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THE PROPOSED ABOLITION OF DE FACTO UNIONS IN TANZANIA: A CASE OF SAILING AGAINST THE SOCIAL CURRENT

BART RWEZAURA*

INTRODUCTION

In April, 1994, the Law Reform Commission of Tanzania (LRC) recommended, *inter alia*, that section 160 of the Law of Marriage Act (LMA), be repealed because it constitutes “an unnecessary encroachment [on] the sanctity of marriage and [is] contrary to the spirit of the Law of Marriage Act”.¹ Subsection (1) of the offending section enacts a statutory presumption of marriage in favour of reputed de facto unions that have existed for a minimum of two years. Subsection (2) states that once the presumption is rebutted, the woman cohabitant and the children born of that union become legally entitled to apply to the court for economic support from the male partner.² In these proceedings the court has similar jurisdiction as a divorce court, including the making of orders for the division of assets jointly acquired by the couple and the determination of who is to have custody of the children. In 1971 when section 160 was enacted, it was widely recognized that de facto unions had become a social fact which the law could not ignore. Hence, the decision to extend to these unions the same legal consequences that follow a formal dissolution of a legal marriage. However, in so doing the legislature had indirectly raised and yet left open a number of important questions that have continued to engage the minds of judges.³

* Senior Lecturer, Faculty of Law, University of Kong Kong. An earlier version of this paper was first presented at the 9th World Conference of the International Society of Family Law held at Durban, South Africa, on 28-31 July, 1997. I wish to express my sincere thanks to Welshman Ncube, Gordon Woodman, Sufian Bukurura, Chuma Himonga, Ulrike Wanitzek and Fareda Banda all of whom read through an earlier draft of this paper and made helpful and encouraging suggestions. Ulrike Wanitzek also allowed me to use sources from our common research in Tanzania. Christabella Kaisi deserves special mention for allowing me to use her unpublished LLM dissertation and Mvmezi Mukoyogo, her LLM supervisor, for making this dissertation available to me.

¹ Law Reform Commission of Tanzania, *Report of the Law Reform Commission on Law of Marriage Act* (No. 5, 1971). Presented to the Minister of Justice and Constitutional Affairs, Dar es Salaam, 1994, 33, (LRC).

² S. 160(1) states that: “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.” And s. 160(2) further states that: “When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make order or orders for maintenance and, upon application made therefore either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for and orders of maintenance and other reliefs shall, insofar as they may be applicable, regulate and apply to proceedings for and orders for maintenance and other reliefs under this section.”

³ In one case *MKWAWA, J.*, wrote: “I must confess that this case caused considerable concern and anxiety in me. I did not at all find it easy to determine the appeal this way or that way. Were its lamentable facts put into a novel or portrayed on the stage they would be taken as being improbable as to be worthy of serious attention” See *Krisantus Matembo v. Adu Kinunda* (Mtwara) High Court Civ

Some of the difficult questions raised by section 160 (LMA) include the absence of any provisions, either in section 160 or anywhere else in the LMA, as to the rights and responsibilities of the parties during cohabitation. Furthermore, no provision was made in case the cohabitants wished to be recognized as married without first seeking the rebuttal of the statutory presumption. Again, no legal rules were instituted to govern the distribution of property where one of the cohabitants died intestate. Such omissions, however, are easily explained when one looks at the legislative history of section 160. The legislature seems to have been so concerned with ensuring economic protection for the female cohabitant and her children that it spared no thought to these legal issues. However, despite these statutory silences the High Court has now held a number of times that section 160 creates a form of marriage with the same legal effects as other forms of marriage provided for in the LMA. This development in the law, even though it remains somewhat incomplete, has generated hostility in certain influential circles. As the LRC warned in its report, "cohabitation should never be mixed up with issues of marriage. De facto arrangements may be considered elsewhere [but] not in the LMA . . ."⁴

This article examines how some judges in Tanzania have creatively applied this progressive statutory provision to deal with complex issues of legal pluralism and social change. It is a case study of Tanzania's pioneering efforts to harmonize the plural systems of family law it received in 1961 from the British colonial state. Furthermore, given the political nature of family law, this paper also describes competition over scarce resources between elderly and younger family members. It describes various struggles for the control of women's labour and the rights of children. At the same time this article argues that the proposed repeal of section 160 is motivated by a misunderstanding of the main object of the LMA and its underlying social policy. Thus, rather than contradicting the spirit of the LMA, section 160 in fact supports and complements the general philosophy and strategy of the Law of Marriage Act. Furthermore, even if section 160 were repealed, such a measure would have little impact on social behaviour as de facto unions are a consequence of social forces that are much deeper and more enduring than law.

THE SPIRIT OF THE LAW OF MARRIAGE ACT

The term "spirit of the LMA" is used in this article to refer to the fundamental objective of the Act. Indirectly, it also refers to the strategy by which the LMA seeks to achieve its major objective. It is widely accepted that the two major objects of the LMA were first, to integrate and harmonize the various systems of personal law existing in Tanzania up to 1971, and secondly, to introduce important reforms in the status of women and children.⁵ Plural systems of law

Appeal No. 112 of 1991 (unreported, 16/7/92). And in *Elizabeth Ismail v. Melikizedek Hanun* [1982] TLR 322, MFALILA, J., noted that "the District Court Magistrate was clearly confused, he did not know what law to apply, customary or national law. In the end he applied both . . ." (at 323).

⁴ See LRC, above, n. 1, 33.

⁵ LRC noted that the LMA "was enacted with the view of unifying and harmonizing the then existing multiple regime[s] of law of marriage. It aimed at bringing the law of marriage into accord with TANU's aspirations of fostering equality, individual dignity, freedom and respect to the people; to provide for freedom of marriage and equal recognition of all marriages however celebrated, whether . . . Christian, Islamic, civil or customary." See LRC, above, n. 1, 1. The acronym TANU refers to the ruling political party. The Court of Appeal of Tanzania has also declared that "the mischief which the LMA, 1971 sought to cure . . . was . . . the traditional exploitation and oppression

such as those found in much of sub-Saharan Africa, including Tanzania, are a result of colonial occupation. They exist mainly because Western law was received into these states while at the same time limited recognition was granted by the colonial state to existing indigenous systems of law and religious law.⁶ Upon attaining their political independence the new African states proceeded to enact legal reforms, some of which were designed to integrate and harmonize these plural systems of personal law while at the same time seeking to raise the status of women and to protect the interests of children.⁷

In this connection, Tanzania was the first country in the region to enact such a detailed statute relating to family law.⁸ Consisting of a total of 167 sections, the LMA contains rules relating, *inter alia*, to the formation of marriage, the status of married women, the law of nullity and divorce, the division of family property and maintenance on divorce, child custody and support, and the statutory presumption of marriage. While the LMA sought to unify the most significant areas of family law and to make certain reforms, it was also keen to avoid sudden and radical changes. For example, although it enacted uniform rules to regulate key aspects such as initial capacity to marry, consent to marriage, property rights between spouses and compulsory judicial divorce,⁹ the LMA also recognized the parties' right to celebrate a marriage in accordance with their personal laws. Furthermore, although the transfer of marriage payments (i.e. bridewealth) ceased to be a precondition to the validity of any marriage, the LMA did not prohibit such property transfers but left it up to individuals to agree on this privately. Indeed, subsequent judicial opinion has confirmed that failure to pay bridewealth has no effect on the validity of the marriage.¹⁰ Such

of married women by their husbands . . . by reducing the . . . inequality between them . . . in so far as their respective domestic rights and duties are concerned." See *Bi Hawa Mohamed v. Ally Sefu*, Court of Appeal Civ App No. 9 of 1983, (unreported) at 13-14.

⁶ See G. R. Woodman, "The peculiar policy of recognition of indigenous law in British colonial Africa: a preliminary discussion," (1989) 22 *Verfassung und Recht in Übersee* 3, 273; B. Rwezaura, "Tanzania: building a new family law out of a plural legal system," in M. D. A. Freeman (ed.), *Annual Survey of Family Law* (1994/95) 33 *Journal of Family Law*, 423-450; S. Poulter, *Legal Dualism in Lesotho: A Study of the Choice of Law Question in Family Matters*, Morija, 1981, 14; C. N. Himonga, *Family Succession Laws in Zambia*, Munster, 1995, 265; and W. Ncube, "Released from legal minority: the Legal Age of Majority Act in Zimbabwe," in A. Armstrong and W. Ncube (eds.), *Women and Law in Southern Africa*, Harare, 1987, 193.

⁷ See C. R. Cutshall, *Justice for the People: Community Courts and Legal Transformation in Zimbabwe*, Harare 1991; A. Sachs and G. H. Welch, *Liberating the Law: Creating Justice in Mozambique*, London, 1990; Republic of Kenya, *Report of the Commission on the Law of Marriage and Divorce*, Nairobi, 1968; Republic of Uganda, *Report of the Commission on Marriage, Divorce and the Status of Women*, Entebbe, 1965.

⁸ See J. S. Read, "A milestone in the integration of personal laws: the new law of marriage and divorce in Tanzania," [1972] *J.A.L.*, 19-39 and B. Rwezaura and U. Wanitzek "Family law reform in Tanzania: a socio-legal report," (1988) 2 *International Journal of Law and the Family* 1-26.

⁹ With the exception of the Muslim men who insisted on retaining their right to pronounce *talak*. Even then, LMA required that all couples married under Islamic law wishing to divorce must first submit their marital dispute to a marriage conciliatory board before *talak* could be pronounced. And even after *talak* has been pronounced, the court retains the ultimate jurisdiction to make ancillary orders, including division of assets and custody of children (s. 107(3) LMA).

¹⁰ See *Raphael Dibogo v. Frabianus Wambura* [1975] LRT at n. 42, and *Ramadhani Mohamed v. Omari Ramadhani* [1976] LRT at n. 8. But as we shall see below, the continuing social importance of bridewealth accounts in part for the failure of certain couples to complete their marriage procedures before commencing cohabitation. Moreover, the fact that the law of bridewealth was reformed without at the same time making corresponding changes in the law of child legitimacy has continued to generate conflict between customary law and the general law. In an attempt to perhaps bridge the gap between the two systems, the High Court has, in recent years, successfully extended the "welfare of the child" principle, contained in s. 125 (LMA), to all children irrespective of the marital status of the parents. See, Rwezaura, *op. cit.* above at n. 6, 523.

property exchanges are now regarded as private contracts between the bride's family and that of the husband.

Furthermore, besides recognizing polygyny, a measure intended to accommodate the interests of Muslim men and African traditionalists, the LMA also created a new form of civil polygynous marriage under its general provisions.¹¹ It also permitted, under certain conditions, the conversion of an existing monogamous marriage into a potentially polygynous marriage by a joint application of the parties (section 11). Even then, and perhaps as a trade-off for the women, the LMA recognized the right of an existing wife to object to a proposed marriage of her husband to another woman on the ground, either, that her husband did not have sufficient means to support his existing family or that the intended wife was otherwise unsuitable.¹² Furthermore, in several sections of the LMA the courts are enjoined to have regard to the customs of the parties before making their decisions in cases such as division of matrimonial assets on divorce or separation (section 114(2) (b)). Again, whereas the welfare of the child is recognized as the paramount consideration in all custody cases, the court is also required to have regard "to the customs of the community to which the parties belong" (section 125(2)) subject to this. Apart from the need to pay attention to custom, the LMA also recognizes women's limited access to economic resources. Thus the primary obligation to maintain a wife is placed upon her husband (section 63), and the wife's duty to maintain the husband arises in exceptional circumstances.¹³ On the other hand, while the LMA recognizes the wife's right to own separate property, to sue and to be sued in contract and in tort, she is still presumed to have authority to pledge her husband's credit and indeed, she may even "borrow money in his name or use any of his money which is in her possession" to meet the family's basic needs (section 64(1)). But the wife's right to maintenance is forfeited where she "is living openly in an adulterous association" (section 64(3)).

In short, the design and approach of the LMA reflects a policy inspired by caution, sensitivity and flexibility.¹⁴ The LMA represents an effort to move with the changing times without totally losing touch with the prevailing community practices. While it enables individuals to "escape" from the restraints of their personal laws, it does not seek to "liberate" them from their customs or religious

¹¹ Parties to a civil marriage may, "if they so wish, request the district registrar to make an entry in the register whether the marriage shall be monogamous or polygamous, and upon such request being made and upon satisfying himself that both the parties have freely and voluntarily made the request, the district registrar shall comply therewith" (s. 29(c) LMA).

¹² According to s. 20(2)(b), an objection to an intended marriage may be made by an existing wife, or one of the wives, to the registrar of marriages or registration officer on the grounds that "the intended wife is of notoriously bad character or is suffering from an infectious or otherwise communicable disease or is likely to introduce grave discord into the household." As noted below, this statutory provision is now used by women cohabitants as a bargaining device to secure financial support from men who wish to marry other women. Indeed the right of the first wife to object to a later additional marriage of her husband is now being seriously considered by the South African Law Commission as a possible improvement on their system of polygyny. See South African Law Reform Commission, *Harmonization of the Common Law and the Indigenous Law (Customary Marriages)*, Project No. 90, Issue Paper 3, 1996, 5.

¹³ S. 63(b): "it shall be the duty of every wife who has the means to do so, to provide in similar manner for her husband if he is incapacitated wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health."

¹⁴ See B. Rwezaura, "The integration of marriage laws with special reference to Tanzania," in J. M. Abun-Nasr, U. Spelleberg and U. Wanzitzek (eds.), *Law, Society, and National Identity*, Hamburg, 1990, 139-161.

beliefs. In this sense the LMA has a double mission.¹⁵ It aims at unifying personal laws while permitting a degree of pluralism and diversity. It is in many ways a provisional statute designed to be periodically reviewed and adjusted to meet the changing social conditions of Tanzania. As will be noted below, this is, in my view, the spirit of the LMA that has provided the basis for judges to creatively develop a new family law for Tanzania. It is into this context that we must place section 160 and the interpretation it has so far received from the courts.

BACKGROUND TO THE ENACTMENT OF SECTION 160 (LMA)

In 1969, the government stated in its proposals for a new marriage law that a practice had developed in Tanzania where couples were living together for many years and having children without being formally married to one another. Experience had shown that the woman cohabitant was the loser in this situation because the day the man got "tired of living with her he [would] drive her out of his house or leave her. Such a woman cannot sue the man for maintenance and her children are . . . illegitimate".¹⁶ Hence, to remove such injustice it was recommended 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 . . ."¹⁷

Given that de facto unions were now viewed as a social fact, the government could not simply ignore them or overlook the injustice that was being perpetrated against women and children in these informal unions. In any case, if the rate of these de facto unions was on the increase, as it was widely believed, then the failure to legally enforce parental responsibility would, in the long run, exert a heavy cost on the entire society. In these circumstances, the LMA—which resulted from the Government White Paper of 1969—aimed to try and cover in some way both formal and informal unions. Yet, how widespread was the practice of cohabitation in 1969, and what forms did it take? Unfortunately, except for a recent study of Dar es Salaam city by Kaisi, there are no national statistics on the incidence of de facto unions. Even then, and despite the general belief that these unions are common in both rural and urban Tanzania, it is important also to be conscious of the difficulty of identifying such de facto unions. As will be noted below, the task of gathering statistics, even if undertaken, would be very difficult indeed, especially in relation to unions that have a customary law origin. This is mainly because the line between a de facto union and an irregular or incomplete customary marriage is often hard to draw. In any case, the need to define marriage in a more precise manner is created by Western law which views marriage as an event. African customary law has traditionally

¹⁵ This point was also noted by the Court of Appeal in *Bi Hawa Mohamed* (see above, n. 5) when it observed that "[a]lthough certain features of traditional inequality still exist under the Act, such as polygamous marriages, these do not detract from the overall purpose of the Act as an instrument of liberation and equality between the sexes," at 13.

¹⁶ See United Republic of Tanzania, *The Government White Paper No. 1 of 1969: Proposals on Uniform Law of Marriage*, Dar es Salaam, 1969, 13.

¹⁷ *Ibid.* at 13.

viewed a marriage as a process which is capable of completion over time.¹⁸ As this article will discuss below, this difference has greatly contributed to the rise of what are referred to as "section 160 marriages". More often the facts reveal that the parties intended to marry under customary law but did not begin, or having begun, failed to complete the process due to factors such as lack of resources or lack of support from the extended family.¹⁹

A recent study of Dar es Salaam city has come up with statistical data which reveal the importance of section 160 to a large group of Tanzanians. In a sample of 126 men and 294 women, covering a period from 1971 to 1992, Kaisi found that 37% of respondents were living in de facto unions or had separated from such unions. Those who were formally married comprised 48.6% of the sample, while the widows and the never-married groups accounted respectively for 6.5% and 5.8%. As to the social and educational background of the parties to the de facto unions, Kaisi found that 43% of the cohabitants were mostly white-collar employees with a minimum of secondary school education.²⁰ Those aged between 21–30 years comprised of 33% of the total sample, while 41% were aged 31–40 years.²¹ Although these data are by no means representative of the whole country, they nonetheless constitute a firm indication of the incidence of de facto unions in urban Tanzania. They also show that most cohabitants are young, educated and in white-collar employment. Furthermore, and going beyond the figures, the Dar es Salaam study also uncovered a thick file of correspondence addressed to the office of the Registrar General containing many queries regarding what to do with several employees living in de facto unions who wished to be paid "married-person" allowances but had no marriage certificates.²² Some of the employees had sworn affidavits showing that they were married. However, unlike the situation in the neighbouring Republic of Kenya where affidavits are widely

¹⁸ See C. O. Kaisi, *Women under Presumption of Marriage: A Critical Analysis of the Law, Practice and Social Implications of S. 160 of the Law of Marriage Act, 1971*, LLM Thesis, University of Dar es Salaam, 1994, 129. Also C. Blesoe, *Women and Marriage in Kpelle Society*, Stanford, 1980, and U. Wanitzek, "Bulsa marriage law and practice: women as social actors in a patriarchal society," forthcoming in W. Zips and E. A. B. van Rouveroy van Nieuwaal (eds.), *Sovereignty, Legitimacy and Power in West African Societies: Perspectives from Legal Anthropology*, Munster, 1998.

¹⁹ As KYANDO, J., noted, the parties' "[a]ttempts to marry were thwarted by their respective family members..." See *Jonathan Gwandenga v. Kasiani Daniel* (DSM) High Court Civil Appeal No. 70 of 1991. Kaisi has correctly noted that socio-economic conditions in Tanzania "have changed tremendously especially in the mid-eighties to date. [M]any people cannot afford high bride price payments and the expensive showing-off of ceremonies of marriages. And with more men and women moving into urban areas in search for jobs, many people just take each other and live together or 'put up' house together." See Kaisi, op. cit. 39. See also below, n. 76.

²⁰ See Kaisi, op. cit. 129.

²¹ The 1985 European figures for de facto unions expressed as a proportion of all legally married couples were as follows: Sweden (19.9%), Finland (11.4%), Norway (10.8%) France (8.6%), Netherlands (7.7%), Great Britain (6.2%), Germany (4.7%), Austria (4.2%), Hungary (2.9%) and Italy (1.4%). See C. Prinz, *Cohabiting, Married, or Single*, Aldershot, 1995, 75. The fact that the proportion of de facto unions in Tanzania far exceeds that of Sweden and of other European jurisdictions may be a consequence of how de facto unions are defined for the particular study and a result of the differences in the law and social conditions producing the European version of de facto unions. On the other hand, the Mozambique figure of 90% reflects a different kind of legal history whereby the Portuguese colonial legal system neither recognized nor prohibited customary unions. Such non-recognition resulted in these unions being defined as "de facto unions" instead of valid customary marriages: see Sachs and Welch, op. cit. 103.

²² These inquiries came from public institutions such as the Tanzania People's Defence Forces, the police, the Tanzania Harbours Authority, the Tanzania Railways Corporation, the Tanzania Posts and Telecommunication, the Insurance Corporation and the Tanzania-Zambia Railway Authority.

used,²³ such documents have not become popular in Tanzania because, among other things, they are not acceptable to most employers. At the Registrar General's Office, there was also "an endless list of women complainants" who had been abandoned by their male cohabitants for other women.²⁴ Most of these women believed that they had been married under section 160 and had come to protest their husbands' expressed intention to marry other women. A number of these women had up to six children born in these unions.²⁵ One cannot dispute, therefore, that de facto unions, whatever class they might belong to (see below), have become part of the Tanzanian social fabric.

Hence, if for no other reason, parties to these relationships are unlikely to applaud the proposal to take away the legal protection available under section 160 (LMA). Beyond the fact that there is now a large number of couples who have formed de facto unions, it can be argued further that the law should endeavour to spread wide enough so as to protect lawful social arrangements that citizens have opted to establish between themselves. Moreover, although Tanzania has an obligation under international law to provide for compulsory registration of marriage, repealing section 160 is not the best way to ensure compliance with this obligation.²⁶ Indeed, it is arguable that the repeal of section 160 contradicts the spirit of Article 13 of the Tanzania Constitution (1977) which provides for equal protection of the law.²⁷

CLASSIFICATION OF DE FACTO UNIONS IN TANZANIA

Three general categories of de facto unions seem to be more frequently litigated in the courts. The first, (i.e. "class one"), consists of customary unions that are considered irregular or incomplete because the essential customary procedures might have been started but not yet completed. And where such a union subsists for some years but without being regularized, customary law recognizes it for certain limited purposes. In such cases the husband has no rights over his children. In some communities, the wife's social status in the husband's wider family remains low until the parties have regularised the relationship.²⁸ Such unions belong to the customary law system and date back to the pre-colonial era. They arise primarily from a failure to comply with the prescribed requirements for contracting a marriage under customary law, as defined, not by state law, but by the woman's family. But as noted above, this

²³ See J. Kabebere-Macharia and C. Nyamu, "Marriage by affidavit: developing alternative laws on cohabitation," unpublished paper presented at the 9th World Conference of the International Society of Family Law, Durban, 28-31 July, 1997.

²⁴ See Kaisi, *op. cit.* 141.

²⁵ According to Kaisi, the average period of cohabitation in her sample was 5.4 years. See Kaisi *op. cit.* 129.

²⁶ See Art. 16(2) of the Convention on the Elimination of All Forms of Discrimination Against Women.

²⁷ A free translation from Kiswahili of Art. 13(1) states, *inter alia*, that "all persons are equal before the law and are entitled, without discrimination to equal protection of the law." The principle of non-discrimination should extend to protect de facto unions in appropriate cases. For the generous legal acknowledgement of de facto unions in the Mozambique family law project "brings within the terms of the Project the great majority of Mozambican families—estimated at 90%—who have not registered their marriages. It is accordingly an important device for narrowing the gap between registered and unregistered unions and thereby materialising the constitutional principle of treating all citizens alike independently of background. As such it is both democratic in its range and unifying in its operation." See Sachs and Welch, *op. cit.*, 103.

²⁸ See M. Olmesdahl, "Marriage and cohabitation: cross-cultural comparisons" in J. Eekelaar and S. Katz (eds.), *Marriage and Cohabitation in Contemporary Societies*, Toronto, 1980, 46-56.

failure is not viewed as a serious irregularity in the same way as Western law views irregularity of ceremonies leading to marriage. The notion of a customary law marriage as a process has traditionally permitted the husband's family to complete the procedures over the years without incurring serious challenges on the status of the parties. During the colonial period and later, challenges to the validity of such a union often arose in the context of a dispute over the rights of children between the parties or their families. Questions concerning the validity of such unions can also arise in a suit for the balance of unpaid bridewealth. In short, although "class one" can be broadly described as de facto union, it is not a result of a conscious decision by the parties not to contract a marriage. Rather, it arises from a failure by either or both of the parties to comply with the essential formalities leading to a valid customary marriage.

The second category of de facto unions (i.e. "class two") consists of what may be called "modern" as well as "voluntary" de facto unions.²⁹ Unlike "class one", these are consciously established, even though the partners may have differing conceptions as to the nature of their relationship.³⁰ They are "modern" because they are not the result of an attempt to contract a customary marriage. In short, they exist as a result of an unwritten mutual agreement between the parties with little if any involvement from their respective families. Such unions are found not only in Tanzania but also in most parts of Africa, particularly in the urban areas. Thus, Michael Bourdillon refers to "a new form of union in urban situations, in which a man and a woman live together although no bride-price is paid. Many Shona [people] reject the idea that such unions are properly to be called marriages; they are referred to as *mapoto* (i.e. pots), suggesting simply a convenient sharing of cooking arrangements."³¹ Bourdillon further notes that although some of these *mapoto* unions might be transitory and short-term, many of them are relatively stable "lasting ten years and more, and involve a contractual arrangement which has been partially recognized by a Shona urban court."³² In short, although "class two" unions raise the question of fact as to whether both or either party has consented to being regarded as married, and if so, what form of marriage such a union should be, in practice section 160 provides room for any cohabitant to challenge such a presumption of marriage. As will be shown below, courts do not impose marriage on parties who can show that they regarded one another merely as "boy- and girl-friend".³³ As to the form of marriage which is to be presumed by the law, such a question remains unresolved, hence the use of the term "section 160 marriage".

²⁹ See O. Jessep, "De facto relationships and the law in Papua New Guinea," (1992) 41 *I.C.L.Q.* 460-471, 462.

³⁰ For example, the male partner might assert that the woman is his girlfriend while the woman believes that she is his wife. Thus most cases show a tendency for women claiming under s. 160 to cite a longer period of cohabitation than men. In some cases the women use their children's age to corroborate their story. See *Leticia Bagumba v. Thadeo Magoma and Anor*, (Mwanza) High Court Civ App No. 8 of 1989 (unreported) where the man testified that between 1977 and 1980 he regularly had sexual intercourse with the appellant but they were living separately. This evidence was contradicted by the appellant who contended that the two had started cohabitation together in 1976. Similar denials by men have also been reported in Kenya (see Kabeberi-Macharia and Nyamu, op. cit. 12). Thus, as noted by Bledsoe, "[w]hen brought to court, cases involving disputes over marital statuses invariably end in a tangle of contradictory testimonies from numerous witnesses" (Bledsoe, op. cit. 8). In these circumstances courts have to be alert to the manipulation of personal status and the possible underlying motives for such conduct.

³¹ See M. F. Bourdillon, *The Shona Peoples*, Harare, 1991, 320.

³² *Ibid.* at 320.

³³ See below, page 198, and n. 48.

The third and final category (i.e. "class three") exists under circumstances where a party who is married under a civil or Christian form purports to end such a marriage using extra-judicial procedure as provided under customary law. Thereafter, believing oneself to be free of a previous marital bond, he or she formally remarries under customary law. Although the second marriage is invalid under the general law, it is normally recognized as valid under the parties' customary law. To this class of unions must be added cases where the male partner of a couple in similar circumstances, as noted above, rather than going through a second ceremony of marriage, decides simply to cohabit with another woman.³⁴ Somewhat similar to "class three" are unions where a monogamously married man, instead of initially divorcing his first wife, purports to marry an additional wife under customary law.³⁵ This practice is common in urban centres where working men, who also have homes in the rural areas, find it convenient to leave their first wives in the village as "farm managers" while they continue to work in the city, regularly sending money and presents and paying occasional visits to their first wives. Such arrangements also provide a convenient relocation for school-age children, away from the supposed "negative" urban influences. In a few instances one also finds some city dwellers who maintain two households—the first with a statutory wife and the second with a cohabitant or customary law wife. Here again, the second marriage is void but either or both parties may not be aware of this until there is a dispute.

It is clear that "class three" unions are a result of a conflict between the customary system, the religious system, and the general law system.³⁶ Thus, unlike "class two", this category is a by-product of multiple systems of marriage law operating in a single jurisdiction, thus making it possible for individuals to switch between the various systems. Before the enactment of the LMA, divorce under customary law was agreed between the spouses and their families, followed, in some cases, by the refund of bridewealth. There was no need for a judicial divorce and no requirement for documentary proof of such divorce. Given such an underlying cultural assumption, couples who contracted Christian or civil forms of marriage did not realize that these marriages could not be terminated in the same way as customary marriages. This impression was reinforced, in some cases, by the fact that irrespective of the form of marriage, parties were still expected to go through all the usual customary preliminaries including the transfer of bridewealth. Therefore, what marked civil or Christian marriages from customary marriages, in many parts of Tanzania, was the participation of a registrar of marriage or a minister of religion as the officiating authority.

³⁴ Kaisi notes that a number of male cohabitants in this category who are still married to their "church wives", either in name or otherwise, are quick to produce their old marriage certificates to prove that they are not married to the claimant partners but to the other women. See Kaisi, op. cit. 135.

³⁵ In the matter of *Mwanjasa Albert*, (DSM) High Court Probate and Admin Case No. 23 of 1989, the deceased had two wives. The first was a church-wife and the other was either "just a cohabiter" (as noted in Kaisi) or probably a customary law wife. There were eight children from each of these unions. See Kaisi, *ibid.* 171.

³⁶ In the matter of *Shekilango R. Hoossein*, (DSM) High Court Probate and Admin Case No. 222 of 1980 (unreported), the deceased, a prominent Tanzanian politician, was previously married in accordance with Islamic law. He subsequently cohabited with another woman, a Christian, with whom he had two children. On his death intestate, the first wife successfully challenged the validity of the second union and was able to prevent the two children from inheriting their father's property. See Kaisi, *ibid.* 170.

The use by parties of more than one system of law in contracting a marriage and the uncertainties in individual status that result from such choices are widely reported in sub-Saharan Africa.³⁷ For example, Poulter found spouses in Lesotho who had "married one another both under the received law and under customary law".³⁸ Nhlapo has also reported a similar situation in Swaziland and how men move between the two systems of law to the great detriment of their women.³⁹ In such cases the difficult question is first to determine the form of marriage that has resulted before its legal effects can be ascertained. In these circumstances parties remain ignorant of their actual legal status under state law for a very long time—until one day a marital dispute or the death of one of the parties (especially the husband) throws a dark shadow on the validity of their marriage. In some cases the challenge to the validity of marriage can be part of an effort to contest the legitimacy of the parties' children in cases of intestate succession. Such disputes are often bitter because they involve scarce resources and several interested parties from both sides of the extended family.⁴⁰

THE EMERGENCE OF THE "SECTION 160 MARRIAGE"

If section 160 had been given a restrictive interpretation, as certain judges have applied to it, it would have remained a simple instrument for recovering financial support for women cohabitants, orders for child support and custody, and decrees for division of assets jointly acquired by the parties.⁴¹ Fortunately, during the last 25 years, the true object of section 160 and its place in the broader scheme of the LMA have emerged in the decisions of many High Court judges. It is important to stress here also that the birth of what may be called "section 160 marriage" has occurred as part of a wider process of judicial integration of the principles of English common law with those of African customary law. In this sense, therefore, it can be said that "section 160 marriage" owes its origin to the gradual process of interaction between the two systems of family law.

³⁷ As noted by Kabeberi-Macharia and Nyamu, "[t]he way in which marriage ceremonies are conducted among Kenyan Africans in the contemporary setting provides further evidence of the fluidity of boundaries [between different forms of marriage valid under the law]". See Kabeberi-Macharia and Nyamu, *op. cit.* 16.

³⁸ See Poulter, *op. cit.* 34.

³⁹ See R. T. Nhlapo "No cause for optimism: bigamy and dual marriage in Swaziland," in Armstrong and Ncube (eds.), *op. cit.* 125.

⁴⁰ In *Angelina Mutalemwa v. Benedict Mutalemwa* [1978] LRT n. 44, the applicant was first married in 1946 in accordance with Roman Catholic rites. Following an informal divorce under customary law, the applicant remarried (presumably under customary law). The second marriage lasted for 21 years, during which five children were born to the union. The wife's application for maintenance was dismissed by the High Court on the ground that her marriage was void. See also *Violet Ishengoma Kahangwa v. Adm'r Gen'l*, Court of Appeal, Civil Appeal No. 17 of 1989 (16/7/90 unreported) per MAKAME, KISANGA, MFALILA, J.J.A., in which comparable facts resulted in the children of the second marriage losing their inheritance rights following the intestate death of their father. For more details on *Violet* see Rwezaura, *op. cit.* 123.

⁴¹ This appears, for example, from the judgments of KAZIMOTO, J. in *Anastasia Mapunda v. Agathon Mbepera* (Mtwara) High Court Civil Appeal No. 45 of 1992, and *Daniel Millinga v. Imelda Hyera* (Songea) High Court Civil Appeal No. 30 of 1992, where the appellate judge stated that although the parties had lived together for more than two years and had acquired the reputation of husband and wife, still they were not married because they did not go through any form of marriage. Rather, they were concubines and were free to come and go as they wished and the courts had no power to grant a decree of divorce. Unfortunately such an erroneous interpretation of s. 160 (LMA) has the effect of increasing, rather than reducing the number of children born out of wedlock.

A presumed marriage is a legal marriage

A number of High Court judges have expressed the view that subsection 1 of section 160 creates a valid form of marriage in cases where the presumption is not rebutted. For example, in *Leticia Bagumba*,⁴² MWALUSANYA, J., held (in 1989) that by fulfilling the conditions laid down by section 160(1), the parties “were duly married by virtue of the doctrine of presumption of marriage”. In this case the couple had lived together as husband and wife for over five years; had gained the reputation of husband and wife, and had not gone through any kind of marriage ceremony.⁴³ This was actually a “class two” union with no involvement of the couple’s respective families. The main dispute between the parties was whether the woman had the right to remain in the family house which her male partner had sold to a third-party without the wife’s knowledge or consent. MWALUSANYA, J., held that in the context of a “presumed marriage”, the wife enjoys the same rights as any married woman including the right to continue to reside in the matrimonial home until the marriage is judicially terminated.⁴⁴ The court not only upheld the wife’s claim but it also ordered maintenance for her and the children. This decision in effect resolves the issue of what rights and obligations such couples have during cohabitation or when they are temporarily living apart. The remaining problem however is that their status remains doubtful until determined by a court of law.⁴⁵

Earlier (in 1980) it was also held by CHIPETA, J., in *Salum Itandala* that where the presumption of marriage under section 160(1) is not rebutted, the parties are “in the eyes of the law . . . still husband and wife”.⁴⁶ In this case, a man seduced the respondent’s daughter (in 1974), made her pregnant, and began cohabiting with her as his wife. Following the woman’s elopement her father demanded a customary fine of five head of cattle before marriage negotiations could commence. It was later agreed, between the parties, that two of the five head of cattle given to the woman’s father would constitute the customary fine and the other three would be a down payment on the agreed bridewealth of 44 head of cattle. This was therefore a “class one” type of union. The parties separated five years later during which time three children were born. The

⁴² *Leticia Bagumba*, op. cit.

⁴³ This is the test applied by NYALALI, J., (as then he was) in *Elizabeth Salwiba v. Peter Obara* [1975] LRT 52.

⁴⁴ S. 59 (LMA) states that where “any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise and the other spouse may be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.” And where this is done in contravention of the above restriction, then, unless the buyer had no notice of the other spouse’s interests, “the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until: (a) the marriage is dissolved; or (b) the court on a decree of separation or an order for maintenance otherwise orders.”

⁴⁵ In my view, s. 160 could be amended to permit parties to such unions to apply jointly for the registration of the marriage once they have fulfilled the conditions laid down by s. 160 (LMA). At the moment one or both parties can apply to the court (s. 94 LMA) for a declaratory decree that they were validly married. However, such a remedy is hardly affordable by most couples and, seemingly, it is only pursued when there is a marital problem. See *Yonathan Gwandenga v. Kastanti Daniel* (DSM) High Court Civil Appeal No. 70 of 1994 (unreported), per KYANDO, J. In this case a man applied to the court to be declared a husband “by virtue of long cohabitation together, and secondly, and perhaps mainly, that he be given a share of the house.” This is one of the very few cases where the man moved into his partner’s house and sought to rely on s. 160 to secure division of assets.

⁴⁶ [1982] TLR 333.

husband claimed these three children but his claim was rejected by the wife's father on the ground that he had not fully paid up the bridewealth and therefore his marriage was invalid and the children, being illegitimate, belonged to the maternal side, as provided by customary law. Such children could be legitimated by paying a customary fee. This led the husband to apply to a local primary court arguing that his marriage was valid and he therefore did not have to legitimate his children. The court held in the husband's favour but this decision was overturned on appeal to the district court. The husband appealed to the High Court where CHIPETA, J., held, relying on section 160(1) and on previous decisions of the High Court, that all the evidence indicated "a very strong presumption that the appellant and the respondent's daughter were lawfully married".⁴⁷

Additional light can be shed on this issue by examining some of the cases where the presumption of marriage has been successfully rebutted. In *Elizabeth Salwiba v. Peter Obara* the court held that "there was no evidence . . . which could show that the parties . . . had acquired a reputation of being husband and wife" (p 225).⁴⁸ The only witness called by the woman cohabitant to give evidence of cohabitation and repute was vague as to whether the parties had acquired the reputation of being married. Again in *Charles Ruyembe v. Mwijuma Salehe*, where the cohabitants described themselves as "boy- and girl-friend", KATITI, J., held that the presumption of marriage had been rebutted because "the lifestyle of the girl and boy friend cannot be equated with that of husband and wife and doing so is a misallocation of dignity and respect." Therefore, in this case the parties had not acquired "the reputation of being husband and wife, to accommodate a presumption that they were duly married" (p 306). But having so held, KATITI, J., correctly made orders under section 160(2), in this case on the custody of the child of the union.⁴⁹ Therefore, the presumption may be heavy but it is not irrebutable and in cases where one of the parties does not wish to be presumed married, there is room under section 160(1) to maintain one's single status.

Another line of decisions leads to the conclusion that in cases where the presumption of marriage cannot arise, this effectively blocks the remedies or relief available under section 160(2). This is especially so where the parties lack the initial capacity to marry or where they have not cohabited for at least two years. Thus, in *Charles Ruyembe*, after stating the provisions of section 160, KATITI, J., added, albeit *obiter*, that "it should never be forgotten that the said subsection [i.e. 160(1)] does presuppose capacity to duly marry, as no presumption will be attached to associations of parties of, for instance, below marriage age. Nor will the subsection apply if the parties are actually married" [i.e. are unable to marry

⁴⁷ Interestingly, the court in *Salum Itandala* does not discuss the welfare of the child as stipulated under s. 125 (LMA). CHIPETA, J., merely held that the "appellant, therefore, is entitled to claim custody of those children. The respondent has no right over them." This looks like an application of the customary rules of guardianship whereby all legitimate children belong to the husband's clan. See Declaration of Customary Law, Rule 175, Government Notice No. 279 of 1963. This was indeed a fitting case for the application of the best interests of the child principle as provided under s. 125 (LMA).

⁴⁸ [1975] LRT 225.

⁴⁹ [1982] TLR 304, 306.

by reason of existing marriage].⁵⁰ In another High Court decision, Mushi, J., held that “[i]f one of the parties lack the legal capacity to marry, the presumption would not even arise for they could never be duly married in the first place . . . and it would indeed be an error of law to suggest that the law can presume a marriage between parties who cannot marry because of lacking initial capacity to marry one another.”⁵¹

In short, where parties fulfil the conditions laid down by section 160(1), and have initial capacity to marry, they will be presumed “duly married” until this presumption is rebutted. Where the presumption is not rebutted, they will remain married until the marriage is dissolved by a court of competent jurisdiction. Until then, the parties are legally entitled to all the rights and obligations enjoyed by any married couple. Evidently, a high burden of proof rests on a person alleging that the parties are not man and wife. Furthermore, according to the holding in *Elizabeth Salwiba*,⁵² if the parties have not cohabited for a period of two years at least, the presumption under section 160(1) will not arise and section 160(2) will not apply.⁵³

The origins of a “Section 160 marriage”

To understand the process leading to the rise of a “section 160 marriage”, one has first to examine briefly the decisions of the High Court in which it has been held, either directly or by implication, that section 160(1) does not give rise to a form of marriage. In the often-quoted case of *Francis Leo*,⁵⁴ MFALILA, J., (as he then was) held that before the presumption of marriage under section 160(1) can apply, it must be shown that the parties went through a ceremony of marriage. And where such a ceremony is not proved, this would be sufficient to rebut the presumption under section 160. *Francis Leo* has not been widely followed. Many judges have expressed the view that a marriage ceremony

⁵⁰ Ibid. “If any evidence is adduced showing that either of the parties lacked capacity, the presumption in favour of the validity of the marriage disappears and the question has to be decided on a balance of probability in the light of all the available evidence.” Based on the English authorities, see P. M. Bromley and N. V. Love, *Bromley’s Family Law*, London, 1992, 68. But, as I have argued elsewhere in this article, the injustice arising from the inapplicability of s. 160(2) (LMA) to couples lacking the initial capacity to marry can be avoided by amending the LMA to grant courts the jurisdiction to order division of assets, maintenance and child custody, in all cases of void marriages. See also B. Rwezaura, “Presumption of marriage in Tanzania,” (1985) 18 *Verfassung und Recht in Ubersee*, 169–179, 179.

⁵¹ *Thadeo Mutanubukwa v. Hermalinda Herman* (Mwanza) High Court Civil Appeal No. 60 of 1991. In this case, the woman cohabitant had contracted a Christian marriage in 1949 and thereafter she believed that she had been validly divorced under customary law. On that basis she remarried in 1961 and the second marriage lasted till 1991 when she petitioned for divorce and division of matrimonial assets. This was therefore a “class three” union. The lower court, with the full knowledge of all the facts, held that the parties had acquired the reputation of having been married to each other as stipulated under s. 160, but that their marriage had broken down irreparably and therefore s. 160(2) was applicable. The lower court seems to have found an ingenious way of doing substantive justice by trying to involve s. 160(2) but for the fact that lack of initial capacity to marry which effectively blocks the application of s. 160(2).

⁵² Cited above, n. 43.

⁵³ This is a correct interpretation of s. 160(2) because “the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more.”

⁵⁴ *Francis Leo v. Paschal Simon Maganga* [1976] LRT n. 22. The facts in *Francis Leo* are comparable to those in *Salum Itandala* (see above, n. 47). In this case the action was also brought by a father-in-law claiming legitimation fee in respect of five children born during a ten-year period of cohabitation between the respondent and the claimant’s daughter. As in *Salum Itandala*, it became necessary to determine whether the respondent was married to the claimant’s daughter.

between the parties is not a pre-condition for section 160 to apply.⁵⁵ But there are others, such as KAZIMOTO, J., who held in *Anastasia Mapunda*⁵⁶ that although the parties had cohabited as husband and wife, they were nonetheless not married because they “did not go through any form of marriage”. Here again, lack of a marriage ceremony was accepted as sufficient to rebut the presumption of marriage and furthermore, to trigger the application of section 160(2). The same reasoning was applied in *Joseph Sindo*⁵⁷ where again KAZIMOTO, J., held that the lower court was mistaken in dissolving (what seemed like a “section 160 marriage”) because although the parties had cohabited for over two years, “the length of period did not convert concubinage into a marriage.”⁵⁸ As noted above, and contrary to the minority view, most High Court judges agree that a valid marriage arises in all cases where the conditions laid down by section 160(1) have been met and where the presumption has not been successfully rebutted. They would join hands with CHIPETA, J., in declaring that “[t]he intention of the legislature [in enacting section 160] was to discourage loose matrimonial associations and unwarranted break-up of marriages, while at the same time reducing the number of children said to be born out of wedlock.”⁵⁹

Yet how did this way of reading section 160(1) evolve? The origins of the interpretation can be traced back to the early decisions on which judges have consequently relied. They include *Sakala v. Elia*,⁶⁰ where it was held that “even assuming that no bride-price was paid, the marriage would be valid on the application of the common law principle that long cohabitation in the absence of evidence to the contrary raises a presumption that a marriage is valid.” Furthermore, the court noted that courts favour the common law principle of presumption of marriage because they are reluctant to “invalidate any marriage unless there are good and compelling grounds for doing so.” In *Loijurusi v. Ndunga*,⁶¹ the High Court stressed again that it was “against public policy to interfere with the family . . . and courts of law all over the world are very loath to allow such interference”. Referring to the English common law doctrine of presumption of marriage, KWIKIMA AG, J., noted that the “Anglo-Saxon common law, to which our legal system is heavily indebted, accords particular regard to the sanctity of marriage. On that principle this court has held that even under

⁵⁵ See for example, *Elizabeth Salwiba v. Peter Obara* [1975] LRT, 52, *Ramadhani Mohamed v. Omari Ramadhani* [1976] LRT 8, and *Leticia Bagumba* (see n. 30). MFALILA, J., accepted this position in *Elizabeth Ismail v. Melikizedek Haruni* [1982] TLR 322. See also Rwezaura, “Presumption of Marriage in Tanzania,” op. cit. 169–179, 169.

⁵⁶ “The parties were concubines and lived together under circumstances that in their community they acquired the reputation of husband and wife thus attracting the provisions of s. 160 [LMA] 1971”. See above, n. 41.

⁵⁷ *Joseph Sindo v. Pasaka Mkondola* (Mtware) High Court Civil App No. 132 of 1991 (unreported).

⁵⁸ Adding that “[a]s they have freely agreed to cohabit, they are likewise free to depart or separate from each other without resorting to a court order. A court has no power to grant a decree of divorce under the circumstances of this case . . .” at 1.

⁵⁹ See *Salum Itandala*, above, n. 46, 335.

⁶⁰ (1971) *High Court Digest* n. 257. In this case the husband applied for custody of children born during the marriage. The children’s mother denied the existence of the marriage on the ground that the husband had not paid any bridewealth to her natal family. The lower court held for the wife but the husband successfully appealed to the District Court where it was held that long cohabitation raises a strong presumption of marriage.

⁶¹ (1971) *High Court Digest*, n. 33. In this case the parties cohabited for six years during which the husband was not able to complete the payment of the whole bridewealth. Thereafter the wife’s natal family tried to break up the union unless the husband paid up the outstanding balance. It was held by the High Court (KWIKIMA, J.) that the strong presumption in favour of the marriage had not been rebutted by the wife’s natal family.

customary law, prolonged cohabitation raises a presumption of marriage unless there are circumstances indicating the contrary.”⁶²

In both cases the appellate judges quoted with approval the 1944 decision of the Governor’s Appeal Board in *Nyamakaburo Makabwa v. Makabwa v. Mabera Watila*, where it was stated that

“when persons are living together as man and wife over a long period, and especially where there are children of the union, the Board would require the strongest possible evidence to rebut the presumption that the marriage was valid. It would require stronger evidence than that of the interested parties to confirm the assertion that no brideprice was paid and even if satisfactory proof was forthcoming that the brideprice has never been paid further evidence would be necessary from an independent source to establish the assertion that non-payment of brideprice necessarily involves the invalidation of the marriage.”⁶³

In 1963, by virtue of Rule 5 of the Declaration of Customary Law, (GN No 279/63) bridewealth was declared no longer necessary for the validation of a customary marriage. This became the official customary law in most districts of Tanzania.⁶⁴ In 1971 the LMA further declared that “a marriage which in all other respects complies with the express requirements of this Act shall be valid for all purposes, notwithstanding any non-compliance with any custom relating to dowry or the giving or exchanging of gifts before or after marriage” (section 41). Moreover, under section 41(f), failure to register a marriage does not affect its validity. Following the amendment to the Judicature and Application of Laws Ordinance, the LMA attained an overriding status over customary law and Islamic law, thus completely eliminating the legal importance of bridewealth.⁶⁵ With these statutory changes in place the way was cleared for section 160 to enter with a defined period of two years’ cohabitation (not previously laid down under the common law) which enabled the courts to declare many unions (predominantly “class one”) as valid marriages. Such unions, as noted above, are essentially customary marriages except for the fact that they are incomplete or irregular. However, that is as far as the law “in the books” could go. On the ground, however, the social importance of bridewealth was not immediately affected by these legal changes and this is the major reason why even today many disputes continue to come to court in which the validity of the marriage is being strongly contested.

In short, it can be argued that section 160 has provided a site for social struggles between elders who are not willing to let their daughters be married to men who cannot pay bridewealth. Young men and women, on the other hand, are beginning to question the traditional view of marriage as a union of families. Many reject the choices made for them by their parents under a system of “arranged marriage” and prefer their own mates.⁶⁶ Hence, it could be argued that the effect of section 160 is to weaken parental authority, particularly in the

⁶² Ironically, the notion of “sanctity of marriage” is used here by KWIKIMA, J., to uphold the validity of a de facto union while the LRC takes the opposite position that s. 160 is an “unnecessary encroachment on the sanctity of marriage . . .” It appears, however, that the comments of the LRC are directed primarily at “class three” unions while KWIKIMA, J., seems to refer to “class one”.

⁶³ Governor’s Appeal Board No. 7 of 1944.

⁶⁴ See Government Notice No. 279 of 1963, Rule No. 5.

⁶⁵ S. 9(3A) of the Judicature of an Application of Laws Ordinance (Cap. 453) states that “notwithstanding the provision of this Act the rules of customary law and the rules of Islamic Law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971”.

⁶⁶ See R. S. Katapa, “Arranged marriages,” in Z. Tumbo and R. Liljestrom (eds.), *Chelewa Chelewa: The Dilemma of Teenage Girls*, Ostersund, 1994, 76–95.

sphere of spouse selection. To that extent the existence of “section 160 marriage” as a form of marriage enables individuals to make a timely escape from the demands of tradition. Yet, as will be discussed below, this is only one aspect of the many functions that section 160 plays in the overall working of the LMA. The doctrine of presumption of marriage is an essential aspect of the overall strategy of the LMA.

SECTION 160: AN ESSENTIAL PART OF THE LMA SCHEME

This section argues that section 160 complements the LMA in four major areas. First, it enhances the principle of individual consent to marriage by promoting autonomy and choice of spouse. Indirectly, it undermines parental power and the custom of arranged marriages. Secondly, it mitigates considerably the problem of unregistered customary marriages. Thirdly, it provides a means by which the economic contributions of cohabitants, especially the women, are recognized and protected. Fourthly, it alleviates the problem of illegitimacy of children, given the rising rate of de facto unions in Tanzania. With regard to its crucial role in the workings of the LMA, this section also argues that the repeal of section 160 might result in judges resorting to the old doctrine of presumption of marriage which arguably existed before 1971 and which remains part of Tanzanian family law.

Principle of individual consent to marriage

The principle of consent to marriage is central to the LMA. Section 9 defines a marriage, as Lord Penzance did in 1866, as “the voluntary union of a man and a woman intended to last for their joint lives.”⁶⁷ Section 16 stipulates that “no marriage shall be contracted except with the consent freely and voluntarily given by each of the parties thereto.” And section 38 provides that “[a] ceremony purporting to be a marriage shall be a nullity if the consent of either party was not freely and voluntarily given thereto.”⁶⁸ So important is the principle of consent to marriage that even when the parties are already married, “no proceedings may be brought to compel a wife to live with her husband or a husband with his wife” (section 140). To enhance this principle the LMA also dispenses with parental consent to marriage when the parties have attained the age of 18 years. In effect, males are exempted totally from parental consent because 18 years is their minimum age for marriage. Prior to the enactment of the LMA the government announced that the minimum age for females was to be fixed at 15 years in order to comply with the UN recommendation and “to prevent the parents from removing their young daughters from school” for purposes of marriage.⁶⁹ In 1994, the LRC further recommended that the minimum age for both males and females be raised to 21 years, noting that “a girl below the age of 18 years may easily be coerced into marriage by greedy parents . . .” If the LRC’s recommendation becomes law, parental consent to

⁶⁷ See *Hyde v. Hyde and Woodmansee* (1866) LR 1 P & D 130, at 133.

⁶⁸ This is in contrast to the law in England after 1973 when lack of consent, previously a ground for making a marriage void, now makes a marriage only voidable. See s. 12(c) Matrimonial Causes Act 1973 and Bromley and Lowe, *op. cit.* 90.

⁶⁹ See United Republic of Tanzania, above, n. 16, 7.

marriage will become legally irrelevant in Tanzania.⁷⁰ It is clear, therefore, that the process of transforming customary marriage into a union of individuals continues to derive support from several provisions in the LMA. Moreover, and perhaps inevitably, such a social trend has come with a new form of domestic arrangement which cannot be separated from the notion of individual freedom to marry. It would have been naïve for the legislature to encourage individual consent to marriage, remove the legal importance of bridewealth and support the weakening of and eventual abolition of parental consent to marriage, while at the same time closing its eyes to de facto unions which are to some extent a by-product, or indeed, a consequence of individual choice. No doubt such choices are largely influenced by the current social and economic context of Tanzania but the law is also important in providing favourable conditions for the exercise of such choices.⁷¹ In this connection, the responses of certain Dar es Salaam cohabitants confirm that de facto marriages are a product of social change. For example, when asked why they had not gone through a formal marriage ceremony, 40% cited financial reasons, 28% said they belonged to different religions and 13% cited parental objection to the proposed marriage.⁷²

Therefore, although as noted above these responses are based on a small sample obtained from a highly urbanized part of the country, still they reflect a wider national trend. This is a trend whereby individual choice of spouse is taking precedence over the dictates of the wider family. In other words, these statistics support a well-recognized movement away from the idea of marriage as a union of families to the modern ideal of a marriage as a union of the immediate parties with individual consent as the underlying principle.⁷³ In conclusion, section 160 has contributed to the continuing process whereby parental power to influence or even to compel their children to marry particular people is on the decline. It has also tended to dampen parental vigour to break their daughter's marriage on account of unpaid bridewealth. In the words of KWKIMA AG, J., it is "against public policy to interfere with the family . . . and courts of law all over the world are very loath to allow such interference."⁷⁴

Mitigating the problem of unregistered customary marriages

Customary marriages have a dismal record of registration in Tanzania. For example, in 1971 when the LMA came into force, 219 customary marriage were registered, compared to the figures of 8,778 (Christian), 2,023 (Islamic), 768 (civil) and 153 (others). In 1983–84 the rate of registration was even more discouraging. There were 62 registered customary marriages compared to that year's national total 35,036 marriages, (broken down as follows: 14,447 Christian, 17,714 Islamic and 2,788 civil). Yet the low rates of registration are not proof that customary marriages have become less popular. On the contrary, "investigation has revealed that customary law marriages are still being celebrated

⁷⁰ See LRC above, n. 1, 25.

⁷¹ This is so notwithstanding the fact that cohabitants who do not wish to be presumed married are not compelled to do so by s. 160(1).

⁷² See Kasisi, *op. cit.* 130.

⁷³ See G. F. A. Sawyerr, "Judicial manipulation of customary family law in Tanzania," in S. Roberts (ed.), *Law and the Family in Africa*, The Hague, 1977, 115–128, 115, and A. Armstrong *et al.*, "Uncovering reality: excavating women's rights in African family law," (1993) 7 *International Journal of Law and the Family*, 314–369.

⁷⁴ See *Lojurusu Ndiinga*, above n. 61.

[in large numbers] but they are not registered.”⁷⁵ As to the reasons why there is such a low rate of registration, the LRC has noted that customary marriages are not registered because the registration procedure is too cumbersome.⁷⁶

Whereas the registration procedure is cumbersome, it is also true that customary marriages continue in certain respects to retain their old nature as a process rather than an event. To understand how this happens, we need to look again at the way the LMA allocated space for marriages under customary law. As a harmonizing and integrating statute, the LMA extended recognition to customary marriages without making their official registration a condition to their validity. More specifically, under section 25 parties are free to contract a marriage in accordance with the rites of a community or the communities to which they belong, provided that they comply with the essential provisions of the LMA. It is also provided under section 43 (LMA) that when such a customary marriage is contracted in the presence of a registration officer, the officer is required to take the necessary steps to register the marriage with the district registrar. And if such an officer is not present at the wedding, (since attendance is not mandatory), then the parties to the marriage are obliged to apply for registration within 30 days of the marriage. To encourage parties to register their marriage, it was further provided that an application for registration can be made after the prescribed time limit has elapsed. Yet despite such enlightened provisions, it has not been possible to improve the rate of registration.

As noted above, it is possible that a number of potential customary marriages do not begin as precise events such as civil marriages do. Rather, they begin less spectacularly as an elopement or a cohabitation which ultimately matures into a proper customary marriage, or indeed, into a church wedding. But some couples never make it to the proverbial altar and this has the effect of postponing the registration of the marriage almost indefinitely.⁷⁷ The effect of all this is that although unregistered customary marriages are recognized, proving them legally can be time-consuming and costly. Moreover, the lack of documentary evidence often provides an incentive to the parties to dispute the existence of the marriage. Thus, in jurisdictions such as Kenya, those who can afford it have resorted to the use of affidavits as a quicker way to establish the existence of a marriage in

⁷⁵ See LRC, above, n. 1, 22.

⁷⁶ Most people in rural communities do not have the time or inclination to travel a long way to register their marriage with a state official. It has therefore been recommended by the LRC that a village-level official be appointed as the registration officer to achieve greater efficiency in the registration process. In Mozambique, the Family Law Project recommended the establishment of a mobile registration centre to enable a more efficient system of registration. See Sachs and Welch, *op. cit.* 103.

⁷⁷ During the late 1980s, in the Kagera region of Tanzania, one Roman Catholic priest who had observed that several young Christians were eloping and simply living together without undergoing a church wedding decided to convene a parish meeting at which he inquired why young people were not celebrating their marriage in church. He was told that parents could not afford marriage expenses associated with a church wedding. After some discussion it was agreed that all the existing cohabitants should be married at one ceremony, followed by a wedding party at the parish. In more recent years certain members of the clergy have spoken against lavish wedding parties which, apart from being wasteful, also tend to discourage other less affluent couples from marrying. Archbishop Kakobe of the Full Gospel Faith Bible Fellowship joined 50 couples into matrimony in a single ceremony at Mwenge, in Dar es Salaam. Previously in 1996, he is also reported to have “staged a joint wedding ritual for 60 couples” at the same church. See Robert Rweyamamu, “Bringing cost-cutting to the wedding day,” *The Nation*, 2 October, 1997. It is suggested that the law ought to be amended to permit a joint application for registration by couples falling in “class one” and “class two” unions as soon as they have complied with the requirements of s. 160(1) (LMA). Those who do not wish to register because they prefer to retain their status as cohabitants could still benefit from s. 160(2) at the termination of their unions.

non-contentious contexts such as applications for passports or employment benefits for married couples.⁷⁸ But as Kabeberi-Macharia and Nyamu have noted, affidavits are not the best solution because, unlike marriage certificates, they are not accepted in courts as conclusive evidence of a marriage ceremony. Moreover, even in Kenya, such documents have a limited time span and must be renewed every year.⁷⁹ Therefore, whereas the LRC's recommendation to improve the registration procedures is a very welcome step indeed, until this happens, the number of cohabitants who require the legal protection offered by section 160 will continue to escalate.

Protection of cohabitant's economic contributions

Many of the cases cited in this article have been instituted by women petitioners seeking maintenance and/or division of jointly-acquired assets. In neighbouring Kenya, a recent study has shown that the majority of the women cohabitants who applied for maintenance were mothers with young children.⁸⁰ It should not be surprising that section 160 is more readily used by women to protect their economic interests and those of their children. One needs to remember that women are traditionally entrusted with the care of young children in most African communities, including Tanzania. Furthermore, women are also economically disadvantaged compared with their male counterparts. All this makes section 160 one of the few available means for women and children in de facto unions to access maintenance. On the other hand, section 160 also provides the means to distribute jointly-acquired assets at the end of cohabitation. In recent years courts have given appropriate recognition in the division of property on divorce to all forms of contribution including housework and child care.⁸¹ Given that courts exercise a similar jurisdiction under section 160(2), women cohabitants are in the same position as divorcing couples in terms of benefits they may derive from any developments in that area of family law.

However, it is regrettable, even if unavoidable, that an accurate interpretation of section 160(2) does not at the moment extend to "class three" de facto unions. Thus, in *Thadeo Mutarubukwa*, a woman cohabitant who had lived with a man she thought of as her husband for 25 years and had children in that union lost her share of family assets because her second marriage was void. Similarly, nothing was given to the woman applicant in *Angelina Mutalemwa*.⁸² Again this was a "class three" de facto union where the applicant had lived with her male partner for 21 years and had five children with him. There are indeed many such cases where women's contributions are not all protected by the general law. It must be stressed again that the lack of protection for "class three" unions seems to be part of a more fundamental shortcoming in the LMA. As the Act now stands, it does not provide remedies for parties to a void marriage. According to section 94(2) (a), any person may petition the court for a declaratory decree to determine the validity of a marriage ceremony. This jurisdiction, unfortunately, does not include the power to order maintenance or division of assets. Indeed, it is not certain whether the court has such power when making a decree of

⁷⁸ See Kabeberi-Macharia and Nyamu, above, n. 23, 22.

⁷⁹ *Ibid.* at 3.

⁸⁰ *Ibid.* at 24.

⁸¹ *Bi Hawa Mohamed*, above, n. 5.

⁸² Above n. 39.

nullity in respect of voidable marriage. Thus, in *Amida Shabani*,⁸³ KISANGA, J., doubted whether section 114 could be read as granting the power to order division of matrimonial assets following a decree of annulment (p. 245).

The time has come for the LMA to permit the application of section 114 in all cases where the court grants a decree of nullity of marriage and a declaration in respect of void ceremony. Were such amendments to be made, courts would have power to do justice to most "class three" cohabitants who are at the moment caught in the unjust web of legal pluralism. Moreover, although this provision was borrowed from English family law,⁸⁴ most world jurisdictions today—including the United Kingdom—have amended their family laws to empower courts to order maintenance and division of assets when granting a nullity decree whether in respect of a voidable or a void marriage.⁸⁵ This recommendation is consistent with the LMA's policy of protecting the economic rights of women, many of whom honestly believe themselves to be legally married. Such an amendment would also harmonize the principles of customary law with those of the received English law from which the rule confining ancillary remedies to validly married parties is derived.

Alleviation of illegitimacy of children

The law governing the legitimacy and guardianship of children in Tanzania requires a large dose of reform.⁸⁶ In its present form, Tanzanian law governing children contravenes Article 2 of the United Nations Convention on the Rights of the Child, 1989, which prohibits discriminatory treatment of children, *inter alia*, on ground of birth.⁸⁷ There are at least two parallel systems of law governing the status and guardianship of non-marital children in Tanzania. On the one hand there is the Affiliation Ordinance (Cap. 279), received from England, under which a single mother may obtain limited financial support for her child. An affiliation order merely establishes the paternity of a child but does not legitimate

⁸³ See *Amida Shabani v. Alfani Mtenga* [1981] TLR 232. Indeed, it is uncertain whether the court has the power to order custody of children in such circumstances. Yet as noted below, this problem has now been addressed by judicially extending the principle of the welfare of the child to all children irrespective of the marital status of their parents. See Rwezaura, above, n. 6, 323. In my view, since a voidable marriage "is for all purposes a valid marriage until it is annulled by a decree of the court" (s. 40 LMA), there is in principle no reason why a decree of nullity in such circumstances should not be construed as analogous to a decree of divorce. Note that *Amida Shabani* was also a "class three" de facto union involving a woman who, it seems, did not formally divorce her first husband before "purporting to marry" her second husband.

⁸⁴ Originally contained in the Matrimonial Causes Ordinance Cap. 364 based on the English Matrimonial Causes Act of 1937.

⁸⁵ See S. Cretney, *Elements of Family Law*, London, 1992, 28, and Bromley and Love, op. cit. 720.

⁸⁶ A number of interesting changes intended to improve the status of all children (including illegitimate children) have been proposed to the government recently by the LRC but these have yet to be widely debated and enacted. See United Republic of Tanzania, *Hotuba ya Waziri wa Sheria na Mambo ya Katiba (The Budget Speech by the Minister of Justice and Constitutional Affairs for Year 1997/98 to the Parliament of the United Republic of Tanzania)*, Dar es Salaam, 1997, at 59–88. Furthermore, unlike Uganda which has made an effort to update and integrate existing child law in line with its international obligations, the recent Tanzanian proposals have merely added new provisions to existing laws on the child without making major reforms. See also J. S. Read, "Protecting Uganda's children: a new model child law for an African state?" (1993) 5 *Journal of Child Law*, 170–177.

⁸⁷ Under art. 2(1) parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Tanzania became a party to the Convention on 10 July, 1991.

such a child. Moreover, even if the parents eventually marry one another, their children born before that marriage remain illegitimate unless legitimated under customary law. Tanzania had no general law providing for the legitimation of children by a subsequent marriage between the children's parents. Finally, although in many jurisdictions a child of a voidable marriage is legitimate and in specific cases children of void marriages are presumed legitimate, there are no such provisions in Tanzania. This situation alone produces a significant number of illegitimate children given that a number of couples cohabit before formally contracting a marriage.⁸⁸

Customary law, on the other hand provides that non-marital children belong to the maternal side unless they are subsequently legitimated by payment of a customary fee. It also provides for legitimation by the subsequent marriage of the parents, but this rule is presumably inapplicable to couples who are not members of a given customary law community. The close link, therefore, between the legitimacy of children and bridewealth is visible in all disputes over rights in children, particularly in cases where the woman's natal family seeks to challenge the validity of the marriage on the ground that bridewealth was not paid. Husbands, on the other hand, defend that such payment is not legally necessary for the validity of a marriage. And where the child is held to be illegitimate and therefore by necessary implication to "belong" to the maternal side, the courts are powerless to intervene. The customary law notion of "belonging" to one or the other family fixes that child's identity and welfare to that particular social group and the "welfare of the child" principle does not usually apply. However, in recent years High Court judges have tended to read section 125 (LMA) expansively to cover all such children. According to one judge "the intention of the legislature in enacting the provisions [of section 125] was to ensure that all children, irrespective of whether they are born to parents who are legally married to each other or to unmarried parents, are brought in and given maintenance to safeguard their welfare".⁸⁹

Clearly, therefore section 160(1) reduces the rate of illegitimacy. Regrettably, however, there are certain categories of children who are left out. They include children born to cohabitants whose unions cannot be legally presumed, (e.g. "class three" unions); children born in unions where the presumption has been rebutted; and premarital children born of parents who are not cohabiting. It is within this context that the decision by certain High Court judges to extend the protection of the "welfare of the child" principle to all children is very welcome indeed. Yet judges, unlike the legislature, cannot make major changes in the law such as abolishing all the legal consequences of illegitimacy. In short, although the abolition of the distinction between marital and non-marital children is what is urgently required, it must be recognized, nevertheless, that at the present time the emergence of "section 160 marriages" has certainly contributed to the reduction of illegitimacy.⁹⁰

⁸⁸ Kaisi found a marriage register at a Roman Catholic Church in Dar es Salaam showing that between 1986 and 1992, a total of 120 couples had lived together as husband and wife before celebrating their marriages in church. See Kaisi, *op. cit.* 144.

⁸⁹ See *Halima Rashidi v. Amon Peter*, High Court Civil Appeal No. 34 of 1993 (22/3/93) per MAINA, J. See also Rwezaura *op. cit.* above, n. 6, 534.

⁹⁰ The law of inheritance is currently under review and it is believed that the intended reforms will further narrow the gap between marital and non-marital children in the area of intestate succession. See Rwezaura, *ibid.* 523 and Tanzania, above, n. 86, 69.

Can presumption of marriage doctrine outlive section 160?

The argument of this section is that the repeal of section 160 does not necessarily put an end to the common law doctrine of presumption of marriage. This is because such a common law rule has been part of Tanzania law since the British colonial era. Even before section 160 was enacted in 1971, courts were already familiar with this doctrine. For example, there are several decisions of the High Court, such as *Nyamakaburo*, *Sakala* and *Loijurus* where judges stated firmly that the English common law doctrine of presumption of marriage had become part of Tanzanian law and was applicable not only to marriage under the general law, but also to customary law marriages.⁹¹ It seems that section 160 merely codified and refined an existing common law rule without superseding or repealing it. In the light of this argument, if section 160 were to be repealed without at the same time abolishing the aforementioned common law rule, then it would continue to apply as if section 160 (LMA) had never been enacted. Thus, in the absence of section 160(1), judges would have to determine the appropriate length of cohabitation necessary for the common law presumption of marriage.

The next question might be how to make up for the repeal of section 160(2). All applications relating to "class three" unions, where a ceremony of marriage (however irregular) has taken place, or where the parties lack the initial capacity to marry, ought to be dealt with under sections 38–39 (LMA) governing nullity of marriage. As noted above, the LMA should be amended so that courts have the power to determine child support and custody, to make financial orders for partners, and to order division of assets on granting a decree or a declaration of nullity of marriage. However, such change in the law will not cover cohabitants who i) lack the initial capacity to marry; ii) have not attempted to go through any ceremony of marriage; and possibly, iii) do not consider themselves husband and wife. Those who fall into the above category have two options. They can, if they belong to a customary law community, rely on Rules 93–97 of the Declaration of Customary Law (GN 279 of 1963), which empower courts to order division of assets on the termination of a concubinage.⁹² Where parties do not belong to a customary law community or wish to opt out of their customary law, the court can apply principles of equity which are part of the received law in Tanzania. These rules are regularly applied in other common law jurisdictions, including Britain, to determine the property rights and interests of unmarried cohabitants.⁹³

But if the above argument regarding the continued application in Tanzania of the doctrine of presumption of marriage does not hold, then section 9(3A) of the Judicature and Application of Laws Ordinance (Cap. 453) offers another option. The foregoing section provides in effect that the rules of customary law and rules of Islamic law are applicable in all matters not specifically covered by the LMA.⁹⁴ Therefore, if section 160 were to be repealed, parties to "class one"

⁹¹ See above, n. 63, 60 and 61 respectively.

⁹² Rule 94 states that "if a man and a woman have started a common household together, the property which has been acquired by common effort [will be] divided as follows . . ." Then follows details as to how this should be done.

⁹³ See for example, *Eves v. Eves* [1975] 3 All ER 768 and *Grant v. Edwards* [1986] 2 All ER 426 and more generally Bromley and Lowe, *op. cit.* 555–584.

⁹⁴ See s. 9(3A) cited at n. 65 above. It follows that such rules would apply in any matter not covered by the LMA.

unions could still rely on the doctrine of presumption of marriage as a principle of customary law as the High Court held in pre-LMA decisions.

SOCIAL PERCEPTIONS OF DE FACTO UNIONS IN TANZANIA

After what has been said above in defence of section 160, it must be evident that it constitutes an important element in the structure of the LMA. It is also a useful tool for mitigating the negative effects of legal pluralism in circumstances of rapid social change. The question that must be considered now is why did the LRC, after five years of study and public consultation, recommend the repeal of this major provision? This part of the paper examines how the members of the public perceive section 160 and the underlying reasons for such a perception.

The analysis of the public perception of de facto unions must begin with the 1994 LCR's conclusions. Two related lines of argument seem to emerge from the reading of the LCR's report and what it offers to support the scrapping of section 160.⁹⁵ The first is a moral objection to the practice of couples living together without formally marrying. In the words of the LRC, the doctrine of presumption of marriage "diminishes the sanctity of marriage . . . and [is] a mockery [to] those who marry according to established rites, religious or otherwise."⁹⁶ A number of references to this theme are found in other parts of the LRC report where, for example, religious leaders "have criticised [section 160] as promoting sinful cohabitation between unmarried men and women".⁹⁷ Again, "if the state wishes to protect [the] interests of children born out of such relationships [it can do so] without referring [to] the sinful relationship between men and women as [a] 'marriage'."⁹⁸

The second ground given by the LCR is that section 160 is ambiguous and, therefore, has led to the growth of contradictory judicial precedents, some of which the LRC considers to be erroneous. The High Court decision in *Francis Leo* is cited as an example, where MFALILA, J., held that although section 160 does not convert a concubine into a wife, such a concubine would nonetheless be entitled to the financial and other remedies stipulated under section 160(2) because the legislature intended to protect such women.⁹⁹ The LCR takes exception to such judicial interpretation because "it legalises illicit cohabitation between a legally married husband or wife" by giving legal protection to those who illicitly cohabit with them. As the above discussion has shown, such an adverse comment presumably applies only to "class three" de facto unions where one of the parties is a party to a subsisting monogamous marriage.¹⁰⁰ Yet, as we have seen, this is not the only category contemplated under section 160. Another criticism of section 160 raised by the LRC concerns the decision in *Theresia Msiwao* where the High Court held that in cases where the presumption

⁹⁵ In fairness to the LRC, I should stress here that the LRC's views appear to be derived from the various studies and public consultations that it undertook in the preparation of its report. Nonetheless, it would be difficult for the LRC to distance itself totally from its own report and its interpretation of the various opinions that it collected.

⁹⁶ See LRC, above, n. 1, 31.

⁹⁷ *Ibid.* at 31.

⁹⁸ *Ibid.* at 31.

⁹⁹ See above, n. 54.

¹⁰⁰ It is also important to remember that some of these subsisting statutory marriages are probably "empty shells" and are no longer considered alive even by the parties themselves. Some of these exist only because no formal steps have been taken to dissolve them.

of marriage has not been rebutted, the parties remain husband and wife and will be so regarded by the law until they have taken "the necessary steps to bring the relationship to an end".¹⁰¹ The LRC thought that such an interpretation of section 160 may not have been intended by the legislature. Therefore, it is apparent that the LRC is strongly opposed to an interpretation of section 160(1) which has the effect of creating an alternative form of marriage. Hence, according to the LRC, section 160 has no place in the LMA because "[c]ohabitation should never be mixed up with issues of marriage".¹⁰²

Another source from which public perception of de facto unions can be gathered is the excellent and relatively recent study of Kaisi who interviewed several people concerning their views on section 160. They included practising lawyers, judges, the LRC, the staff at the Registrar General's office, religious leaders of various denominations, the Department of Social Welfare, elders and some influential members of the public. Their responses were mixed but they provide a reliable idea of what certain influential Tanzanians think about de facto unions and their views on what the law should be. Inevitably, their views are also coloured by their positions in the community. For example, religious leaders and elders were both unanimous in their condemnation of section 160 and in urging the government to repeal it. According to Kaisi, "church leaders are all not happy with section 160 [because] it encourages illegal associations, prostitution and . . . sinful lives."¹⁰³ She adds that the religious leaders "have gone to the extent of accusing section 160 to be [sic] a great contributor to the increase in the number of street children and the spread of AIDS".¹⁰⁴ One Muslim leader also stated that section 160 was contrary to the Quranic teachings. The Hindu Mandal Community leader stated that cohabitation out of marriage was not yet a problem in their sect but such living arrangements are in any case viewed as "prostitution by our community".¹⁰⁵

The elders, both male and female and aged at least 60 years, expressed equally strong views, adding that cohabitation out of marriage was a serious problem in Tanzania, "and that it [was] spreading like wildfire [and is] a habit which is a bad example to the young generation".¹⁰⁶ They thought that this problem was caused by the lack of proper parental guidance for children and the lack of concern for traditions and customs "which in the past used to be passed on to the children". They also thought that the disregard of important traditional rituals such as the initiation ceremonies—"which were very important for both girls and boys"—is one of the causes for such a big rise in the number of de facto unions. The introduction of co-educational schools was also blamed by these elders for the rise in cohabitation, as were the empowerment provisions of the LMA which dispense with parental consent for the marriage of majors.¹⁰⁷

¹⁰¹ *Theresia Msiwao v. Muvamba Mohamed* (DSM) High Court (PC) Civ App No. 10 of 1978 (unreported).

¹⁰² "The Commission is not certain whether or not this is the correct interpretation . . . contemplated in the Government Paper No 1 of 1969." See LRC, above n. 1, 33.

¹⁰³ *Ibid.* at 144.

¹⁰⁴ *Ibid.* at 145.

¹⁰⁵ *Ibid.* at 146.

¹⁰⁶ *Ibid.* at 51.

¹⁰⁷ The elders stated that, "as things are nowadays, our children do not even care whether their parents are informed of their intended marriage or not. As a result they don't even marry but end up in cohabitation only on 'flimsy excuses' such as hard economic situations, or they have no dowry or that they are not yet economically ready to marry, of which we had never heard of in the past."

Kaisi's interviews at the Department of Social Welfare and at the Registrar General's office reveal another side of the story concerning the perception of section 160 by the public. The interviews show how men have successfully exploited the uncertainty surrounding section 160 to escape from their family obligations. According to a senior official in the Department of Social Welfare, their office had been receiving an increasing number of complaints, particularly from women cohabitants who have been badly mistreated by their male consorts. Some have "been ordered to get out of the house or left without food after their husbands found other women whom they [wished] to marry officially".¹⁰⁸ Although such cruel treatment of women also takes place in conventional marriages, husbands do not normally deny being married to their wives as the marriage can be easily proved. It seems that when marital conflicts occur, the party who is financially stronger finds it tempting to deny the marital relationship because it was not a formal marriage. Reference has also been made above to the large number of women found at the Registrar General's Office who had been abandoned by their male cohabitants for other women. Again the evidence from the Department of Social Welfare indicated that male cohabitants did not keep appointments for mediation sessions despite being repeatedly summoned. In the case of the few who did, the tendency among them was to strongly deny that they were married by challenging their adversaries to produce marriage certificates. But in the majority of cases these men were prepared to acknowledge the children of the union and to support them financially.¹⁰⁹

Comments and opinions from practising lawyers and judges were largely concerned with the technical or doctrinal aspects of section 160 and how it fitted into the rest of the LMA. Thus, certain District Court magistrates wanted section 160 to be amended and clarified to remove the contradictory interpretations it had received from High Court judges. Practising lawyers suggested that section 160(2) should not be applied to cohabitants who lacked the initial capacity to marry because "the presumption of marriage does not legally arise."¹¹⁰ One retired State Attorney thought that section 160 was a good law as long as the remedies stipulated under section 160(2) were confined to parties who have initial capacity to marry. The former chairman of the Law Reform Commission stated, presumably in his personal capacity, that it would be wrong to repeal section 160 without providing alternative legal protection of women cohabitants and their children.¹¹¹ Primary court magistrates (mostly women) stated that section 160 was a good law because it protected women and children. Even more pointed was the opinion of one female activist lawyer who argued that there was no need to repeal section 160, particularly at a time "when other countries [in western Europe and also the USA and Australia] have adopted this concept of cohabitation into their laws and it is working smoothly. [And]

See Kaisi, *op. cit.* 151. Clearly therefore, there is a wide gap between the views of the elders and those of the youth.

¹⁰⁸ *Ibid.* at 147.

¹⁰⁹ *Ibid.* at 147.

¹¹⁰ *Ibid.* at 138.

¹¹¹ See Kaisi, *op. cit.* MWAIKASU, J., the former chairman of the Law Reform Commission of Tanzania, did not chair the committee which recommended the repeal of s. 160 (LMA). This committee was chaired by NSEKELA, J., a former chief corporation counsel of the Tanzania Legal Corporation who is now a judge of the High Court.

even other countries in Africa have commended Tanzania for such a progressive law [and] are also trying to see how they can copy from us."¹¹²

It must be clear by now that the call to repeal section 160 has a distinctly political dimension to it. For example, the elders seem to be driven by a more general dissatisfaction with the way economic and social changes have undermined their parental authority and threatened their economic welfare.¹¹³ For parents, section 160 has come to symbolize a challenge to their parental authority. The prescription they offer is very indicative of their world-view. For the youth, section 160 represents power and a means for self-determination. There is no doubt, however, that section 160 does not work in isolation. As this article has pointed out, much of the LMA promotes this kind of individual self-determination. In the eyes of religious leaders, the provision contributes to the erosion of morals and the declining influence of religious doctrine. Again, they would like the law to reflect their version of social order. For male cohabitants who wish to discard their partners, section 160 presents a nuisance to their notion of male hegemony and economic exploitations of female labour. Indeed, life for them would be more peaceful if section 160 were repealed. Hence, although section 160 is more recent in time than the social problems it is said to have caused, still it has come to act as a scapegoat and to symbolize everything corrupt and sinister. But as this article has shown, senior judges have not permitted such victimization of women and children.

Hence, to sum up the public perception of section 160, it must be noted that in almost every society one necessarily finds competing interests and political groupings, each supporting one or the other cause. In the light of this, the question now is where do our policy-makers stand regarding the retention or repeal of section 160? If the LRC's view is taken as one expression of policy, then this can be challenged on a number of grounds. First, it seems to have a rather narrow concept of de facto unions and seemingly bases its recommendations on "class three" unions. Indeed, a number of practising lawyers interviewed by Kaisi thought that "class one" and "class two" unions could be easily formalized either by state registration and/or by the transfer of bridewealth to the wife's family.¹¹⁴ Secondly, by leaning excessively towards the demands of elders and religious leaders, the LRC's recommendation totally ignores the potential interests of the youth, women and children, whose opinions and interests also deserve attention in policy formulation. As must be obvious, policy-making involves the balancing of conflicting interests, which is what the LMA attempted to do in 1971.

CONCLUSION

This article has shown that the incidence of de facto unions in Tanzania is in one sense a result of the interaction between plural models of marriage operating in a single jurisdiction. The first, and most dominant, is the concept of marriage contained in the English colonial marriage laws from which the LMA derived some of its basic principles. The essential features of this model

¹¹² Ibid. at 139.

¹¹³ See B. Rwezaura "Changing community obligations to the elderly in contemporary Africa," in J. M. Eekelaar and D. Pearl (eds.), *An Aging World: Dilemmas and Challenges for Law and Social Policy*, Oxford, 1989, 113.

¹¹⁴ See Kaisi, op. cit. 139.

include the concept of marriage as a voluntary union of two individuals, as monogamous, as a result of a formal and legally prescribed ceremony, indissoluble except by judicial fiat, and as giving rise to specific rights and obligations which are enforceable by the state legal system. The African traditional model, on the other hand, is grounded on the notion of marriage as a union of two families; it is polygynous; it results not from a single precise ceremony but from a long process of negotiations between families; it is consummated by the transfer of an agreed bridewealth (or part thereof); it can be open-ended at its inception though gradually attaining a more definite character, especially after the birth of children. Its termination is much like its formation, not by judicial decree, but extra-judicially through negotiations between the two families followed, in some cases, by a refund of a portion of bridewealth. Consequently, the termination of customary unions can be the result of many years of living apart followed by the remarriage of the wife. As long as bridewealth is not refunded a marriage might endure and it is not unusual in some communities for a wife to return with new children to her old husband after having lived apart from him for several years.¹¹⁵

In 1971 these two models were integrated under the LMA and came under the jurisdiction of the national legal system administered by judges trained in the English common law. The doctrine of presumption of marriage, borrowed from English common and in existence before 1971, became codified and enacted as section 160 of the LMA. In its native jurisdiction this doctrine provided the much-needed bridge between the old common law system of marriage and the then-new statutory form of marriage introduced in 1753 by the first Marriage Act called after Lord Hardwicke.¹¹⁶ In this sense the doctrine of presumption of marriage ensured a smooth transition between the old and the new system. In Tanzania, both before and after 1971, this doctrine tended to validate marriages that did not strictly comply with the prescribed procedures. But in another sense, the doctrine has also operated to enhance individual freedom while also undermining the notion of marriage as a union of families. By enhancing individual autonomy and choice, section 160 has tended to play the political function of weakening the power of elders to determine the marriage choices of their children. On the other hand, section 160 has also seemingly supported unions-made outside the authority of the Christian church and, to a lesser extent, outside the prescriptions of the Islamic faith. This has consequently provoked a certain forceful political backlash, leading to the call to repeal of section 160.

The repeal of section 160 will have very little if any effect on society given that it is sailing against the social current. With regard to the social and economic changes taking place in Tanzania today and the plural and transitional nature of its family law, it is difficult to imagine how this system of marriage can actually function without the lubricant that section 160 currently provides. That is why it is recommended that rather than repealing this provision, it should instead be retained and refined along the lines suggested above. However, as is also noted,

¹¹⁵ See Wanitzek, *op. cit.*

¹¹⁶ See L. Stone, *Road to Divorce: A History of the Making and Breaking of Marriage in England*, Oxford 1995, 121-137.

the repeal of section 160 will not by itself result in the repeal of the old common law doctrine of presumption of marriage. Thus whatever may happen to section 160, courts will continue to perform the difficult task of harmonizing the present plural systems of family law, while also trying to respond to the needs of a changing society.¹¹⁷

¹¹⁷ In July, 1997, the Minister for Justice and Constitutional Affairs reported to the Parliament that the LRC proposals, including its recommendation to repeal s. 160, would be opened for wider public discussion in the near future. According to the Minister, considering that family law and the law of inheritance affect people's religious beliefs, cultures and human rights, it will be necessary to seek wider consensus within the community before definite statutory changes are finally presented to parliament.