusha.
43. Mulebya - T.LC. Dar es Salaam.
44. Mrs. Rwebangira - T.LC. Dar es Salaam.*
45. Malingumu Lutashobya, Advocate, Dar es Salaam.
46. Emanuel Kisusi, Advocate, Dar es Salaam.

SUMMARY:

1. Total number of questionnaires used: 110
2. Number of responses (see names with asterisk): 6
3. Rate of response: 6.6%

Table 2

REGIONAL VISITS:

REGIONS AND DISTRICTS VISITED BY THE LMA, (1971) WORKING GROUP RESEARCH TEAMS AND THE COMMISSION WHERE LAW OF MARRIAGE ISSUES WERE CANVASED

REGIONS	DISTRICTS	TEAM INVOLVED	NO. OF METINGS	ATTENDANCE	REMARKS
ARUSHA	**Arumeru**	**LMA,71 Working Group Team**	**1**	**150**	**LRC CHAIRMAN**
	Arusha	**"**	**2**	**350**	
	Loliondo	**LRC TEAM**	**1**	**130**	
	Babati	**"**	**2**	**450**	
	Hanang	**"**	**2**	**350**	
	Mbulu		**2**	**390**	
K'NJARO	**Moshi**	**LMA,71 Working Group Team**	**1**	**300**	
	Moshi	**LRC TEAM**	**2**	**-**	**PART TIME COMMISSIONER**
	Mwanga	**LMA,71 Working Group Team**	**1**	**150**	
	Mwanga	**LRC TEAM**	**1**	**-**	**PART TIME COMMISSIONER**
	Same	**"**	**3**	**-**	**LRC CHAIRMAN**
	Rombo	**"**	**1**	**-**	**PART TIME COMMISSIONER**
TANGA	**Tanga**	**LMA,71 Working Group Team**	**1**	**200**	
	Muheza	**"**	**1**	**250**	
	Muheza	**LRC TEAM**	**1**	**-**	**PART TIME COMMISSIONER**
	Korogwe	**LMA,71 Working Group Team**	**1**	**300**	
	Handeni	**LRC TEAM**	**1**	**-**	**PART TIME COMMISSIONER**
	Pangani	**"**	**1**	**-**	**"**
	Lushoto	**"**	**2**	**-**	**LRC CHAIRMAN**

	Songea Mbinga Tunduru	LRC TEAM " "	1 1 1	500 150 100	PART TIME COMMISSIONER " "
	Mtwara Newala Masasi	LRC TEAM " "	4 3 6	475 670 1000	FULL TIME COMMISSIONER FULL TIME COMMISSIONER FULL TIME COMMISSIONER
LINDI	Lindi	LRC TEAM	4	786	FULL TIME COMMISSIONER
TABORA	Igunga Nzega	LRC TEAM "	1 2	100 250	LRC CHAIRMAN "
SHINYANGA	Kahama Shinyanga Maswa Meatu Bariadi	LRC TEAM " " " "	2 1 2 1 1	350 220 300 160 260	LRC CHAIRMAN " " " "
KAGERA	Bukoba	LMA,71 Working Group Team	1	-	D.M. MWITA AND S.B. SALULA
MWANZA	Mwanza Sengerema Geita	LMA,71 Working Group Team " "	1 1 1	- - -	LMA,71 Working Group Team CHAIRMAN AND M.S. LONGWAY
11	36	-	63	8,371	-

APPENDIX 'D'

REASONS FOR EMERGENCY CERTIFICATES TO MARRY

OMBI LA KUTAKA RUHUSA MALUM YA MSAJILI MKUU KWA KIPINDI 1984 - 1989

SABABU	1984	1985	1986	1986	1988	1989	JUMLA
(1) Muda wa Kuishi nchini umekwisha	7	7	27	83	29	50	203
(2) Uhamisho	25	25	55	113	62	110	390
(3) Sababu za Kidini	2	3	3	4	4	3	19
(4) Kwenda nje ya Nchi kwa Masomo au matibabu	24	12	31	88	21	67	243
(5) Likizo (Fupi)	49	30	68	150	-	22	319
(6) Kuishi pamoja kwa muda mrefu	11	8	29	71	15	49	183
(7) Ugonjwa	1	-	2	1	1	2	7
(8) Haki au Malipo Kazini (Askari)	4	-	22	24	34	1	85
(9) Wazazi wamekuja kwa shughuli hiyo	-	-	11	-	-	3	14
(10) Mimba	-	-	-	-	-	9	9
(11) Mke kwenda kuuguza Mkwe	-	-	1	32	-	22	55
J U M L A	123	85	249	566	166	338	1527