



# DIVORCE AND POLYGAMY IN TANZANIA

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## ABSTRACT

*This Article explores the unique legal issues surrounding polygamous marriage and divorce in mainland Tanzania, and submits that the Law of Marriage Act of 1971 (LMA) should be amended to include a provision that governs co-wives' property interests in the case of divorce. Moreover, it proposes awareness-raising efforts to increase legal literacy and to promote the rights of co-wives. Under Section 10(1) of the Act, a marriage is defined as "the voluntary union of a man and a woman, intended to last for their joint lives," and may either be monogamous or polygamous (or potentially polygamous). Further, under Section 57, no wife in a polygamous marriage holds a superior position in matrimonial homes than any other wife. Effectively, under the LMA all co-wives have equal rights and obligations while they are married.*

*But what about after a divorce? Although a plain reading of Section 57 could logically extend equal rights and obligations to co-wives upon divorce, Tanzanian courts have not interpreted it this way. In Maryam Mbaraka Saleh v. Abood Saleh Abood, a senior co-wife was unsuccessful in reopening divorce proceedings concerning her husband and a former co-wife. Previously, the ex-wife had won her case before the Court of Appeal, which held that she was entitled to forty percent of the marital property, based on her contribution. The fact that the husband was engaged in a polygamous marriage was never raised until the remaining co-wife sought to secure her share of the assets. The Court of Appeal declined her request for relief because she was not a party to the original divorce proceedings. Thus, although the LMA contemplates both monogamous and polygamous marriage, it only appears to contemplate the divorce of monogamous couples. Because non-divorcing co-wives cannot be a party to divorce proceedings, and only parties can claim a stake in marital assets, the LMA currently offers no means for non-divorcing co-wives to claim a stake in marital property.*

*This Article argues that the LMA fails to protect the property rights of all co-wives upon divorce, and that reform is imperative as Tanzanian divorce rates increase. Numerous articles have been written about succession and property rights relating to marriage in Tanzania, but no scholarship specifically examines these rights within the context of a polygamous marriage, which account for approximately one fourth of all Tanzanian marriages. To the extent that divorce is on the rise in Tanzania, this issue is both timely and consequential.*

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## DIVORCE AND POLYGAMY IN TANZANIA

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### I. INTRODUCTION

In 1977, Abood Saleh Abood and his wife, Farka, shared a house in Dar es Salaam, Tanzania.<sup>1</sup> One year later, Abood decided to take a second wife—a common practice in Tanzania<sup>2</sup>—with whom he had one daughter.<sup>3</sup> Ten years after his second marriage, Abood’s second wife petitioned for a divorce with the Magistrates Court.<sup>4</sup> She claimed that she was entitled to fifty percent of the family’s Dar es Salaam house based on her contribution within the meaning of Section 114 of the Tanzanian Law of Marriage Act (LMA),<sup>5</sup> which provides that courts shall consider each party’s household contributions when determining how to divide marital assets during a separation or divorce.<sup>6</sup> After two appeals and a lengthy legal battle,<sup>7</sup> the Court of Appeal held that Abood’s second wife was entitled to a forty percent share in the family’s Dar es Salaam

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<sup>1</sup> Bart Rwezaura, *Tanzania: Building a New Family Law Out of Plural Legal System*, 33 U. LOUISVILLE J. FAM. L. 523, 531 (1994-1995).

<sup>2</sup> Roughly twenty-five percent of all Tanzanian women are in polygamous marriages. *See Gender Equality and Social Institutions in Tanzania*, Social Institutions and Gender Index (SIGI), <http://genderindex.org/country/tanzania> (last visited May 6, 2011) (“Almost one-quarter of Tanzanian women live in polygamous marriages.”); *see also Tanzania: Women’s Control of Resources and Caring Capacity*, U.N. SYSTEM OF ORGANIZATIONS, <http://www.unsystem.org/scn/archives/tanzania/ch11.htm> (last visited May 6, 2011) (claiming that the average rate of polygamy was 27% in Tanzania).

<sup>3</sup> *See Rwezaura, supra* note 1, at 530.

<sup>4</sup> *Id.*

<sup>5</sup> Law of Marriage Act, 1971 (Tanz.) [hereinafter LMA]. Section 114 of the LMA, entitled “Power of the Court to Order Division of Marital Assets,” grants the court the power to order the division of any assets acquired during the marriage “to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets.” LMA § 114(2)(b). Although in this case the court relied on LMA § 114(2)(b) to grant the divorcing co-wife an inequitably *large* share of the marital property, in other instances the court may rely on LMA § 114(2)(a) to grant the divorcing co-wife an inequitably *small* share of the marital property or no share at all. *See infra* Part III.C.

<sup>6</sup> *See Rwezaura, supra* note 1, at 530.

<sup>7</sup> *Id.* (“The major dispute between them related to the Magistrates’ Court’s order, which awarded the wife a fifty percent share in the house located in the City of Dar es Salaam. The husband unsuccessfully appealed to the High Court against the lower court’s decision, but on further appeal by the wife, the Court of Appeal held that the wife had made a contribution”).

house.<sup>8</sup>

Meanwhile, Farka, Abood's first and remaining wife, was excluded from the division of marital assets entirely.<sup>9</sup> By awarding a forty percent share of the family's assets to Abood's second wife, the Court of Appeal had effectively deprived Farka of her personal share in the marital property.<sup>10</sup> Hoping that the Court of Appeal would reopen the case and reconsider its ruling in light of her shared—and possibly superior—interest in the marital property, Farka applied to the Court of Appeal for a review of its decision.<sup>11</sup> However, the Court declined her request for review with costs, claiming that Farka was not permitted to reopen the case because she was not a party to the original divorce proceedings.<sup>12</sup>

Ironically, even if Farka *had* attempted to be a party to the original divorce petition, her efforts would have been rejected; the LMA, in its current form, does not permit polygamous co-wives to be a party to the divorce petition of an exiting co-wife.<sup>13</sup> Thus, the court's ruling effectively gave the divorcing co-wife a superior interest in the marital property.<sup>14</sup>

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The Court of Appeal's decision highlights the LMA's failure to adequately protect

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<sup>8</sup> See *Maryam Mbaraka Saleh v. Abood Saleh Abood*, High Ct. Civ., App. I (1992) (Tanz.).

<sup>9</sup> See Rwezaura, *supra* note 1, at 531.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> LMA § 105, entitled "Parties to Petitions" states that "No person shall be made a co-respondent to a petition for a decree of separation." *Id.* § 105(1); see *infra* Part III (for a more in-depth analysis of section 105).

<sup>14</sup> See *e.g.* Rwezaura, *supra* note 1, at 531.

the economic interests of co-wives and their children in a polygamous divorce.<sup>15</sup> While the LMA contemplates how to divide assets upon monogamous marriage,<sup>16</sup> polygamous marriage,<sup>17</sup> and monogamous divorce,<sup>18</sup> the LMA does not contemplate asset division upon polygamous divorce.<sup>19</sup> This gap in the statutory scheme demonstrates that women in polygamous marriages do not have the means to enforce their property rights, and thus face economic uncertainty, including the possibility of involuntarily and inequitably sharing their assets with co-wives.<sup>20</sup>

This Article explores the unique legal issues surrounding polygamous marriage and divorce, and submits that the LMA should be amended to include a provision that governs co-wives' property interests in the case of divorce.<sup>21</sup> Moreover, it proposes awareness-raising efforts to increase legal literacy and to promote the rights of co-wives.<sup>22</sup> Although the United Republic of Tanzania ("Tanzania") consists of two regions, mainland Tanzania and the semi-autonomous island of Zanzibar,<sup>23</sup> this Article only

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<sup>15</sup> See *id.* at 532 (discussing how the current version of the LMA may result in injustice to co-wives in the case of polygamous divorce); Mark J. Calaguas, Cristina M. Drost & Edward R. Fluet, *Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania*, 16 COLUM. J. GENDER & L. 471, 505 (noting that the gap in the LMA's provisions with regard to property rights of co-wives in polygamous divorce is "surprising"); Sandra Ka Hon Chu & Alison Symington, *Respect, Protect, and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, 1, 3-39 (2009) ("Where the proprietary consequences of polygamous marriages are not regulated, women in such relationships do not have a clear right to property within marriage, or any means of enforcing their property rights.").

<sup>16</sup> LMA § 56 (governing the rights and liabilities of married women).

<sup>17</sup> *Id.* § 57 (governing the equality between wives when a man has more than one wife).

<sup>18</sup> *Id.* § 114 (governing the power of the court to divide marital assets).

<sup>19</sup> See Rwezaura, *supra* note 1, at 532 (noting that the LMA leads to unsatisfactory results in the case of polygamous divorce because the LMA was drafted "without consideration of the circumstances of couples who are polygamously married.").

<sup>20</sup> See Hon Chu & Symington, *supra* note 15, at 3-39.

<sup>21</sup> See *infra* Part IV.A.

<sup>22</sup> See *infra* Part IV.B.

<sup>23</sup> The Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/TZA/6, 8 (Apr. 16, 2007), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/264/84/PDF/N0726484.pdf?OpenElement> [hereinafter CEDAW].

considers the legal systems governing mainland Tanzania.

Although many human rights groups and scholars advocate for the eradication of polygamy altogether,<sup>24</sup> and thus view polygamy legislation as a step backward—not forward—in the fight for gender equality,<sup>25</sup> we take the position that, to the extent that polygamy is still widely practiced in Tanzania and is unlikely to decrease significantly in the near future,<sup>26</sup> the government cannot sit idly by and wait for polygamy to be “phased out” while a large portion of Tanzania’s population remains without legal protection upon divorce.<sup>27</sup>

Numerous articles have been written about succession and property rights relating to marriage in Tanzania,<sup>28</sup> but no scholarship specifically examines these rights within the context of polygamous divorce. To the extent that polygamous marriages are common in

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<sup>24</sup> See, e.g., Human Rights Committee, General Comment 28, Equality of rights between men and women, 68th sess., U.N. Doc. CCPR/C/21/Rev.1/Add. 10 (2000), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 183, para. 24, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003) (“Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”).

<sup>25</sup> See, e.g., SUSAN DELLER ROSS, *ADVANCING WOMEN’S RIGHTS GLOBALLY, CONSOLIDATED FIRST, SECOND, THIRD, AND FOURTH QUARTERLY REPORTS* (June 2006) (“laws allowing men to marry as many women as they like . . . discriminate against women, increase women’s risk of HIV/AIDS infection, and adversely affect women’s economic situation.”).

<sup>26</sup> The percentage of women living in polygamous marriages has only decreased slightly in the last twenty-five years. In 1986, 27.5 percent of women were living in polygamous marriages. Westoff, Charles F., Ann K. Blanc & Laura Nyblade, *MARRIAGE AND ENTRY INTO PARENTHOOD. DEMOGRAPHIC AND HEALTH SURVEYS COMPARATIVE STUDIES NO. 10.*, 19 (Calverton, MD: Macro International, Inc. 1994). According to the most recent statistics, that number is 25 percent—a decrease of only 2.5 percent. See *Gender Equality and Social Institutions in Tanzania*, Social Institutions and Gender Index (SIGI), <http://genderindex.org/country/tanzania> (last visited May 6, 2011).

<sup>27</sup> See ZUBEIDA TUMBO-MASABO & RITA LILJESTRÖM, CHELEWA, CHELEWA: THE DILMENA OF TEENAGE GIRLS 42 (1994) (predicting that polygamy in Tanzania was likely to decrease in the near future as young women become more educated).

<sup>28</sup> See generally Tamar Ezer, *Report: The Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters*, 7 GEO. J. GENDER & L. 599 (2006); Nadia Steinzor, *Women’s Property and Inheritance Rights: Improving Lives in a Changing Time* (Mar. 2003), available at [http://www.usaid.gov/our\\_work/crosscutting\\_programs/wid/pubs/womens\\_property\\_inheritance.pdf](http://www.usaid.gov/our_work/crosscutting_programs/wid/pubs/womens_property_inheritance.pdf) (last visited May 6, 2011).

Tanzania,<sup>29</sup> and Tanzanian divorce rates are increasing,<sup>30</sup> this issue is both timely and consequential. Furthermore, evidence linking polygamous marriage with women's social and economic vulnerability and health further reinforces the need to ensure women in polygamous unions have adequate financial autonomy and legal recourse upon divorce.<sup>31</sup>

Part II of this article explores the origins of polygamy in Tanzania and examines why it persists today.<sup>32</sup> Part III surveys the Tanzanian legal system and outlines the laws governing polygamous marriage.<sup>33</sup> Part IV discusses why a polygamous divorce law is imperative to protect the economic interests and to promote the well being of co-wives.<sup>34</sup> Part V explores ways to alleviate the discrimination written into Tanzania's marriage and divorce laws and discusses other reformations.<sup>35</sup> Part VI concludes.<sup>36</sup>

## II. POLYGAMY IN TANZANIA: AN OVERVIEW

Polygamy is the practice whereby a person is married to more than one spouse at the same time.<sup>37</sup> There are two main forms of polygamy: polygyny, in which a man is married to more than one wife, and polyandry, where a woman is married to more than

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<sup>29</sup> See *Gender Equality and Social Institutions in Tanzania*, Social Institutions and Gender Index (SIGI), <http://genderindex.org/country/tanzania> (last visited May 6, 2011).

<sup>30</sup> See Hasina Mjingo, *Matrimonial separations, divorces on the increase*, DAILYNEWS ONLINE ED., (Jan. 22, 2011 22:00), <http://www.dailynews.co.tz/home/?n=16583&cat=home> (According to the Registration, Insolvency and Trusteeship Agency (RITA) the few registered divorce cases show that in 2007 only 47 married couples received their divorce certificates. . . . In 2009 the figure jumped to 96.”).

<sup>31</sup> V. Agadjanian and A. Chika Ezech, *Polygny, gender relations, and reproduction in Ghana*, J. COMPARATIVE FAMILY STUDIES 31 (2000): 427–441 (finding that areas with higher levels of polygamy were characterized by a higher degree of gender inequality and by women's dependency on men than in areas where there are lower levels of polygny); I.O. Orubuloye et al, *Sexual networking in the Ekiti District of Nigeria*, in STUDIES IN FAMILY PLANNING 22(2) (1991): 61–73 (finding women in polygamous marriages were more likely to have sex outside of marriage than women married to one spouse, citing the need for material or economic assistance as one reason for doing so).

<sup>32</sup> See *infra* Part II.

<sup>33</sup> See *infra* Part III.

<sup>34</sup> See *infra* Part IV.

<sup>35</sup> See *infra* Part V.

<sup>36</sup> See *infra* Part VI.

<sup>37</sup> MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 3 (Berg 2008).



one husband.<sup>38</sup> In Tanzania, however, polygny is the only legal form of polygamy; under the LMA, a married woman who marries another man “shall be guilty of an offen[s]e.”<sup>39</sup> Moreover, the LMA defines a polygamous marriage as “a union in which the *husband* may during the subsistence of the marriage *be married to or marry another woman or women.*”<sup>40</sup> Thus, under Tanzanian law, and for purposes of this Article, the term “polygamy” refers solely to a marriage between a man and more than one wife.

Polygamy has deep and ancient roots in Tanzania.<sup>41</sup> It is thus difficult to examine current notions of polygamous divorce in Tanzania without first discussing how the practice has transformed alongside the eras of colonization, Westernization, and modernization. Tracing the historical evolution of polygamy in Tanzania yields meaningful insights about the complicated and unique legal issues that arise in the context of polygamous marriage. This section discusses the historical origins of polygamy in Tanzania and explores why polygamy it persists today.

#### *A. Historical Origins*

Prior to the colonization of the African region that is now Tanzania, large polygamous families were considered necessary for survival, as households had to be self-sufficient and consume primarily what they produced.<sup>42</sup> Also, larger families facilitated social stability,<sup>43</sup> and in traditional African society polygamy was associated with wealth and status.<sup>44</sup> Furthermore, feminists have argued that, historically, polygamy

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<sup>38</sup> *Id.*

<sup>39</sup> See LMA § 152(1).

<sup>40</sup> *Id.* § 9(3) (emphasis added).

<sup>41</sup> ZEITZEN, *supra* note 37, at 18.

<sup>42</sup> Penelope E. Andrews, *Who’s Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 11 J. & Fam. Stud. 303, 322 (2009).

<sup>43</sup> *Id.*

<sup>44</sup> See J.B. Ojywang, *Polygamy as a Legal and Social Institution in Kenya*, 10 E. AFR. L.J. 63, 69 (1974).

helped women establish company and community for themselves, and share the burdens of household labor and child rearing.<sup>45</sup> However, even though African women benefited indirectly from polygamy in pre-colonial Tanzania, “the institution of polygamy is imbedded in patriarchal traditions”<sup>46</sup> and its social impact has changed over time.<sup>47</sup>

After Germany began colonizing Tanzania in 1884,<sup>48</sup> polygamy’s role in tribal culture began to shift. After colonies in what is now Zanzibar and mainland Tanzania were acquired from Germany by Great Britain in 1919, a formal foreign legal structure was imposed.<sup>49</sup> In this new legal system, customary tribal law no longer governed many substantive areas of law, such as criminal law. For family law matters, however, Great Britain permitted customary tribal law to be applied in the “Native Subordinate Courts.”<sup>50</sup> Therefore, although polygamy conflicted with Christian ideals and the European statutory framework that promoted individual equality, polygamy was allowed to persist because it provided a steady stream of labor.<sup>51</sup>

Polygamy continued after Tanzania gained independence from Great Britain in 1961. On December 10, 1961 the region that is now mainland Tanzania became an autonomous state. The United Republic of Tanzania, which consists of mainland Tanzania and Zanzibar, was created in 1964, after Zanzibar nationalists overthrew the sultan who controlled the island at the time.<sup>52</sup> Although both mainland Tanzania and

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<sup>45</sup> Andrews, *supra* note 42, at 322.

<sup>46</sup> *Id.* at 320.

<sup>47</sup> See generally ZEITZEN, *supra* note 37.

<sup>48</sup> Robert V. Makaramba, *The Secular State and the State of Islamic Law in Tanzania*, in MUSLIM FAMILY LAW IN SUB-SAHARAN AFRICA: COLONIAL LEGACIES AND POST-COLONIAL CHALLENGES, 273, 275 (Amsterdam University Press (2010), Shamil Jeppie, Ebrahim Moosa & Richard L Roberts eds.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 276.

<sup>51</sup> Andrews, *supra* note 42, at 321.

<sup>52</sup> Calaguas, et al, *supra* note 15, at 482.

Zanzibar are governed by the same constitution, there is little overlap in their legal systems as they pertain to marriage and family law.<sup>53</sup> Today Zanzibar has separate religious courts, called Kadhi courts, which try cases pertaining to family law matters for parties claiming to follow “Muslim personal law.”<sup>54</sup> Although these Kadhi courts are intended for a distinct class of Zanzibar citizens—Muslim citizens, as Zanzibar is estimated to be 99 percent Muslim<sup>55</sup>—the Kadhi courts essentially handle all marriages and divorces on the island of Zanzibar.<sup>56</sup> While some cases originating in Zanzibar can be appealed to the Court of Appeal of the United Republic of Tanzania, those involving Islamic legal matters such as marriage and divorce cannot be.<sup>57</sup> Though polygamy is still practiced in Zanzibar, Zanzibar’s polygamy laws and practices will not be discussed in this Article, due to their substantial dissimilarity to those of mainland Tanzania.

### *B. Polygamy Today*

With roughly one-fourth of its women involved in polygamous marriages,<sup>58</sup> Tanzania remains one of the few countries in the world where polygamy is still widely practiced.<sup>59</sup> Although traditional polygamy is still common in rural areas of Tanzania,

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<sup>53</sup> *Id.*

<sup>54</sup> Shamil Jeppie, Ebrahim Moosa & Richard L Roberts, *MUSLIM FAMILY LAW IN SUB-SAHARAN AFRICA: COLONIAL LEGACIES AND POST-COLONIAL CHALLENGES*, 273, 274 Amsterdam University Press (2010).

<sup>55</sup> *Id.* at 273.

<sup>56</sup> Makaramba, *supra* note 48, at 274.

<sup>57</sup> *Id.*

<sup>58</sup> *Gender Equality and Social Institutions in Tanzania*, Social Institutions and Gender Index (SIGI), <http://genderindex.org/country/tanzania> (last visited May 6, 2011) (“Almost one-quarter of Tanzanian women live in polygamous marriages.”); *see also Tanzania: Women’s Control of Resources and Caring Capacity*, U.N. SYSTEM OF ORGANIZATIONS, <http://www.unsystem.org/scn/archives/tanzania/ch11.htm> (last visited May 6, 2011) (claiming that the average rate of polygamy was 27% in mainland Tanzania).

<sup>59</sup> *Tanzania: Women’s Control of Resources and Caring Capacity*, U.N. SYSTEM OF ORGANIZATIONS, <http://www.unsystem.org/scn/archives/tanzania/ch11.htm> (last visited May 6, 2011). Polygamy is popular in both urban and rural areas, although it is markedly lower in Dar es Salaam than other urban centers. A United Nations survey indicated that the average rate of polygamy was 27% in mainland Tanzania, 12.4% in Dar es Salaam, 24.1 % in other urban areas, and 29.4% in rural areas. Although Dar es Salaam has a significantly lower polygamy rate than the rest of mainland Tanzania, scholars largely attributed this

modernization and Westernization have shifted how polygamy is practiced in its urban areas.<sup>60</sup> In large cities like Dar es Salaam, traditional polygamy has been largely replaced by private, *de facto* polygamy, which is considered to be more attuned to Tanzanians' perceptions of modernity.<sup>61</sup> *De facto* polygamy is characterized as a relationship in which a man marries one wife and also forms extra-legal domestic and sexual unions with other women.<sup>62</sup> What differentiates these "unofficial co-wives" from a mistress or prostitute is the familial relationship that is often shared between an unofficial co-wife, the man, and his official wife.<sup>63</sup> Instead of hiding the unofficial co-wife from the official wife, a man will often openly support an unofficial co-wife financially, acknowledges the paternity of her children, and allow her to live in his house.<sup>64</sup>

As Tanzanian women's contribution to the economy has increased,<sup>65</sup> Tanzanian scholars and women's rights activists have become less tolerant of the continued practice

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percentage to the increase in "informal" or *de facto* polygamy whereby men marry one wife and do not marry their other domestic partners. Because *de de facto* polygamous is unofficial by nature, this practice would not be reflected in polygamy statistics. See ZEITZEN, *supra* note 37, at 157; see *infra* Part IV.I (discussing this practice).

<sup>60</sup> Interview with Kellen Mngoye, Fabia Shundi & Amine Mnegne Mlawa, Women's Research and Documentation Project, in Dar es Salaam, Tanzania (Mar. 10, 2011).

<sup>61</sup> Interview with Kellen Mngoye, Fabia Shundi & Amine Mnegne Mlawa, Women's Research and Documentation Project, in Dar es Salaam, Tanzania (Mar. 10, 2011) (remarking that "because polygamy is less accepted, the practice is starting to go underground."); see ZEITZEN, *supra* note 37, at 157 (noting that the practice of keeping unofficial wives may "represent African elite men's attempt to embody Western ideals of a modern man" while they continue to "secretly strive towards the African ideal of polygyny.").

<sup>62</sup> See ZEITZEN, *supra* note 37, at 158. Given the unofficial nature of these relationships, there are no statistics available representing the number of unofficial co-wives in Tanzania. *Id.* Unofficial co-wives have mostly been "lost between marriage categories, classified as being in consensual unions or single." *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Women's important contribution to economic activity is well recognized. In the 2006 World Economic Forum Global Gender Gap Report, Tanzania was ranked number 1 among 115 countries in terms of economic participation and opportunity. Amanda Ellis et al, *Gender and Economic Growth in Tanzania*, The World Bank 1 (Washington, D.C. 2007). However, this ranking should be read cautiously, as it measures gaps, not levels, and fails to account for the different economic opportunities accessible to men and women.

of polygamy.<sup>66</sup> Arguing that polygamy inherently subjugates women, is economically oppressive, is emotionally damaging,<sup>67</sup> and increases women’s risk of contracting HIV/AIDS,<sup>68</sup> activists have called for the further regulation or elimination of polygamy in Tanzania.<sup>69</sup> They argue that polygamy, which is rooted in gender and human inequality, violates the Universal Declaration of Human Rights from 1948,<sup>70</sup> the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>71</sup> and the 1993 UN Declaration on the Elimination of Violence Against Women.<sup>72</sup> Because Tanzania has ratified these declarations, activists argue that these declarations should be used to prohibit polygamy.<sup>73</sup>

Others disagree with the argument that polygamy inherently subjugates women, and point to many of the advantages conferred upon women who enter into a polygamous marriage: a shared workload, financial support, physical safety in a larger household, and

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<sup>66</sup> Interview with Kellen Mngoye, Fabia Shundi & Amine Mnegne Mlawa, Women’s Research and Documentation Project (WRDP), in Dar es Salaam, Tanzania (Mar. 10, 2011).

<sup>67</sup> Interview with Kellen Mngoye, Fabia Shundi & Amine Mnegne Mlawa, Women’s Research and Documentation Project (WRDP), in Dar es Salaam, Tanzania (Mar. 10, 2011).

<sup>68</sup> Michel Caraël, *The Impact of Marriage Change on the Risks of Exposure to Sexually Transmitted Diseases in Africa*, in *NUPTIALITY IN SUB-SAHARAN AFRICA: CONTEMPORARY ANTHROPOLOGICAL AND DEMOGRAPHIC PERSPECTIVES*, 255, 259 (Caroline Bledsoe & Gilles Pison eds. 1994); *see infra* Part IV.II.A for a discussion of polygamy as it relates to HIV/AIDS.

<sup>69</sup> *See, e.g.*, Ezer, *supra* note 28, at 601.

<sup>70</sup> With regard to restrictions on marriage, the Universal Declaration on Human Rights (UDHR) only requires that it be consensual. Furthermore, the UDHR could be interpreted to support, or at least permit polygamy, as it states that men and women have a right to marry “without any limitation due to . . . religion.” Universal Declaration of Human Rights, Dec. 10, 1948, art. 16(2). As the practice of polygamous marriages in Tanzania has religious underpinnings, *see infra* Part III, its relationship with this article of the UDHR is somewhat ambiguous. Therefore its application to laws that govern polygamy in Tanzania is outside the scope of the topics covered in this article.

<sup>71</sup> Although CEDAW obligates ratifying countries to enact laws that promote equality between men and women “irrespective of their marital status” (See U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. I), it does not uniformly prohibit polygamy. In fact, polygamy is not expressly discussed in its text. Therefore, it will not be discussed in this article.

<sup>72</sup> ZEITZEN, *supra* note 37, at 177-78. Because the UN Declaration on the Elimination of Violence Against Women only discusses gender-based violence generally, it has little bearing on the legitimacy of polygamous marriages specifically. *See generally* U.N. Declaration on the Elimination of Violence Against Women, Dec. 20, 1993. Therefore, it will not be discussed in this article.

<sup>73</sup> ZEITZEN, *supra* note 37, at 178.

cooperation in household tasks and raising children.<sup>74</sup> Advocates of polygamy further argue that women should be free to enter into any relationship they choose; if a Tanzanian woman feels she is better off being a co-wife than remaining single in a society that strongly disapproves, condemns and rejects female celibacy, than why should this union be prohibited?<sup>75</sup> Alternatively, some scholars support polygamy for sociobiological reasons, arguing that polygamy is a natural response to the fact that women outnumber men in Tanzania.<sup>76</sup>

Regardless of your stance on polygamy, the fact remains that it is still widely practiced even as Tanzanian divorce rates increase.<sup>77</sup> According to the Registration Insolvency and Trusteeship Agency (RITA), registered Tanzanian divorce rates increased 49 percent increase in from 2007 to 2009.<sup>78</sup> In an interview with Amine Mnenge Mlawa of the Women's Research and Documentation Project (WRDP), Ms. Mlawa stated that this trend was likely to increase in the polygamous context as well—as gender roles shift, HIV/AIDS awareness increases, and Tanzanians generally become more accepting of single parents.<sup>79</sup> As such, adopting a law that will protect the property rights of co-wives upon divorce is both timely and important.

### III. TANZANIAN LAWS THAT GOVERN POLYGAMOUS MARRIAGES

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<sup>74</sup> *Id.* at 175.

<sup>75</sup> Issa Toure, *Tanzania: Women and Polygamy – A Controversial Issue*, ALLAFRICA.COM (Jan. 19, 2008), <http://allafrica.com/stories/200801210535.html> (discussing why polygamy is controversial in Tanzania).

<sup>76</sup> It is estimated that women account for 51% of the population in Tanzania, while men account for 49%. This disparity is attributed to the fact that women live an average of five years longer than men. U.S. DEPT. COMM., POPULATION TRENDS: TANZANIA (Sept. 1995), available at [www.census.gov/ipc/prod/ppt92-10.pdf](http://www.census.gov/ipc/prod/ppt92-10.pdf).

<sup>77</sup> See Hasina Mjingo, *Matrimonial separations, divorces on the increase*, DAILYNEWS ONLINE ED. (Jan. 22, 2011 22:00), <http://www.dailynews.co.tz/home/?n=16583&cat=home>.

<sup>78</sup> *Id.*

<sup>79</sup> Interview with Kellen Mngoye, Fabia Shundi & Amine Mnenge Mlawa, Women's Research and Documentation Project, in Dar es Salaam, Tanzania (Mar. 10, 2011).

During the early postcolonial period in Tanzania, both customary and Islamic law governed the area of family law.<sup>80</sup> This choice of law scenario was highly problematic, and often resulted in confusion and abuse.<sup>81</sup> In an attempt to unify its family laws, Tanzania adopted the LMA in 1971.<sup>82</sup> All family law matters are adjudicated through the three-tier court system established by the Magistrates' Courts Act of 1963.<sup>83</sup> In ascending order, the three-tier court system consists of the Primary Court, the High Court, and the Court of Appeal.<sup>84</sup>

Although this formal court system is intended to govern all legal matters in mainland Tanzania, it is notable that in rural areas—the areas where polygamy is most prevalent—customary law or Islamic law may still be the only forms of marriage or divorce law known, let alone practiced.<sup>85</sup> Moreover, although the LMA supersedes customary and Islamic law in the laws it explicitly provides for,<sup>86</sup> it still defers to customary or Islamic law in certain provisions<sup>87</sup> and in matters not provided for, like

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<sup>80</sup> Bart Rwezaura, *Tanzania: Building a New Family Law Out of a Plural Legal System*, 33 U. LOUISVILLE J. FAM. L. 523, 523-524 (1995).

<sup>81</sup> *Id.* For example, Bart Rwezaura noted the phenomenon of Christian men who entered into monogamous marriages and then used customary law to acquire additional co-wives, only to later disavow obligations towards a subsequent spouse by disputing the legal effect of the later relationships. *Id.*

<sup>82</sup> *Id.* at 523.

<sup>83</sup> Calaguas, et al, *supra* note 15, at 487.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 475.

<sup>86</sup> See Judicature and Application of Laws Ordinance, Cap. 453, § 9(3A) *as amended by* LMA, Second Schedule (“Notwithstanding the provisions of this Act, the rules of customary law and Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971.”).

<sup>87</sup> See, e.g., LMA § 9(2)(a) (providing that marriage contracted “in Islamic form or according to rites recognized by customary law in Tanganyika, be presumed, unless the contrary is proved, to be polygamous or potentially polygamous”); *Id.* § 66 (permitting corporal punishment against a spouse if it complies with customary law); *Id.* § 107(1)(b) (suggesting that a judge may defer to customary law in deciding whether to grant a divorce); *Id.* § 114 (permitting a judge to defer to customary law to determine division of the parties assets in the case of divorce); *Id.* § 116 (permitting a judge to defer to customary law in deciding whether to grant maintenance in the case of divorce).

polygamous divorce.<sup>88</sup> Thus, depending on a person's location in Tanzania, customary law or Islamic law could govern a polygamous divorce scenario, as this is permitted through the LMA. This section briefly outlines these laws.

#### A. Customary Law Traditions

“Customary Law” refers to traditional tribal law.<sup>89</sup> Long before Tanzania was colonized, customary law governed private legal matters such as “marriage, divorce, custody, inheritance, and burial.”<sup>90</sup> Leaders did not operate in a formal representative capacity, but rather, leadership occurred on a local level, and traditional leaders worked collectively with a group of elders and other tribe members to make decisions in the group's best interest.<sup>91</sup>

Within ten years of Britain's presence in mainland Tanzania, the British introduced a more formal, centralized legal system, which was modeled after its own.<sup>92</sup> However, the new codified system impeded upon customary law's tendency to evolve in response to local demands. In traditional African culture customary law used to provide protection to women through an “extended kinship network.”<sup>93</sup> This family based network allowed women to exercise their economic and social liberties, despite their

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<sup>88</sup> Although LMA section 114 contemplates division of the divorcing parties' assets, it does not explicitly consider this division in the case of a polygamous marriage. *See* LMA § 114; *see also* Rwezaura, *supra* note 1, at 532 (discussing how the current version of the LMA may result in injustice to co-wives in the case of polygamous divorce).

<sup>89</sup> Ezer, *supra* note 28, at 601.

<sup>90</sup> Johanna E. Bond, *Gender, Discourse and Customary Laws in Africa*, 83 S. CAL. L REV. 509, 515 (Mar. 2010).

<sup>91</sup> *Id.* at 558.

<sup>92</sup> *See* Waheeda Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, 24 INT'L J.L. POL'Y & FAM. 361, 381-85 (2010); *see also* Erin E. Goodsell, *Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom on Today's South Africa*, 21 BYU J. PUB. L. 109, 117 (2007).

<sup>93</sup> Goodsell, *supra* note 92, at 146-47.



differential role.<sup>94</sup> Under customary law, in the case of polygamous marriage specifically, co-wives could share the responsibility of child rearing.<sup>95</sup> Therefore, before colonization, in some ways customary law provided women with relative autonomy.

However, scholars argue that customary law discriminates against women today as a result of this relatively recent movement toward a hierarchical, recorded legal system, as “changing circumstances [then] rendered that [codified] law useless.”<sup>96</sup> For example, attempts to capture ancient customary law traditions through codification resulted in a law that explicitly denies widows inheritance in Tanzania today.<sup>97</sup>

Customary law relating to inheritance is codified under two government notices and the codified law explicitly states “the widow shall have no share of the inheritance if the deceased left relatives of his clan” as her share will be managed by her children.<sup>98</sup> This then effectuates the discriminatory inheritance traditions of Tanzania’s predominantly patrilineal communities,<sup>99</sup> because it means that a woman can only inherit a part of the marital property, upon the death of her husband, if she has no children and there are no other family members. Finally, the Judicature and Applications of Laws Act (JALA), provides that customary law will be the default law to govern succession for all Tanzanians of African descent.<sup>100</sup> Therefore, even if the widow was working outside the

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<sup>94</sup> *Id.* at 146.

<sup>95</sup> Andrews, *supra* note 42, at 322.

<sup>96</sup> Goodsell, *supra* note 92, at 147; *See* Amien, *supra* note 92, at 381-85.

<sup>97</sup> Ezer, *supra* note 28, at 609.

<sup>98</sup> Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Second Schedule, Laws on Inheritance [Sheria za Urithi], rule 27 in Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS. [CAP 358 R.E. 2002] [hereinafter GN 436, 2d sched.].

<sup>99</sup> Ezer, *supra* note 28, at 606 (claiming that eighty percent of Tanzanian communities are patrilineal).

<sup>100</sup> *Id.* (citing JALA §11(1)b). Although customary law is the default law to govern inheritance in mainland Tanzania, a Tanzanian married couple may opt to have the Indian Succession Act (ISA), govern the distribution of the husband’s estate in the case of his death. Under the ISA a widows’ property interests are protected, as the ISA grants the surviving spouse the deceased spouse’ entire estate, or one third of it in

home, her deceased husband's family could claim a higher ownership right to all of the marital assets, as a result of the statute referenced above. Especially as clans' kinship networks that used to support widows have already been "disrupted by colonialism, capitalism, and urbanization," these attempts made to preserve customary traditions related to marital property are very harmful to modern Tanzanian women.<sup>101</sup>

Similarly, in the case of a divorce governed by customary law, the ex-wife is rarely awarded any of the property she acquired or contributed to acquiring after the marriage took place.<sup>102</sup> Left destitute, the ex-wife may then seek out another marriage, usually polygamous, which only perpetuates her state of economic dependency. These examples shows that although customary law was once a flexible, evolving doctrine, after its codification it has devolved to become a means to inappropriately discriminate against women by and through the law, as it can no longer adapt to modern day circumstances.<sup>103</sup>

It is important to note that these instances of oppression are the result of *codified* customary law. Although some outsiders have condemned customary law because of its discriminatory application in the case of polygamous marriages, un-codified customary law may still be the chief guarantor of order in rural communities.<sup>104</sup> Furthermore, customary law's organic, flexible foundation may not have been completely lost through ineffective, ill-advised attempts to codify it. At the very core of traditional African

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the case that the deceased spouse has living lineal descendants. However, due to the cultural and statutory preference for customary or Islamic inheritance law, the ISA is rarely applied to Tanzanians of African descent. Furthermore, judges and magistrates are typically unfamiliar and believe that it is not within the jurisdiction of the primary court.

<sup>101</sup> See Goodsell, *supra* note 92, at 147.

<sup>102</sup> In an interview with Amina Mlawa of Tanzania's Women's Research and Documentation Project, Ms. Mlawa stated that in more rural areas co-wives are even less likely to be awarded a share of the marital property. Interview with Amina Mlawa, Director, Women's Research and Documentation Project (WRDP), in Dar Es Salaam, Tanzania (Mar. 9, 2011).

<sup>103</sup> Goodsell, *supra* note 92, at 147.

<sup>104</sup> Calaguas, et al, *supra* note 15, at 478.

culture is “respect for human dignity, social justice, and fairness.”<sup>105</sup> Although customary law is more focused on group rights, as opposed to modern constitutional law principles that focus on individual rights, under traditional African law the former was viewed as facilitating the latter.<sup>106</sup> For these reasons, prohibiting the practice of gender distinguishing African traditions recognized through customary law, such as polygamous marriage, may be bad for African women, as some do not see polygamous marriage as inappropriately discriminatory in itself.<sup>107</sup> Furthermore, as some Tanzanian women choose to engage in polygamous marriages under customary law without seeking formal legal recognition,<sup>108</sup> one could not logically conclude that they would be better protected through a statute banning polygamous marriage, as it would have no impact on these already occurring unofficial marriages.

### *B. Islamic Law Traditions*

Like customary law, Islamic law has a pre-colonial history in Tanzania. The geographic boundaries of the United Republic of Tanzania are a product of European colonialism, but Islam arose there long before it was colonized. It is therefore difficult to determine exactly when this religion began to influence the decentralized tribal communities that occupied the territory.<sup>109</sup> However, it is recorded that the region that is now the city of Dar Es Salaam became an Arab settlement in 1860 through a peaceful agreement struck with the tribal inhabitants.<sup>110</sup> Although these settlers brought with them

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<sup>105</sup> Goodsell, *supra* note 92, at 146.

<sup>106</sup> *Id.* at 145.

<sup>107</sup> *Id.* at 147.

<sup>108</sup> *See supra* Part II.B; *See infra* Part III.A.

<sup>109</sup> Makaramba, *supra* note 48, at 275.

<sup>110</sup> *Id.*

their Muslim traditions, this did not disrupt the practice of local tribal customs.<sup>111</sup>

Instances similar to this one resulted in a gradual immersion, rather than a sudden imposition of Muslim cultural tradition, on the local people.

Before colonization in mainland Tanzania, Islamic law, which governed Muslim marriages and divorces, was practiced alongside customary law. Alternatively, during most of the colonial period Islamic law was considered to be functionally synonymous with customary law.<sup>112</sup> After it gained independence, Tanzania once again distinguished between customary law and Islamic law in judicial application of laws, rather than grouping them together as “native law” as was done during colonization.<sup>113</sup> However, Islamic law scholar Robert Makaramba argues that this legislative distinction has become somewhat superficial in its application.<sup>114</sup>

Though Islam might be the first religion in the world to grant women the right to divorce,<sup>115</sup> Islamic law, as it is practiced in Tanzania today, still gives husbands far superior property rights in relation to their wives.<sup>116</sup> Although wives are entitled to a dowry, if the wife is the party who pursues the divorce she may be required to return the dowry or even provide her husband with some other form of material consideration.<sup>117</sup> For most forms of divorce under Islamic law, the wife’s consent is not required.<sup>118</sup> Furthermore, there is no unity between the property of the husband and the wife. Rather, men and women are entitled to what they each independently earn. Unfortunately, due to

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 276.

<sup>113</sup> *Id.* at 277.

<sup>114</sup> *Id.* at 278.

<sup>115</sup> Kathleen A. Portuan Miller, *Who Says Muslim Women Don’t Have the Right to Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y INT’L L. REV. 201, 202 (2009).

<sup>116</sup> *Id.* at 211.

<sup>117</sup> *Id.* at 223.

<sup>118</sup> *Id.* at 202.

the financially subordinate role assumed by the wife as a part of the Islamic tradition, wives rarely acquire property in their name during the course of the marriage.<sup>119</sup> Therefore, this rule combined with other rule related to dowry leaves women with little to no property protections upon divorce. Women have better economic protection during divorce if they include a right to divorce in their marriage contract;<sup>120</sup> however, as a result of the social pressures described above, such contracts are rarely struck. Although Islamic law has been interpreted to allow for contributions made to the other spouse's estate to be considered for the division of property in the case of divorce, this type of division would be very hard to implement in Tanzania at this time, due to the infrequency of recording a wives' contributions.<sup>121</sup>

The statutory deference granted to both customary law and Islamic law in mainland Tanzania is particularly discriminatory toward polygamous co-wives. Under Islamic law, a Muslim man is allowed to marry up to four wives.<sup>122</sup> Contrary to customary law, Islamic law does allow widows and daughters to inherit, although the amounts allotted to each are half that allotted to their male counterparts. Islamic law explicitly provides that widows and daughters only get one-half of the property interest of men in the same familial position. Specifically, widows with children are entitled to one-eighth of their spouse's estate, whereas a widower with children is entitled to one-

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<sup>119</sup> Prominent Islamic scholars claim that one of the grounds that permit a wife to seek a divorce, "failure to maintain," which refers to a failure to provide financial support. However there is no reciprocal responsibility assigned to a wife. *Id.* at 228.

<sup>120</sup> *Id.* at 225.

<sup>121</sup> Amien, *supra* note 92, at 375.

<sup>122</sup> See Abdulrahman O.J. Kaniki, *Tanzania: Polygamous Marriage and the Law*, ALLAFRICA.COM (June 19, 2010) <http://allafrica.com/stories/201006210899.html>.

fourth.<sup>123</sup> A widow without children is entitled to one-fourth of her spouse's estate, whereas a widower is entitled to one-half.<sup>124</sup> When a marriage is polygamous, however, wives must divide the share allocated to the "wife" amongst themselves, resulting in one-thirty-second for each wife if there are four, whereas the husband will inherit the percentage allocated above from *each* wife, resulting in at least one hundred percent if he has four wives.<sup>125</sup> As mentioned above, this discriminatory scheme is carried out even further in the case of divorce, as the wife is unlikely to receive any share in the marital property if she is the party who pursues the divorce. Furthermore, in the case of a polygamous divorce, even if the ex-wife does receive a share of the marital property, her share will likely be quite minimal based on this equation for property distribution.<sup>126</sup>

### C. The Law of Marriage Act

In 1971, Tanzania enacted the LMA in order to integrate customary and Islamic law and provide women with some basic civil rights upon marriage and divorce.<sup>127</sup> The LMA supersedes customary and Islamic law in the laws for which it explicitly provides,<sup>128</sup> but still defers to customary or Islamic law in certain provisions.<sup>129</sup>

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<sup>123</sup> Waheeda Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, 24 INT'L J.L. POL'Y & FAM. 361, 375 (Dec. 2010).

<sup>124</sup> Ezer, *supra* note 28, at 615 (*citing* the Holy Qu'ran).

<sup>125</sup> *Id.*

<sup>126</sup> If the widow of a Muslim husband is not a Muslim, she is barred from inheriting any of the marital property at all. Ezer, *supra* note 28, at 632.

<sup>127</sup> James S. Read, *A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania*, 16 J. AFR. L. 19, 19 (1972). The LMA was modeled largely on a Kenyan proposal to reform its own family laws that urged reform and integration of the disparate systems of religious, customary, and law. See Mapendekazo ya Serikali juu ya Sheria ya Ndoa (Government's Proposals on Uniform Law of Marriage), Government Paper No. 1 of 1969.

<sup>128</sup> See Judicature and Application of Laws Ordinance, Cap. 453, § 9(3A) *as amended by* LMA, Second Schedule ("Notwithstanding the provisions of this Act, the rules of customary law and Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971.").

<sup>129</sup> See, e.g., LMA § 9(2)(a) (providing that marriage contracted "in Islamic form or according to rites recognized by customary law in Tanganyika, be presumed, unless the contrary is proved, to be polygamous or potentially polygamous").

Spanning 167 sections, the LMA contains marriage registration laws,<sup>130</sup> minimum age requirements for marriage,<sup>131</sup> the establishment of marriage conciliation boards<sup>132</sup> and separation and divorce provisions.<sup>133</sup> It also determines maintenance for women<sup>134</sup> and child custody<sup>135</sup> upon separation or divorce.

Although these changes were seen as a milestone in the fight for women's rights in Tanzania, the LMA has been widely criticized for two main reasons.<sup>136</sup> First, the LMA maintains certain gender discriminatory practices such as polygamy for men, but not women,<sup>137</sup> and different marriage ages for men and women,<sup>138</sup> to accommodate customary and Islamic law. Second, the LMA is ambiguous in many areas, often resulting in unjust outcomes for women upon divorce.<sup>139</sup> One such area of ambiguity is property division in the case of polygamous divorce.<sup>140</sup>

## 1. Polygamous Marriage

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<sup>130</sup> *Id.* §§ 99-101.

<sup>131</sup> *Id.* § 13.

<sup>132</sup> *Id.* §§ 102-104.

<sup>133</sup> *Id.* Part III, §§ 42-55.

<sup>134</sup> *Id.* § 115. In an interview Mary J. Nisi of the Tanzania Women's Lawyer's Association, Ms. Nisi stated that Tanzanian women rarely receive maintenance upon divorce because a husband's income is often unrecorded. For example, if the ex-husband is employed as a bus driver or does odd jobs, he would not receive formal paychecks. In such cases, the ex-wife could not receive maintenance, even in the unlikely event that the court awarded it to her. Interview with Mary J. Nisi, Staff Attorney, Tanzanian Women's Lawyer's Association (TAWLA), in Dar Es Salaam, Tanzania (Mar. 7, 2011).

<sup>135</sup> LMA § 125(3).

<sup>136</sup> *See, e.g.,* Rwezaura, *supra* note 1, at 532 (discussing how gaps in the current version of the LMA may result in injustice); Sandra Ka Hon Chu & Alison Symington, *supra* note 15, at 3-39 (discussing discriminatory provisions and statutory ambiguities in the LMA relating to polygamy).

<sup>137</sup> Whereas men are allowed to marry more than one woman, "a woman who is a party to a ceremony whereby she purports to marry another man shall be guilty of an offen[s]e." *Id.* § 152(1).

<sup>138</sup> *Id.* § 13 (providing that a man must be 18 years old to marry, whereas a woman must be 15 years old).

<sup>139</sup> For example, the LMA does not provide whether women can claim housework and child care as "contributions" to jointly-acquired assets of LMA § 114, the provision that advises courts how to divide marital property upon separation or divorce. The Court of Appeal's decision in *Bi Hawa Mohamed v. Ally Seifu* resolved this issue, holding that section 114 was read to include domestic services in determining the contribution of each party to familial wealth. T.L.R. 32, Court of Appeal (Dar es Salaam) Civ. App. No. 9 of 1983.

<sup>140</sup> Rwezaura, *supra* note 1, at 532.

In line with its integration of customary and Islamic laws, the LMA allows men to marry more than one wife.<sup>141</sup> The LMA defines marriage as “the voluntary union of a man and a woman, intended to last for their joint lives”<sup>142</sup> and may either be monogamous (or intentionally monogamous) or polygamous (or potentially polygamous).<sup>143</sup> Marriage may be “converted” to polygamy or monogamy with the wife’s consent.<sup>144</sup> If a wife does not consent to the conversion of her marriage to polygamy, she may file an objection with a registration official.<sup>145</sup> Because the LMA relies on the patriarchal traditions of customary and Islamic law in its allowance of men to marry many wives, women are strictly prohibited from marrying more than one man.<sup>146</sup>

Before a polygamous marriage occurs, the parties notify the registrar of their desire to marry.<sup>147</sup> Along with other formal declarations, a polygamous marriage statement must include all names of the husband’s wives.<sup>148</sup> After a man has given notice of his intention to marry an additional wife, the other wives may object if taking another wife “would cause hardship to his existing wife or wives and infant children,”<sup>149</sup> the

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<sup>141</sup> *Id.* at 526.

<sup>142</sup> LMA § 9.

<sup>143</sup> *Id.* § 10.

<sup>144</sup> *Id.* § 11. A polygamous marriage is defined “a union in which the husband may during the subsistence, of the marriage be married to or marry another woman or women.” *Id.* § 9. Not everyone can convert a marriage to polygamous: two Christians cannot convert a monogamous marriage to a polygamous marriage so long as they continue to profess the Christian faith. *Id.* § 11(5).

<sup>145</sup> *Id.* 20(2).

<sup>146</sup> *Id.* § 152(1).

<sup>147</sup> *Id.* § 18 (detailing preliminary measures for marriage).

<sup>148</sup> *Id.* § 18(9).

<sup>149</sup> *Id.* § 20(2)(a).



intended wife is “of notoriously bad character,” suffers from a “communicable disease,” or “is likely to introduce grave discord into the household.”<sup>150</sup>

## 2. Polygamous Divorce

In deciding whether or not to grant a divorce, Tanzanian courts examine the totality of the circumstances, giving due regard to the custom of the community to which the parties belong.<sup>151</sup> Once a marriage is dissolved, the court has the power to divide jointly acquired assets<sup>152</sup> and to determine child custody.<sup>153</sup> Section 114 provides that courts shall evaluate two main considerations when they determine how to divide property: the “contributions made by either party in money, property, or work towards the acquiring of the assets,” and the “custom to the community to which the parties belong.”<sup>154</sup>

Although Section 114(2)(b) requires that the court consider the financial and occupational contributions of the divorcing parties in deciding how to divide the marital assets, it does require a court to consider the contributions of non-divorcing co-wives,

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<sup>150</sup> *Id.* § 20(2)(b).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* § 115. When courts order a man to pay maintenance for his wife, they look to the “degree of responsibility which the court appoints to each party for the breakdown of the marriage” and the “customs of the community to which the parties belong.” *Id.* Remarriage by either party extinguishes the right to maintenance. *Id.*

<sup>153</sup> *Id.* § 125(3). When deciding how to award custody of a child, the court looks what is best for the “welfare of the child.” The court also considers the wishes of the parents, the child’s desires, and the customs of the community to which the parents belong. However, the LMA creates a rebuttable presumption that the mother will take custody of any children under seven, if such a result does not disturb the life of the child. In neither parent is fit to take custody of a child, the Act provides that other family members may take custody. Under the Act the father has a duty to maintain his children regardless of whether he has physical custody of them. These support obligations transfer to the mother only when the father is dead, missing or otherwise unable to provide maintenance. *Id.*

<sup>154</sup> *Id.* § 114. In *Bi Hawa Mohamed v. Ally Seifu*, the Court of Appeal held that Section 114 includes domestic services in determining the contribution of each party to familial wealth. T.L.R. 32, Court of Appeal (Dar es Salaam) Civ. App. No. 9 of 1983.

and thus, is likely to leave them out of the calculation to divide assets.<sup>155</sup> This result is particularly unjust when a non-divorcing co-wife has been married longer than the divorcing co-wife, or has otherwise “contributed” more toward the acquired assets.<sup>156</sup>

Moreover, Section 114(2)(a) requires courts to grant deference to customary and Islamic law, which both afford husbands far superior property rights in relation to their wives.<sup>157</sup> Effectively, Section 114’s ambiguity and deference to discriminatory legal systems fails to protect the economic interests of co-wives and their children upon divorce.<sup>158</sup>

Alternatively, some commentators have suggested that Section 57 guarantees equal legal protection for co-wives, as it provides that when “a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law.”<sup>159</sup> However, while “equal status” may sufficiently protect co-wives’ property rights in the context of marriage, it leads to unjust outcomes upon divorce.<sup>160</sup> For example, consider a divorce scenario where a divorce occurs in a marriage with a husband and four co-wives, all of whom have been married a different number of years and have varying numbers of children and personal assets. If, upon divorce, a court granted each party its “equal right” to the share of marital assets, a new, childless co-wife would be entitled to the same stake in the marital property as a co-wife that has been married for twenty years with three children. Such a result is unjust, and does not

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<sup>155</sup> See Rwezaura, *supra* note 1, at 530.

<sup>156</sup> See, e.g., *Maryam Mbaraka Saleh v. Abood Saleh Abood*, High Court Civil Appeal No. 6 of 1991.

<sup>157</sup> See *supra* Part III.A-B.

<sup>158</sup> Courts have failed to extend Section 114(2)(b) to the polygamous divorce context. See *Maryam Mbaraka Saleh v. Abood Saleh Abood*, High Court Civil Appeal No. 6 of 1991.

<sup>159</sup> LMA § 57. See Abdulrahman O.J. Kaniki, *Tanzania: Polygamous Marriage and the Law*, ALLAFRICA.COM (June 19, 2010) <http://allafrica.com/stories/201006210899.html>.

<sup>160</sup> See Rwezaura, *supra* note 1, at 530.

accurately reflect the individual “contributions” of each co-wife under Section 114(2)(b). Effectively, by viewing all co-wives equally, the LMA fails to protect a co-wife’s proportional share in the marital property upon divorce.<sup>161</sup>

Aside from the fact the LMA’s failure to explicitly provide for co-wives’ property rights upon divorce, it also unfairly discriminates against co-wives by not allowing them to be a party to another co-wife’s divorce petition—effectively depriving them of any right to make their contributions and property interests known to the court.<sup>162</sup> Section 105(1) provides that “No person shall be made a co-respondent to a petition for a decree of separation.”<sup>163</sup> This conclusion suggests that when a co-wife petitions for divorce or separation, she will have a priority right to a share of the matrimonial assets over the remaining co-wives.<sup>164</sup> Hence, unless co-wives take care to ensure that the court safeguards the co-wives’ undeclared property rights, they have to depend upon their husband to persuade the court that they too have made substantial contributions to the family assets, and the court should thus preserve their share.<sup>165</sup> Because of this gap in its statutory scheme,<sup>166</sup> the LMA does not adequately protect the rights of polygamous co-wives upon divorce.

#### **IV. WHY TANZANIA NEEDS A POLYGAMOUS DIVORCE LAW**

Due to the inequitable division of property that is permitted through Sections 105 and 114 of the LMA, a law that governs asset division upon polygamous divorce is needed. Such a law would better protect the property interests of both divorcing and non-

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> LMA § 105(1).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Rwezaura, *supra* note 1, at 530 (discussing the LMA’s failure to account for a polygamous divorce scenario).

divorcing co-wives. This protection would then incentivize un-official co-wives to seek legal marriages and empower women to leave unhealthy and abusive polygamous marriages.

*A. Incentivizing Unofficial Co-Wives to Seek Legal Marriages*

Although Tanzanians may receive full legal recognition for a polygamous marriage through the LMA, polygamy is being transformed to include other, unofficial relationships, whereby men marry one woman by statutory law and also form extra-legal domestic and sexual unions with other women.<sup>167</sup> Called “unofficial” or “secondary” co-wives, these women are effectively married in that they are in a regular sexual union with one man, are financially maintained by the man throughout the relationship and have children whose paternity is acknowledged by the man.<sup>168</sup> However, because they are not legally married, unofficial co-wives have limited social recognition and little protection under the LMA.<sup>169</sup> Whereas official co-wives share resources, unofficial co-wives often receive fewer resources than official wives.<sup>170</sup> Though some women stand to gain economically from engaging in unofficial marriages in an immediate sense, these arrangements offer them little long-term stability, as partaking in an unofficial marriage may leave a woman destitute if her un-official husband loses interest in her. Although Section 160 of the LMA permits unrecorded marriages to be recognized when a man and a woman have lived together for two or more years and presented themselves as

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<sup>167</sup> ZEITZEN, *supra* note 37, at 157.

<sup>168</sup> *Id.* Some scholars believe that this trend toward unofficial co-wives may represent African elite men’s outward attempt to embody Western ideals of a modern, monogamous man, while he secretly strive toward the African ideal of polygamy. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 175.

married,<sup>171</sup> this permissive passage is hard to implement in the case of their separation, as one of the two parties, the unofficial husband, would likely have little interest in providing evidence to suggest that there was a marriage.

Moreover, unofficial marriages create tension in the official marriage by violating the monogamous foundation of the marriage. The existence of unofficial co-wives undermines the lives of official wives by removing men's responsibilities towards them and their children, and instead perpetuates men's sexual privileges.<sup>172</sup> Pursuant to the LMA, in order for a marriage to become polygamous through the husband's marriage to a second wife, the first wife must be informed of the second marriage and can oppose it on limited grounds.<sup>173</sup> However Amina Mlawa of the Women's Research and Documentation Project claims that sometimes the first wife is not properly informed, and in the case of an unofficial co-wife, would have no protection through the LMA, short of seeking a divorce, even if she were.<sup>174</sup> Yet, as stated above,<sup>175</sup> women who are officially married may be reluctant to seek a divorce in response to an unofficial co-wife or otherwise because their property interests would be poorly protected due to the discriminatory distribution of marital assets permitted under Section 114(2)(a).<sup>176</sup> Therefore, even if she did not support the existence of the un-official co-wife, the official wife would have little recourse. On the other hand, as un-official co-wives property interests probably would

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<sup>171</sup> See LMA § 160.

<sup>172</sup> *Id.* at 177.

<sup>173</sup> See LMA §§ 11, 20; See *supra* Part III.C.

<sup>174</sup> Interview with Amina Mlawa, Director, Women's Research and Documentation Project, in Dar Es Salaam, Tanzania (Mar. 9, 2011).

<sup>175</sup> See *supra* Part III.C.

<sup>176</sup> See LMA § 114(2)(a) (stating that the court shall consider "custom of the community to which the parties belong" in determining how to divide marital property). For a discussion of why this deference to "custom of the community to which the parties belong" will likely result in the discriminatory assignment of little or no property to the divorcing co-wife. See *supra* Part III.A-B.

not be better protected if they sought out an official marriage, they currently have little incentive to pursue one. Although the LMA provides that co-wives shall have “equal rights and liabilities,”<sup>177</sup> this provision if co-wives lack clearly defined rights to their marital property upon divorce.<sup>178</sup>

For these reasons, *de facto* polygamous marriage appears to be advantageous only to men, with little to offer women in the long term. Thus, a law that protects co-wives’ property interests would incentivize unofficial wives to seek legal marriages, and deter the hurtful practice of Tanzanian men forming unions with unofficial co-wives.

### *B. Empowering Women to Leave Abusive and Unhealthy Polygamous Marriages*

#### 1. Polygamy and Domestic Violence

Despite the social advantages associated with polygamous marriage, a polygamous family is particularly fraught with problems, not only between husbands and wives, but between co-wives as well.<sup>179</sup> Domestic violence is highly prevalent in Tanzania: a 2002 survey by the World Health Organization found that 41 percent of married women in Dar es Salaam and 87 percent in the Mbeya District had experienced physical or sexual violence at the hands of a partner at some point in their lives.<sup>180</sup>

Research indicates that these rates are even higher in polygamous marriages.<sup>181</sup> The competition in polygamous marriages produces disharmony, envy, jealousy, rivalry and

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<sup>177</sup> See LMA § 57.

<sup>178</sup> Although a spouses’ “joint efforts” in acquiring marital property may be considered in a judges’ determination of how to distribute it in the case of divorce, the judge is also required to consider the “custom of the community to which the parties belong” to make the determination. See LMA § 114. As explained in Part III, if the parties belong to a community that practices customary law or Islamic law, and the judge considers its customs, then the co-wife is unlikely receive any part of the marital property in the case of divorce. See *supra* Part III.

<sup>179</sup> Laura Ann McCloskey, Corrine Williams and Ulla Larsen, *Gender Inequality and Intimate Partner Violence Among Women in Moshi, Tanzania*, 31 INTER’L FAM. PLANNING PERSP. 124, 130 (2005).

<sup>180</sup> MYRA BETRON, GENDER BASED VIOLENCE IN TANZANIA, USAID 10 (Nov. 2008).

<sup>181</sup> *Id.*

abuse among family members.<sup>182</sup> Jealousy and competition among co-wives is typically focused on property and economic resources, especially when they are perceived to be limited.<sup>183</sup> In a family with three wives and fifteen children, for example, the husband may not be able to afford school fees for all of the children.<sup>184</sup> This fight to secure resources for their own children's needs creates a rivalry between the co-wives. Sexual and emotional jealousies are also sources of unrest, particularly when the husband favors a particular wife—typically the most recent and youngest wife—and neglects the emotional and sexual needs of the other wives.<sup>185</sup>

Legislation to regulate polygamous divorce and empower women to leave abusive marriages could be instrumental in promoting initiatives to reduce the high rate of domestic violence in Tanzania.<sup>186</sup> The causes of violence lie in the way society is organized: unequal economic opportunities available to women and men, the lack of protection offered to victims by the legal system, and unavailability of other institutional resources for victims are among the determinants of violence.<sup>187</sup> To the extent that law reform vests women with certain rights if she decides to escape a domestic violence situation, it should be viewed as a positive step toward Tanzania's effort to reduce domestic violence.<sup>188</sup>

## 2. Polygamy and HIV/AIDS

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<sup>182</sup> Vanessa von Struensee, JD, MPH, *The Domestic Relations Bill in Uganda: Addressing Polygamy, Bride Price, Cohabitation, Marital Rape, Widow Inheritance, and Female Genital Mutilation* (July 2005), available at [www.preventgbvafrica.org/system/files/DRB1.vonstruensee\\_0.pdf](http://www.preventgbvafrica.org/system/files/DRB1.vonstruensee_0.pdf).

<sup>183</sup> ZEITZEN, *supra* note 37, at 32.

<sup>184</sup> *Id.*

<sup>185</sup> Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1533 (1997).

<sup>186</sup> MYRA BETRON, GENDER BASED VIOLENCE IN TANZANIA, USAID 10 (Nov. 2008).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

Evidence linking polygamous marriage with a heightened risk of being infected with HIV/AIDS also reinforces the need to ensure women in polygamous unions have adequate financial autonomy and legal recourse upon divorce.<sup>189</sup> Many of the co-wives and sexual partners in polygamous marriages live in fear of becoming HIV-infected, as they often have little control over the sexual behavior of other members of the family.<sup>190</sup> Polygamous marriages create a fertile ground for the spread of HIV.<sup>191</sup> Because the practice of official or unofficial polygamy creates a network of simultaneous or sexual relationships linking sexually active people not only to one another but also to the partners of their partners—and to the partners of those partners, and so on—polygamy contributes to infection levels.<sup>192</sup> Polygamous men generally seek out young women, even as they themselves age.<sup>193</sup> In this way, the co-occurrence of official and unofficial polygamy may spread the virus from one generation to the next.<sup>194</sup>

Legislation to regulate polygamous divorce and empower women to leave unhealthy marriages could be instrumental in impeding or promoting initiatives to address the HIV/AIDS epidemic.<sup>195</sup> Within the context of polygamous divorce, the devastating impacts of HIV/AIDS, widespread poverty, and increasing competition for require a legislative solution. Law reform is not a complete solution to the HIV epidemic

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<sup>189</sup> ZEITZEN, *supra* note 37, at 176; Michel Caraël, *The Impact of Marriage Change on the Risks of Exposure to Sexually Transmitted Diseases in Africa*, in *NUPTIALITY IN SUB-SAHARAN AFRICA: CONTEMPORARY ANTHROPOLOGICAL AND DEMOGRAPHIC PERSPECTIVES*, 255, 259 (Caroline Bledsoe & Gilles Pison eds. 1994).

<sup>190</sup> ZEITZEN, *supra* note 37, at 157; Maureen Mswela, *Cultural Practices and HIV in South Africa: A Legal Perspective*, 12 *Potchefstroom Electronic L.J.*, 1, 57 (2009), available at <http://ssrn.com/abstract=1555212>.

<sup>191</sup> Helen Epstein, *God and the Fight Against AIDS*, *N.Y. REV. BOOKS*, Vol. 52, No. 7, Apr. 28, 2005, available at <http://www.nybooks.com/articles/17963> (last visited May 6, 2011).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Hon Chu & Symington, *supra* note 15, at 1-21.



among women, but it is a necessary and often neglected step.<sup>196</sup>

## V. RECOMMENDATIONS

### A. Amend the Law of Marriage Act

Polygamy is firmly rooted in the religious and customary practices of Tanzania; therefore an outright ban on polygamy may not prevent people from entering into polygamous relationships.<sup>197</sup> Prohibiting polygamy could have the unwanted effect of encouraging informal, *de facto* polygamous relationships that provide no legal protection to women and children.<sup>198</sup> Where a prohibition is politically and culturally unfeasible in the short-term, as it is in Tanzania, polygamy should be regulated.<sup>199</sup> Amending the LMA to include a provision that explicitly and fairly divides co-wives' property interests upon divorce could combat harmful, discriminatory practices specific to polygamy without banning the practice entirely. This amendment, combined with calculated steps to educate polygamously married Tanzanian women of their new property rights, could improve the overall status of these women. However, practical considerations to the amendment's implementation may limit its effect.

The following statute empowers courts to oversee the distribution of property in polygamous marriages to ensure that all co-wives have more equitable access to property upon separation and divorce:

- (1) Where a party has more than one spouse in a polygamous marriage, ownership of property between that party and each spouse shall be determined as follows during marriage and upon divorce:
  - (a) all of the assets and liabilities acquired by or accruing to the party and the first spouse before, on or after the date of the marriage, and

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> ZEITZEN, *supra* note 37, at 157; *see supra* Part IV.A.

<sup>199</sup> Hon Chu & Symington, *supra* note 15, at 1-21.

acquired or accrued before the party married the second spouse, shall be owned in equal shares between the party and the first spouse;  
(b) any property acquired by or accruing to the party after he or she marries the second spouse shall be owned in equal shares between the party, the first spouse and the second spouse, and the same principle shall be applied to any other subsequent spouse or spouses; and  
(c) any property acquired by or accruing to the spouses of the party after the first marriage shall be their respective separate property and they have the right to administer and freely dispose of it.<sup>200</sup>

This amendment creates explicit property rights for both divorcing and non-divorcing co-wives upon divorce. It provides that the property interests of a non-divorcing co-wife who has been married for longer than a divorcing co-wife—and therefore may have a greater property interest than the divorcing co-wife based on her contributions—will be protected. To ensure that a non-divorcing co-wife’s property interests are expressly protected, subsection (a) states that all shares acquired by the party and first spouse prior to the party’s marriage to the second spouse, “shall be owned in equal shares between the party and the first spouse.”<sup>201</sup> Through the explicit terms of this proposed amendment, LMA Section 105,<sup>202</sup> which disallows a non-divorcing co-wife from being party to the divorce proceedings, could no longer be utilized for the purpose of denying that co-wife her equitable share of the marital property upon the other co-wife’s divorce.

This amendment would also protect a divorcing co-wife’s property interests, as it grants her an equal share in the marital property acquired since the date she became party to the marriage.<sup>203</sup> In this way, divorcing co-wives would not be subject to the

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<sup>200</sup> Hon Chu & Symington, *supra* note 15, at 3-39 (derived in part from s. 70 of Uganda, *Domestic Relations Bill of 2003*, s. 11 of Kenya’s *The Matrimonial Property Bill of 2007* and s. 20 of Ghana, *Property Rights of Spouses Bill of 2008*).

<sup>201</sup> *Id.*

<sup>202</sup> LMA § 105.

<sup>203</sup> Hon Chu & Symington, *supra* note 15, at 1-21.

inequitable distribution of marital property previously permitted through Section 114(a)'s deference to customary or Islamic law in the distribution of marital property upon divorce.<sup>204</sup> Although this amendment does not discuss the role of customary or Islamic law specifically, the LMA supersedes these laws in matters provided for in the statute.<sup>205</sup> Therefore, if the LMA adopted the proposed amendment, customary and Islamic legal traditions would have to assimilate to its terms in the case of polygamous divorce.

### *B. Awareness Programs*

It is clear that, if it were adopted, this amendment to the LMA would make more positive rights available to women in the case of a polygamous marriage or divorce. However, it still would not provide them with immediate relief. Helping co-wives attain economic stability requires more than rewriting statutory provisions. This is because local communities frequently remain ignorant of discrete changes to statutory law, particularly in more remote villages.<sup>206</sup> In an interview with Mary J. Nisi, a TAWLA staff attorney who directly assists Tanzanian women with divorces and related matrimonial legal matters, Ms. Nisi stated that the village culture is particularly resistant to progressive social change, through legislative reform or otherwise.<sup>207</sup> To emphasize this point, Ms. Nisi stated, "Now we have beautiful laws, but much trouble implementing

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<sup>204</sup> See LMA § 114(2)(a); See also LMA § 116 (permitting a judge to defer to customary law in deciding whether to grant maintenance in the case of divorce).

<sup>205</sup> See Judicature and Application of Laws Ordinance, Cap. 453, § 9(3A) *as amended by* LMA, Second Schedule ("Notwithstanding the provisions of this Act, the rules of customary law and Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971.').

<sup>206</sup> Interview with Mary J. Nisi, Staff Attorney, Tanzania Women's Lawyer's Association (TAWLA), in Dar Es Salaam, Tanzania (Mar. 7, 2011). See generally, Johanna E. Bond, *Gender, Discourse and Customary Laws in Africa*, 83 S. CAL. L REV. 509-575 (Mar. 2010).

<sup>207</sup> Interview with Mary J. Nisi, Staff Attorney, Tanzania Women's Lawyer's Association (TAWLA), in Dar Es Salaam, Tanzania (Mar. 7, 2011).

them.”<sup>208</sup> Ms. Nisi’s statement was in reference to the LMA in its current form.<sup>209</sup>

Effectively, a substantive amendment to the LMA to protect women’s property interests upon divorce will have no material effect on the lives of many co-wives unless news of this change is made available to them, and in a form that they can understand.

Thus, campaigns to enhance awareness of women’s legal and human rights must be an integral part of any statutory amendment. The most basic way to enhance women’s awareness of their legal rights is through observation. If co-wives in urban areas benefit materially from this amendment, in that they retain at least some of their property in the case of a divorce between them and their husband or another co-wife and their husband, then co-wives in neighboring villages may learn of their new property rights purely through observation of this occurrence. This would then incentivize them to pursue legal polygamous marriages rather than un-official marriages, as they would correctly perceive the former to be significantly better for them than the latter. However, there are still language barriers that might prevent women in rural areas from learning of the improved property standard for legal co-wives in urban areas.

Moreover, increasing legal literacy is crucial to informing women of their legal rights upon divorce. Although English is the official language of Tanzania and the language of its recorded laws, most Tanzanians outside of its urban areas only speak Swahili.<sup>210</sup> Furthermore, women from rural areas often do not receive much formal education.<sup>211</sup> Therefore, at the very least, the Tanzanian government should make a concentrated effort to see that a summary of the LMA amendment, one that has been

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* See Maria Herminia Graterol, Anurag Gupta, *Girls Learn Everything: Realizing the Right to Education Through Cedaw*, 16 *New Eng. J. Int’l & Comp. L.* 49, 65-64 (2010).

translated to Swahili and phrased in layman's terms, is made available to women in these remote areas. If local women's organizations help to circulate it, a summary like this, which accounts for social and linguistic barriers, could be particularly effective in informing rural Tanzanian women of their property rights in the case of polygamous marriages, and thereby inspire them to exercise these new found rights, so as to protect themselves in the unfortunate event of a divorce.

Finally, there are opportunities to increase legal literacy of co-wives' property rights by linking it to existing HIV/AIDS awareness-raising programs. In response to the high HIV/AIDS rates in the country, HIV/AIDS awareness campaigns are already widespread in Tanzania.<sup>212</sup> In the past several years, for example, mass media campaigns have been launched by the United Nations Population Fund (UNFPA), Women in Law and Development in Africa (WILDAF), and the Tanzania Women's Media Association (TAMWA) on HIV/AIDS.<sup>213</sup> However, these campaigns scarcely link HIV to its broader social causes, such as polygamy.<sup>214</sup> If these mass media awareness-raising campaigns linked HIV/AIDS to polygamy, while simultaneously informing women of their legal rights upon divorce, they could effectively raise legal literacy while empowering co-wives to leave unhealthy relationships.

### *C. Challenges to Reform in Tanzania*

Even if news of this reform to the LMA reaches women in rural locations, there is one remaining overarching concern, regarding the long-term effect of enacting another law that accommodates polygamy in Tanzania. It is difficult to assess the impact of

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<sup>212</sup> MYRA BETRON, GENDER BASED VIOLENCE IN TANZANIA 10, USAID (Nov. 2008).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

enhanced polygamy laws on the principle of gender equality overall, but many human rights activists and feminist scholars argue for its total abolition, arguing that it categorically gives women second class status.<sup>215</sup> However, in response to these pressures, states that neighbor Tanzania such as South Africa have passed laws to further regulate polygamous marriages.<sup>216</sup>

Therefore, although polygamy is invariably discriminatory, one must consider the context in which it takes place before denying it legal recognition. In an interview with Mary Nsemwa, the program head for the Tanzania Gender Networking Program (TGNP), Ms. Nsemwa stated that “there are three reasons for polygamous marriage” in Tanzania today.<sup>217</sup> According to Ms. Nsemwa, the first reason in culture—seeing as being an unmarried woman by a certain age is unacceptable within local communities outside of the city, being a second wife or even an unofficial second wife may be more appealing to some women than being single.<sup>218</sup> The second reason is wealth—for reasons of pride, some Tanzanian women simply want to marry into a family of wealth.<sup>219</sup> By a certain age, this is true even if they are going to be a second or third unofficial wife.<sup>220</sup> The third reason is labor—even today, in cash crop areas women and children are used as laborers,

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<sup>215</sup> See Waheeda Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, 24 INT’L J.L. POL’Y & FAM. 361, 381-85 (2010); see also Goodsell, *supra* note 92, at 117; see generally Ezer, *supra* note 28, at 599-645.

<sup>216</sup> *Id.* at 375.

<sup>217</sup> Interview with Mary Nsemwa, Tanzania Gender Networking Program (TGNP), in Dar Es Salaam, Tanzania (Mar. 8, 2011).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

and have their own plot of land that they tend.<sup>221</sup> However, in the case of divorce, the unofficial wife has no property interest because her labor is unreported.<sup>222</sup>

In short, Tanzania is an impoverished and relatively decentralized developing state where polygamy is still widely practiced. Due to these pervasive social and economic pressures, a blanket law that excludes polygamy from the realm of legally recognized marriages would do nothing to help, and would likely hurt women, especially in rural regions where polygamy is most prevalent. The reality is, even if polygamy were banned, many of these women would still engage in polygamous marriages unofficially, due to necessity, and their rights would be even less protected than they already are. Therefore, a law that expressly delegates property rights to co-wives upon divorce is a very reasonable step in the direction of attaining gender equality for this group. Finally, as men's property interests would be reduced in the case of a polygamous divorce due to this amendment, this might then deter them from pursuing polygamous marriages. In this way, the proposed amendment might help to phase out polygamy in the long run, resulting in more equitable marital relationships.

## VI. CONCLUSION

In sum, Tanzania is one of the few countries where polygamy is still widely practiced. Although Tanzanians may receive full legal recognition for a polygamous marriage through the LMA, polygamy is being transformed to include other, unofficial relationships, whereby men marry one woman by statutory law and also form extra-legal domestic and sexual unions with other women. Due to the inequitable division of property that is permitted through the LMA, a law that governs asset division upon

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

polygamous divorce is needed. Such a law would better protect the property interests of both divorcing and non-divorcing co-wives, would incentivize un-official co-wives to seek legal marriages, and empower women to leave unhealthy and abusive polygamous marriages. This amendment, combined with calculated steps to educate polygamously married Tanzanian women of their new property rights, could improve the overall status of these women.