

THE PRESENTATION OF CLAIMS IN MATRIMONIAL PROCEEDINGS IN TANZANIA: A PROBLEM OF LANGUAGE AND LEGAL CULTURE*

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I. Introduction

As a system that deals with social ordering, the law is very much a function of words, i.e., of language.¹ Language is one of the most effective ways of communicating. One of the most cardinal principles of the common law criminal system is constituted in the maxim *ignorantia juris non excusat* (ignorance of the law is no excuse). In conformity with this principle, Tanzania's Penal Code, the basic criminal law statute, assumes that everybody knows the law.² Knowledge of the law presupposes 'legal literacy', which in turn means that the citizenry (or at least a reasonable portion of it) is capable of understanding what the law says. Hence, the law must speak in a language the people understand. Only then can they reasonably be expected to generally conduct themselves in accordance with the law.

In criminal law, the problem of legal ignorance is slightly reduced because the law of crime is inter-linked with rules of morality. Abiding by it is in many ways identifiable with the society's moral norms, which makes it perhaps the most well-known branch of the law in most communities. But this is merely a general presumption, and only so in relative terms. The larger part of the criminal law, especially its specific elements and procedure, remain unknown. In civil law, the law is even less known. In reality, therefore, the general populace remains mostly ignorant of the law. Consequently, the claim that everybody is presumed to know the law amounts to nothing but a fallacy.³

This position is aggravated in many African countries by the existence of a plurality both of legal systems and of languages within one and the same country. One cannot therefore speak of knowledge of 'the' law because a certain law, mostly the African customary law, may be well known to a person or a group of the population, while the official state law remains

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¹ Marasinghe (1977) p. 507: 'Law expresses itself through a language, and, therefore, the language of the law has the greatest influence upon a nation'.

² Knowledge of the law is stated to be no defence to any criminal offence unless such knowledge is expressly stated to be an element of the offence. See 'General Rules as to Criminal Liability', The Penal Code, Cap. 16 (Chapter 16 of the Revised Laws).

³ The Honourable Mr. Justice Nyo Wakai, Supreme Court of Cameroon, in his foreword to Anyangwe (1989) p. xix.

largely unknown. The diversity of languages plays a major role in this situation. The process of reception⁴ of European legal systems in Africa during the colonial period and thereafter embraced not only the taking over of a foreign law and legal culture but, inseparably, also of a foreign legal language--or, as M.L. Marasinghe put it, of 'a whole new language, a new culture and a new way of life' (Marasinghe 1977: 509).

The main object of legal reception in the case of Tanzania was the English common law.⁵ There was no doubt that during the colonial period English law was to be expressed in the English language, even after having been transferred into a different culture. After all, those who governed the territory and dominated the application of the law were British. Only at the level of 'native' administration and courts was Kiswahili used in order to facilitate communication with the population. Chiefs, clerks and others played an important role as interpreters and intermediaries in this process of communication. Naturally, this casting changed at independence. The question of the future of the law, and the language in which it was to be expressed, arose. Obviously, Tanzania's choice of Kiswahili as the national language had important implications for choices made, and developments taking place, as regards the language of the law.

This paper attempts to highlight some of the problems brought about by the necessary interaction of language and legal culture in Mainland Tanzania. The paper is aimed at pointing out some of the consequences of both foreign and local language use in legal communication. It will take as an example the problems faced by parties in matrimonial proceedings both in the lower and higher courts of Tanzania, concentrating on cases originating from Mara, Mwanza and Kagera regions, which are located along the shores of Lake Victoria.

What is exactly meant by the term 'language of the law'? As B.A. Rwezaura points out, this is in the first line 'the language in which the legal system functions' which is composed mainly of the legislature and the judiciary. So 'the language of the law' refers first to the language in which bills and subsidiary legislation are drafted, and then debated and passed in parliament. Second, it refers to the language in which courts conduct and record their proceedings, and write their judgments (Rwezaura 1993: 34). When dealing with the language of the law, however, one cannot restrict oneself to this narrow meaning of the term. Rwezaura includes in this wider field of relevance areas such as the language of legal education, and the language which is used in the context of court proceedings, for instance by the police when prosecuting a case, in discussions between lawyer and client (*ibid.*), or by the court clerks when entering a case and interviewing the complainant.

This leads to a further area of interest and relevance for the language of the law. L. Omondi puts it thus: 'Language is the medium through which individuals acquire all values that govern

⁴ On the question as to what extent it is necessary to differentiate between 'reception', 'imposition', and 'octroi', see Scholler (1983).

⁵ Cf. the so-called reception clause, originally contained in section 17 (2) of the Tanganyika Order in Council of 1920, which refers to 'the substance of the common law, the doctrines of equity and the statutes of general application in force in England at the date of this Order [i.e. 22nd July 1920]'.

society and that form the basis for laws.' (Omondi 1989: 16) People attain their legal 'socialisation' through the language with which they grow up. The values contained in their culture are reflected in the concepts of their language, which together play an important role for the formation of people's legal assumptions, convictions, and actions (ibid.). In the words of A. B. Weston, the language of the law embraces all fields of human activity, for all fields are to some extent covered by legislation (Weston 1965: 63).

Our research on matrimonial proceedings shows how important it is to analyse questions relating to the language of the law in this wider framework. The Primary Courts, the lowest instance of courts in Tanzania, provide the most intensive contact, both quantitatively and qualitatively, between the population and the state court system. With the large number of Primary Courts in the country, their less formal proceedings, the exclusion of advocates, and the participation of lay persons in the decision process, Primary Courts are far more easily accessible for the people than the higher courts. Their proceedings are therefore a suitable study object for those who are interested not only in the 'centre' of the state and the legal and judicial system, but also in the 'periphery' and how the legal and judicial system functions there.⁶

The problems arising within our context of language and the law can be divided into three categories: The first are those which relate specifically to problems of language, secondly, those caused by ignorance of law and procedure, and thirdly, those that arise because of the law's failure to translate into correct language the customs and traditions of the people. All these three aspects, however, are closely connected to each other and are illustrative of the difficulties brought about by the necessary interaction of language and legal culture. Before going into details on this topic, some background information on Tanzania's language of the law will be provided, followed by a short summary of the law of matrimonial proceedings.

II. The Language of the Law in Tanzania

Despite the fact that Kiswahili is the national language in Tanzania, the principal language of the law remains English. Although this is not specifically stated in the law, the inclination towards the use of English in the enactment of legislation and in the records of the higher courts is enough evidence of the preference of English to Kiswahili by the country's most authoritative sources of law.⁷ There are varying reasons for this preference, and why it has not been possible, so far, to switch to Kiswahili as the sole language of the law in Tanzania. But

⁶ Cf. Marasinghe (1977) p. 509: 'Bridging the centre with the periphery'.

⁷ It is to be noted that the celebrated Nyalali Report, which dealt with the question of whether Tanzania should introduce a multi-party political system, and which was presented in three volumes, had two of them in Kiswahili, but the third volume, which considered the laws recommended for amendment or repeal, was prepared in English. The Commission stated the reason to be that the laws being considered were themselves written in English. See *Taarifa ya Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi Vya Siasa Tanzania 1991*, especially the Introduction to Kitabu cha Tatu. As Allott observes: 'The law is the most conservative part of government, and hence is slowest to respond to changes in linguistic policy'. See Allott (1974) p. 135.

that aspect is beyond the scope of this paper.⁸ It is however pertinent to point out that a major contributing factor has been the fact that the medium of instruction for legal education in Tanzania is English.⁹ Tables 1 and 2 are illustrative of the preference of English to Kiswahili, in both the legislative and adjudicative processes:

Table 1: Language Use in the Legislative Process

Step in Legislative Process	Language Used
Drafting of Principal Legislation (Bills)	English (with Kiswahili version of Objects and Reasons). Exception: Constitution (Kiswahili)
Drafting of Subsidiary Legislation	Kiswahili or English
Debating of Bills in Parliament	Kiswahili
Enactment of Principal Legislation (Acts, Constitution)	English Exception: Constitution (Kiswahili)
Publication of Subsidiary Legislation (Government Notices)	Kiswahili or English
Translation of Principal Legislation	From English to Kiswahili: e.g. Penal Code, Magistrates Courts Act 1963 (now repealed), Law of Marriage Act, Ward Tribunals Act From Kiswahili to English: Constitution

⁸ This subject is discussed at length in Rwezaura (1993)

⁹ In the late 1970s and early 1980s, there were serious plans by the Government and the University of Dar es Salaam to switch to Kiswahili as the medium of instruction by the 1992/93 academic year. However, the enthusiasm has apparently disappeared. Cf. The Committee of Deans, University of Dar es Salaam, 'Mapendekezo Kuhusu Hatua za Kujiandaa kwa Kufundisha kwa Kiswahili', Faculty Board Paper No. 85/10; and Faculty of Law, University of Dar es Salaam, 'A Report by Faculty Board Ad Hoc Committee on Kiswahili as a Medium of Instruction at the University of Dar es Salaam', Faculty Board Paper No. 89/12 and Appendix A thereto. Cf. also Mukoyogo (1991)

As shown in Table 1, almost all principle legislation is drafted in English,¹⁰ even though all of the present draftsmen and women are fluent in Kiswahili. The fact that draftsmanship is not taught in Tanzania has contributed to the tendency to prefer English in legislative drafting.

Most draftsmen and women are trained abroad, mostly at the University of the West Indies.¹¹ The language used in their training is English. On the other hand, not all the Members of Parliament know English sufficiently to be able to read and understand the Bill they are supposed to decide upon (cf. Rwezaura 1993). Although the Bills contain a Kiswahili version of the objects and reasons, this is obviously not enough. However, both the Constitution of the United Republic and that of Zanzibar¹² are written in Kiswahili,¹³ which explains away the argument that the language is not developed well enough to be used in modern legislation.¹⁴

A few legislation in the mainland of Tanzania have been translated into Kiswahili. However, this process has been too slow to have much practical effect. Among the translated Acts is the Law of Marriage Act of 1971,¹⁵ the relevant piece of legislation for matrimonial proceedings. In its case, even the Bill had been translated into Kiswahili. After the debate in Parliament which led to some changes in the Bill, the Act was passed in English but later translated into Kiswahili.¹⁶

In court trials, the problems are played out in the realities of their social setting. During the colonial period, only English was used in all courts presided over by qualified lawyers. Other languages required an interpreter. This posed considerable problems to the parties involved. After independence, the use of Kiswahili in the courts has been increased. All judicial officers

¹⁰ As for subsidiary legislation, some of it is drafted and published in Kiswahili, some in English. Among the more important pieces of subsidiary legislation in the field of family law are the Local Customary Law Declarations of 1963, which codified and unified the majority of the patrilineal customary laws of Tanzania in the major areas of family and inheritance laws. The official versions of the Declarations are only available in Kiswahili. Cf. Sheria Zinazohusu Hali ya Watu, Government Notice No. 279 of 1963, 1st Schedule; Sheria za Ulinzi, Government Notice No. 436 of 1963, 1st Schedule; Sheria za Urithi, Government Notice 436 of 1963, 2nd Schedule; Sheria za Wosia, Government Notice No. 436 of 1963, 3rd Schedule. cf. Mukoyogo (1991).

¹¹ Information obtained from Parliamentary Draftsmen, Attorney General's Chambers, Dar es Salaam. For a discussion of the problems associated with this situation, cf. Crabbe (1992) pp. 630-648.

¹² Adopted in 1977 and 1984 respectively. In this paper, however, our analysis will be confined to Tanzania Mainland only.

¹³ The Union Constitution was later translated into English. We could not establish as to whether the Zanzibar Constitution has been translated into English. For an unofficial translation, cf. Bierwagen & Peter (n.y.).

¹⁴ The Honourable Mr. Justice Nyalali, C.J. 'Address at the Admission Ceremony of New Advocates', 15th December, 1992, p. 4. Part of his speech is also reported in the *Daily News* (Tanzania) of 16th December, 1993, p. 3. Furthermore, Weston (1965) shows how Kiswahili is capable of adaptation and expression of fineness of meaning, in some cases even more than is English.

¹⁵ No. 5 of 1971. Others include the Penal Code (Chapter 16 of the Revised Laws), the former Magistrate's Courts Act of 1963 (No. 55 of 1963), repealed and replaced by the Magistrates Courts Act (No. 2 of 1984) and the Ward Tribunals Act (No. 7 of 1985).

¹⁶ This was specifically provided for under section 167 of the Act (cf. appendix), which placed the duty of translating the Act into Kiswahili in the hands of the Minister responsible for legal affairs.

are fluent in Kiswahili, and they have been more than willing to use the language during trials.¹⁷ The official language of the courts differs from one court level to another, and may sometimes differ in the same court depending on the character of the proceedings. The following table outlines the use of language in different levels and stages of courts

Table 2. Language of the Courts

Court	Language of Proceedings	Language of Record
Court of Appeal	English or Kiswahili	English
High Court	English or Kiswahili	English
Resident Magistrate's Court	English or Kiswahili (or third language?)	English
District Court	English or Kiswahili (or third language?)	<u>Original Jurisdiction:</u> English <u>Appellate Jurisdiction:</u> English or Kiswahili
Primary Court	Kiswahili	Kiswahili

This table shows that the use of Kiswahili is more frequent in the higher courts than in the lower courts. The Court of Appeal and the High Court are required to keep their records in English in all instances.¹⁸ However, the proceedings may be conducted either in English or in Kiswahili.¹⁹ The records of the Resident Magistrate's Court, and the District Court as far as its original jurisdiction is concerned, must also be in English. Where the District Court is dealing with appeals, revisions and confirmatory proceedings, the record may be either in English or in Kiswahili.²⁰ Both at the Resident Magistrate's Court and the District Court the proceedings

¹⁷ For a percentage analysis of the use of Kiswahili in Tanzanian courts as contrasted with English and the vernaculars, see Kavugha & Bobb (1980)

¹⁸ The term 'record' in this context includes the written record of the proceedings and the judgment or other order of the court

¹⁹ Rule 3A of the Tanzania Court of Appeal Rules (Government Notice No. 102 of 1979), as amended by Government Notice No. 451 of 1985 (cf. appendix), provides this for the Court of Appeal. We are not aware of a statutory basis for this position as far as the High Court is concerned.

²⁰ Section 13(2) of the Magistrate's Courts Act, 1984 (cf. appendix). A nearly identical formulation was contained in the earlier version of the Magistrate's Courts Act of 1963 (Act No. 55 of 1963)

may be conducted, in any instance and irrespective of its nature, in either of the two languages²¹ At the Primary Court, the lowest level of the state court system, Kiswahili is declared to be the only official language of the court which means it is used both for the proceedings and the records.²²

From this overview it is clear that problems may result in trials at the Resident Magistrate's Courts and at the District Courts, particularly from instant translation of Kiswahili proceedings into the English record, which may sometimes fail to represent a witness' testimony or a party's submissions correctly. A further need to initially interpret from yet another language into Kiswahili arises where parties are not sufficiently conversant with Kiswahili. This is the case for some of the elderly village population, particularly the women. Before turning to consider the practice of the courts and some of the problems which flow from the coexistence of Kiswahili and English as languages of the law, a short explanation will be provided of the nature and legal basis of matrimonial proceedings in Tanzania.

III. Matrimonial Proceedings

Matrimonial proceedings are regulated by the Law of Marriage Act, 1971. A matrimonial proceeding²³ is any matter touching upon a marriage relationship which is brought to court²⁴ by way of a petition for a declaratory decree, annulment of marriage, separation or divorce, or a chamber application for maintenance, custody of children, division of matrimonial property, or other matrimonial relief.²⁵

The Law of Marriage Act replaced the multiple systems of law that hitherto governed marriage and the status of children. While certain traditional legal elements were integrated, others were left out of the Act, but not always by express exclusion. Hence, one sees within the Law of Marriage Act concepts which are based on the common law, Islamic law, and the customary laws of the various ethnic groups in the country. The Act was therefore aimed at integrating religious and customary laws and the English common law, while at the same time reflecting the Government's policies of equality and fairness between the sexes and the protection of children.²⁶

²¹ Section 13(2) of the Magistrate's Courts Act, 1984. The formulation that 'the language of courts of a resident magistrate and of district courts shall be either English or Kiswahili, or as the magistrate holding such court may direct; . . . ' could be interpreted to mean that a language other than Kiswahili or English can be directed to be the language of the court. This, however, would be possible in actual practice only where the magistrate and the parties have another common language, which may rarely be the case. The word 'or' was not contained in the 1963 version of the Magistrate's Courts Act.

²² Section 13(1) of the Magistrate's Courts Act, 1984 (cf. appendix)

²³ See section 2 (1) of the Law of Marriage Act (cf. appendix)

²⁴ The right to move the court to exercise its matrimonial jurisdiction is provided for in section 77 of the Law of Marriage Act

²⁵ Section 81 of the Law of Marriage Act (cf. appendix)

²⁶ The Law of Marriage Act is based essentially on the results of work done in Kenya and contained in the Report of the Commission on the Law of Marriage and Divorce (1968) (also known as the Spry Report).

However, the limitations of the power of legislation, and the words applied in it, often become clear in the practical application of the Law of Marriage Act. In any attempt to express legal principles in a language different from that within whose socio-linguistic framework they developed, there are bound to be practical problems. Legal concepts, as expressed in the legal terminology of the language of their country of origin, cannot be translated easily into the language of a different culture with different legal concepts. Some of the problems connected with this exercise, and some of the highly contradictory views as to how to go about it, are reflected in the literature.²⁷ The natural limitations of the other language can be seen in the divergence of the words used in the law, which appear to carry a different connotation from its original meaning. Naturally, the continued use of English in the process of law-making has substantially contributed to legal ignorance among the population (Fortman and Mihyo 1993: 154). Some of the examples that will be given in this paper will explain the point.

In the practice of the courts, the majority of matrimonial proceedings deal with divorce and the legal consequences of divorce. This includes the division of matrimonial assets, maintenance of former spouse, and custody and maintenance of children. Most of the cases which will be discussed below are in the field of division of matrimonial assets and maintenance of spouse after separation or divorce. According to section 114 of the Law of Marriage Act, the court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts. In exercising this power, the court is required to consider, among others, the custom of the community to which the parties belong, and the extent of the contributions made by each party in money, property or work towards the acquisition of the assets. Furthermore, section 115 of the Law of Marriage Act empowers the court, under certain conditions, to order a man to pay maintenance to his wife or former wife, and vice versa.

In customary law, such rights are usually not provided. The reason for this lies in the different concept of marriage and its socio-economic background. While in most African societies, marriage is a matter not only of the spouses but also of the two families involved, the European concept of marriage is that of a union between an individual man and woman. In the customary context, a divorced wife would return to her family of origin and be supported by them, or, if she remarries, her new husband will provide for her. As for the children, in patrilineal societies, they would generally stay with their father's family and be supported by them. Claims against a spouse for division of matrimonial property and maintenance would therefore not arise. But with socio-economic change, this form of support from the extended families has become uncertain and therefore increasingly unreliable, to the disadvantage particularly of women and children. The need for an individual right to maintenance and

The Law of Marriage Act is closely modelled on the proposed Bill drafted by the Commission (Appendix VII of its Report).

²⁷ Cf. for instance, with special reference to Kiswahili and English, Weston (1965), Harries (1966) and Weston (1967). Cf. also Möhlig (1973) p. 236. Sippel (1995) p. 302 discusses some of these problems with reference to the use of Kiswahili and German during the German colonial period.

division of jointly acquired matrimonial property therefore arose and was taken care of by the legislature by enacting the relevant provisions of the Law of Marriage Act mentioned above. However, for reasons referred to earlier, these provisions have remained largely unknown to the people. Moreover, most people do not imagine that such a right could exist, since it does not exist in customary law. Some of the obstacles a wife can encounter in her attempt to realise her legal right to a share in the matrimonial property or maintenance are discussed in the following section.

IV. The Nature of Claims and the Use of Words in Matrimonial Proceedings

1. Problems relating to language

In the case of *Consitansia Anatori v. Taidini Snaga*,²⁸ the wife had filed a petition in the Primary Court for divorce and division of property acquired during her marriage with the respondent husband. In the course of their twenty-two years of marriage, they had acquired a considerable amount of property. In what appears to be either a misuse of words or a misunderstanding of the legal concepts behind them, the Primary Court granted the divorce and ruled that the wife was a '*mtumishi*' (servant) of the husband and awarded her TShs 600/- as '*fidia*' (compensation). The wife appealed to the High Court. In her memorandum of appeal, she complained that she was not a servant, but a wife. But she was herself also caught up in a similar language trap when she claimed, in the same memorandum, '*kwa mujibu wa sheria za ndoa ... nipewe kiinua mgongo kilicho halali na wala siyo fidia ...*' Literally translated, this means: 'in accordance with the laws relating to marriages, [I pray] for payment of retirement benefits and not compensation.' Such payment, of course, can legally be given only to an employee under the laws governing relations between employers and employees,²⁹ and never to a wife or husband in their capacities as such.³⁰

The case of *Veronica Kondela v. Samuel Nyando*³¹ illustrates a similar problem. Here, too, the wife's use of the term '*fidia*', which literally means 'compensation', was rather in the sense of '*ugawaji wa mali ya ndoa*', which is the Kiswahili terminology used in the law to refer to 'division of matrimonial property'.³² The wife petitioned for divorce in the Primary Court at Sengerema and claimed for '*fidia*' (compensation) for her two years of marriage with the respondent husband. The court did not consider this claim at all, which it should have taken to

²⁸ Matrimonial (Primary Court) Civil Appeal No. 35 of 1977, High Court of Tanzania, Bukoba, original Primary Court Rulenge (Ngara District) Civil Case No. 8 of 1977.

²⁹ See, particularly, the Employment Ordinance (Chapter 366 of the Revised Laws) and the Security of Employment Act (Chapter 574 of the Revised Laws).

³⁰ See also Rwezaura (1985) p. 125, where he cites the case of *Martha Robi Timotheo v. Augustino Kinogo*, Primary Court Tarime, Civil Case No. 130 of 1966, in which the spouse used the term '*kiinua mgongo*' for her claim for maintenance.

³¹ Primary Court Sengerema Civil Case No. 77 of 1984.

³² Section 108 (b) of the Law of Marriage Act (cf. appendix).

mean 'division of matrimonial property'. Instead, it merely issued an order of divorce and made no mention of the wife's claim for '*fidia*'.

Similarly, in *Christina Gati v. Chinato Mwita*,³³ the wife presented a claim for '*fidia au masurufu*' (literally meaning compensation or allowances). She won partially in the Primary Court and was awarded four head of cattle. The husband appealed to the District Court. The District Magistrate found her claim for '*fidia au masurufu*' to be of no substance. He thus proceeded to quash the Primary Court's order and dismiss her claims. On appeal to the High Court, Mr. Justice Munyera uncovered the wife's linguistic mistake, which appeared to have confused the District Magistrate. But in the process, the learned Judge made a not-so-dissimilar mistake himself. To quote his own words:

The claim is for what the appellant called '*fidia au masurufu kwa muda nilioishi naye na kumfanyia kazi*.' The admitting judge observed that the District Magistrate misdirected himself as to the nature of the claim. It was an issue of division of matrimonial assets and not maintenance. I agree with the learned judge although the appellant misrepresented her claim when she called it '*fidia au masurufu*', something not provided in law.

The terminological problem that caught the judge here was that while it is true that the word '*fidia*' is not provided in law, the term '*masurufu*' is.³⁴ But, the only way one could have seen this was by using the Kiswahili version of the Law of Marriage Act. The English version provides for 'maintenance', which denotes something the Kiswahili translation ('*masurufu*') could not fully reflect. The Kiswahili version of the Law of Marriage Act itself uses varying Kiswahili terms for one and the same English term 'maintenance', i.e. '*(gharama za) utunzaji*' and '*(gharama za) masurufu*'.³⁵ Since the judge must have been used to the English version of the Law of Marriage Act, it would not have been easy for him to envisage the use of the word *masurufu* which was used by the petitioner and does in fact appear in law. It would have been better if the translator had stuck to the use of one (most suitable) term here. Perhaps the best Kiswahili translation for 'maintenance' in this instance would have been *gharama za utunzaji*, or something similar to that, but certainly not *masurufu*, which in law usually arises in an employer/employee relationship.³⁶ It would appear that this misunderstanding is caused by a popular assumption among some ethnic groups that at the end of a marriage relationship, a compensation of some kind must be due to the wife (cf. also Rwezaura 1985). The wife's formulation '*masurufu kwa muda nilioishi naye na kumfanyia kazi*' hints at that.

³³ Matrimonial (Primary Court) Civil Appeal No. 7 of 1985, High Court Mwanza, original Tarime District Court Civil Appeal No. 8 of 1984, and Primary Court Mtana Civil Case No. 59 of 1984.

³⁴ Cf. Part VI (g), especially sections 116 et seq., of the Law of Marriage Act.

³⁵ Cf. sections 114 et seq. of the Law of Marriage Act.

³⁶ Under section 167 of the Law of Marriage Act (cf. appendix), the final say on the correct translation of the Act in the event of a dispute lies with the Attorney General. Perhaps in further recognition of the problems of translation that may arise in the practical application of the Act, the section gave the Minister responsible for legal affairs the powers, from time to time, to 'modify or vary the Kiswahili translation of this Act in order to remove any ambiguity, inconsistency or inaccuracy.' No such powers in respect of the English version (which is the original and binding version) are given.

2. Problems relating to ignorance of law and procedure

The second problem which is closely connected with language problems and is derived essentially from being governed by a legal culture which is unfamiliar to the people, is the petitioner's ignorance of the law and procedure applicable. In most cases, the strict application of legal rules results in unfavourable consequences and sometimes even injustice to the ignorant party. One example of such a situation is the above-mentioned case of *Consitansia Anatori v Taidini Snaga*.³⁷ The High Court found a simpler way of resolving the matter and thus avoided going into the merits of the case. It nullified the proceedings of the Primary Court on the ground that the matter had not been referred to a Marriage Conciliatory Board (*Halmashauri ya Usuluhishi wa Ndoa*) as the law then required before a petition for divorce could be made.³⁸ This illustrates another aspect of the problem of ignorance of the law: Most people do not know where to go when they are faced with a legal problem. The parties in this case had actually gone through several attempts at reconciliation, but these were done by elders and CCM³⁹ leaders, and never by a Marriage Conciliatory Board, which was, however, the only body recognised by law. It is clear, upon perusal of the record, that by the time the petition was filed in court, there was no likelihood of an amicable settlement between the parties.⁴⁰ As a result of this frustrating exercise, the wife had wasted much time and money without achieving anything in the end.

In *Robi Magere v. Julius Wambura*,⁴¹ the wife complained in her appeal to the High Court that the Primary Court had not given her any guidance on the procedure and presentation of evidence. Of course, the burden of proof in such instance is always on herself as the party alleging the fact, but it would still have been possible for the court to explain certain basic matters of procedure where it was clear that for the purposes of ensuring a just settlement of the matter, either of the parties needed such an explanation.⁴² In fact, both the Primary Courts Manual (*Maelezo ya Mahakama za Mwanzo*), published in 1964 by the Ministry of Justice in both English and Kiswahili, and the Law of Marriage Act require the magistrate to perform a

³⁷ Cf. note 36 above.

³⁸ The Boards were established, under the authority of section 102 of the Law of Marriage Act, vide the Marriage Conciliation Board (Establishment) Order, Government Notice No. 108 of 1971, which was later repealed by section 30 of the Ward Tribunals Act, 1985. The functions of the Boards are now vested in Ward Tribunals by Section 9 (1), read together with Part III (ii) of the Schedule to the Ward Tribunals Act, 1985.

³⁹ Chama cha Mapinduzi (Party of the Revolution), the then sole political party in Tanzania.

⁴⁰ A similar thing happened in *Yolanda Petro v. Alphonse Makaji*, Primary Court Sengerema Civil Case No. 97 of 1985, in which the District Court quashed the proceedings, even though there was evidence showing that the local CCM office had tried all they could to reconcile the parties, but failed.

⁴¹ Matrimonial (Primary Court) Civil Appeal No. 25 of 1979, High Court Mwanza, original Sengerema Primary Court Civil Case No. 64 of 1979.

⁴² Similarly, in the above-mentioned case of *Christina Gati v. Chinato Mwita* (cf. note 41 above), the lack of proper evidence led to the dismissal of the wife's appeal and thus, finally, despite the judge's sympathetic interpretation of the wife's formulation, to the failure of her claims.

more active role in order to ensure that he or she gets the full picture of a case in order to give a correct and proper judgment.⁴³

In ensuring that parties take informed legal positions, it would have been better if the court could have explained, for instance, whether there was an alternative position to the one a party was taking on a particular matter. In *Nyamasisi Getere v. Musenye Chacha*,⁴⁴ for example, the wife refused to be divorced after twenty-four years of married life. Her reason was that she was too old. The law does not recognise such a ground as sufficient for refusing an order of divorce.⁴⁵ But what she meant was that it was unjust for her to be divorced after what she had done for her husband and the family; that at her age it was not possible for her to remarry, and that if she divorced she would have no other way of maintaining herself. Clearly, the wife was not aware of her legal rights to division of matrimonial property and possibly maintenance. Otherwise, she would have claimed these in the alternative—that she did not want to be divorced, but if the court decided to grant a decree of divorce, then it should divide whatever property that was jointly acquired during the marriage, and/or order the husband to maintain her. According to section 108 of the Law of Marriage Act, it is the duty of a court hearing a petition for a decree of separation or divorce to inquire, as far as it reasonably can, into the arrangements made or proposed as regards maintenance and the division of any matrimonial property and to satisfy itself that such arrangements are reasonable.

A particular problem of lack of legal knowledge is revealed by the case of *Mariamamu Amani v. Amani Mwikwabe Mwita*.⁴⁶ The wife had petitioned for separation and maintenance. She had lived with her husband for twenty-five years, during which time she had given birth to eleven children. In 1966, she fell sick and her husband sent her to her parents for treatment. During that same year, one of her daughters was married for a bridewealth of forty-two head of cattle. The second daughter married in 1970 for forty-six head of cattle, whereupon the husband married a third wife, and later on a fourth. The wife stated that all these new marriages were partly a result of the new-found wealth from her daughters' bridewealth, and partly from their joint efforts in farming and business activities. Her husband now owned more than 100 head of cattle and 60 goats. But since 1966, he had stopped providing for her and taking care of her. She thus prayed for an order compelling her husband to provide for her by building her a separate house for herself and maintaining her.

The Primary Court refused her prayer for separation but ordered the husband to build her a house and provide for her upkeep. However, the husband did not abide by these orders. Hence, the problem was one of enforcing the Primary Court's order. Ordinarily, execution proceedings

⁴³ Section 108 of the Law of Marriage Act, Paragraph 3 of the Primary Courts Manual, 1964.

⁴⁴ Matrimonial (Primary Court) Civil Appeal No. 2 of 1981, High Court Musoma.

⁴⁵ The only ground for divorce which the law provides for is the irreparable breakdown of marriage, section 99 of the Law of Marriage Act (cf. appendix). Hence, a party who does not want a divorce will have to show that the marriage has not broken down irreparably.

⁴⁶ Matrimonial (Primary Court) Civil Appeal No. 3 of 1978, High Court Musoma, original Primary Court Mtana Civil Case No. 107 of 1977.

are done by the same court which gave the judgment.⁴⁷ She therefore should have gone to the Primary Court to ask for the court's assistance. Instead, she appealed to the High Court. The judge appeared not to understand the Primary Court's judgment. He therefore dismissed the appeal and advised her to petition for maintenance, a matter which the lower court had already ruled was the wife's entitlement. This is a clear example of the difficulties that one may face because of one's ignorance of court procedure. The wife did not have to appeal to the High Court. She simply needed to go to the Primary Court and ask for execution of the decree. The husband's property could have been attached to enforce it. Her problem would thereby have been solved.

3. Problems relating to the divergence between state law and customary law

A combination of language and legal problems is revealed by cases in which there are wide differences between formal legal concepts of the Law of Marriage Act and the customary legal practices of the people. In fact, that is one main reason why there are problems of terminology in the first place. Discussing this connection between law and culture, A.B. Weston had this to say:

Few legal concepts are universal, and even fewer are absolute. Moreover, a legal system, it is argued by some, is so much part of the culture of a people that it must, or should, or would be better if it did reflect that culture in the principles, notions and distinctions which are the layers [sic] of its operation. (Weston 1965: 64)

One aspect which poses particular problems is where the set of facts has not been considered or accepted by the relevant legislation. An examination of these matters would demonstrate that even the use of an indigenous national language, such as Kiswahili in Tanzania, may still not reflect the realities of a particular cultural and linguistic community where its own vernacular is used to describe its legal institutions. In such cases, the local people may have their own legal concepts, which are either absent at the national level, in which case the use of terms becomes difficult, or considered altogether inappropriate in the context of national legal policy. In the latter case, legislative action, as determined by politicians and national institutions such as the parliament, may deliberately seek to change customary legal institutions. All these features are characteristic of the Law of Marriage Act. The following section considers only one such aspect, which demonstrates the problem in its most graphic terms.

⁴⁷ Under Rules 56 to 85 of the Primary Courts Civil Procedure Rules, the Primary Court itself has powers to execute its orders and decrees. It is only when the execution relates to the attachment of the judgment debtor's shares in a company or a partnership, whereby the Primary Court must, subject to the consent of the District Court, transfer the execution to the District Court. See paragraph 18 of the Primary Courts Manual, 1964. Furthermore, under sections 33 and 34 of the Civil Procedure Code, execution proceedings are to be done by the court which passed the decree, unless for certain reasons that court decides on its own to transfer the matter to another court for execution.

Among some ethnic groups, such as the Kuria and Simbiti of Mara region, a specific type of customary marriage is practised which is known as *mokamona* in Kikuria, and sometimes rather erroneously termed 'woman-to-woman marriage' in English. There is no Kiswahili term for it that is known to us. In the earlier days it was resorted to especially by an older woman who could not herself bear male children. But it has now been transformed into an arrangement that caters not only for this traditional objective but for others such as economic support systems like security for old age, and even as a source of labour in the older woman's economic activities (cf. Rwezaura 1985: 144-146). According to the concept of 'woman-to-woman marriage', the older woman takes over the role of 'husband' and marries her own 'wife'. Since she cannot herself discharge the biological functions of a male husband, she finds a man who would do so on her behalf. The children born out of this relationship will be considered to belong to the female 'husband'.

Another explanation, given by B A Rwezaura in his exhaustive analysis of *mokamona* marriage, is that a sonless woman assumes the role of a 'mother-in-law' while the younger woman takes the role of a 'daughter-in-law', i.e. as the wife of a fictitious son of the sonless elderly woman. The children by a selected genitor are considered as grandchildren of the 'mother-in-law', who also had provided the bridewealth (Rwezaura 1985:144-146). It would appear from our study that this concept of a mother-in-law-daughter-in-law, as opposed to a husband-wife relationship,⁴⁸ is the one recognised by the societies that practise this form of marriage. For that reason, we shall in this paper refer to them as such.

Obviously, the Law of Marriage Act never envisaged the *mokamona* situation (or, if it did, it excluded such marriages by necessary implication) when it restricted marriage to a 'voluntary union of a man and a woman ...'⁴⁹ It can thus be assumed, right from the beginning, that neither same-sex marriages nor a woman's marriage with a fictitious husband fall within the legal definition of a marriage. Consequently, they are also not mentioned under section 38 of the Law of Marriage Act, which says in which cases a marriage is void. Yet there have been a number of cases taken to court involving such couples. The courts are therefore faced with a tricky situation: Should such a case be considered a matrimonial cause or just an ordinary civil case? Since the law and procedure for matrimonial causes are different from those of other civil cases, the answer to this question will have an important bearing on the consequential rights and duties of the parties.

The *mokamona* daughter-in-law in *Muyanza Ngweba v. Siaya Mwananasi*⁵⁰ had deserted her mother-in-law, who then petitioned for divorce. The daughter-in-law did not object. The prayer for divorce was therefore granted. But the Primary Court also awarded custody of three

⁴⁸ In fact, the use of the terms 'husband' and 'wife' in reference to *mokamona* marriage may be misleading, such as when some colonial social anthropologists and government officials thought it was some kind of a homosexual relationship, while others considered it as a form of slavery and prostitution. See Rwezaura (1985) pp. 147-148.

⁴⁹ Sections 2 (1), 'marriage', and 9 of the Law of Marriage Act (cf. appendix).

⁵⁰ Matrimonial (Primary Court) Civil Appeal No. 6 of 1976, High Court Mwanza, original Magu District Court Civil Appeal No. 12 of 1976 and Igalukiro Primary Court Civil Case No. 114 of 1975.

children of the marriage to the daughter-in-law, because 'the children were not born in a legal marriage'. The mother-in-law appealed to the District Court. However, since the law of matrimonial proceedings originally had not given District Courts the power to hear appeals from Primary Courts,⁵¹ the District Magistrate redirected the matter to the High Court. Mr. Justice Lugakingira dismissed the appeal and expressed the view that the matter was not a matrimonial one:

In spite of the notoriety of this practice our law does not recognise it as a form of marriage. There was, therefore, no marriage to dissolve as regards the parties. The practice may be regarded as a breach entitling the appellant to damages as against the respondent's father.

A couple of years later, the same judge was faced with a similar situation in *Nyamburi Waise v. Bhoke Nyakichogo*.⁵² In this case, the daughter-in-law could not conceive after cohabiting with the man designated for her. Again, in dismissing the appeal, Mr. Justice Lugakingira said:

There was, of course, no marriage at all and this was not a matrimonial proceeding. In the event the Primary Court should have dismissed the so-called petition and merely advised the respondent to sue for what she paid. Similarly, this appeal is not available. The parties have never married under any of our laws and the appellant has no marriage to cling to. What transpired was that the appellant furnished cattle in consideration of certain advantages from the appellant which were not forthcoming. It would therefore appear that the respondent's remedy lies in a suit for the cattle only.

However, even the learned judge appears to be at a loss as how the claim for cattle could be founded when he advises the respondent to sue for her cattle 'if she can establish where the breach lies ...'. For, the problem the mother-in-law in such a case is likely to face is how to fit her case into one of the legal classifications of agreements enforceable by law. The Law of Contract Ordinance clearly states that no agreement is enforceable if it is founded on an illegal consideration. Obviously, the marriage, and the expected consideration, namely the mother-in-law's right to the children born out of the arrangement, was also non-existent under the official law and therefore unenforceable. That appears to be the judge's reasoning in the first case (*Muyanza Ngweba v. Siaya Mwananasi*) in which the daughter-in-law did in fact bear children. Is there a way whereby the agreement between the mother-in-law and the daughter-in-law's father could be enforced under customary law, a way by which the restrictive provisions of the Law of Contract Ordinance could be avoided? Or is this an example of a so-called 'limping marriage'⁵³ which is a valid marriage under one legal system--the customary law--while another legal system--the official law of the state--refuses to accept it?

In addition, the law's omission in respect of such arrangements had the effect of creating a 'limping parent-child relationship'. A lot of incidental questions would thereby arise, and there

⁵¹ Section 80 of the Law of Marriage Act, now amended by Act No. 15 of 1980.

⁵² Matrimonial (Primary Court) Civil Appeal No. 12 of 1978, High Court Mwanza, original Primary Court Mtana (Tarime District) Civil Case No. 123 of 1977.

⁵³ This term is borrowed from Kegel (1995) p. 112 and other authors, who use its German equivalent 'hinkende Rechtsverhältnisse' in the context of private international law.

is no clear-cut answer for most of them. For example, where will lie the legitimacy of the children? Will they have the right to inherit? If so, whom can they inherit--their biological father or the 'parents in-law'? Since the daughter-in-law's life was, to all intents and purposes, that of a wife, and she probably contributed to the acquisition of certain property, would she be entitled to division of that property when the relationship ends? Would the children, too, have a right to such property if they had personally contributed to their acquisition, such as working in the farms, etc.? These are questions which are important to deal with in order to find ways in which, though the marriage itself is non-existent, some of the legal consequences of the actual relationship could be provided for in order to take care of the parties involved, especially the children.

Some of these points have been dealt with by the High Court. The judges appear to have taken differing views on them, but they are at least in agreement in certain material respects: There is general consensus that a *mokamona* marriage is not a legally recognised marriage. For, such a marriage is not a marriage by definition. It therefore carries no legal force from its very beginning. That is why the High Court in *Muyanza Ngweba v. Siaya Mwananasi*⁵⁴ refused even to confirm the nullification of the marriage by the Primary Court. Moreover, even the provision which declared all existing customary marriages before the enactment of the Law of Marriage Act as valid 'notwithstanding any provision of this Act which might have invalidated it but for this section' would disqualify *mokamona* marriages because the Act only recognises marriages between 'a man and a woman'.⁵⁵

The courts have nonetheless been prepared to enforce the incidents of the relationship, generally recognising it as a customary contract in which each party is enjoined to discharge her obligations and entitled to expect performance from the other party. It would thus appear that the judges have decided to solve the problem by refusing to recognise the relationship as a marriage at all, but to return it to the domain of ordinary customary contracts,⁵⁶ where its incidents can be taken care of in accordance with customary law.⁵⁷

⁵⁴ Cf. note 62 above

⁵⁵ See section 165 (1) of the Law of Marriage Act

⁵⁶ The other method would have been to develop what may be called a judicial extension of the provisions of section 39 of the Law of Marriage Act which deals with voidable marriages. In such a case, the court may nullify a marriage if, inter alia, one of the parties was incapable of consummating it. That would mean that since the purported husband was a fictitious man, and therefore incapable of performing such a role, the marriage could be avoided by a decree of the court. However, this reasoning would have its own problems. The description of a voidable marriage defines such marriage as being 'for all purposes a valid marriage until it is annulled by a decree of the court' (section 40). Being invalid ab initio, it is difficult to bring a *mokamona* marriage within the ambit of section 39.

⁵⁷ In cases involving the children's parentage, the High Court has held that the mother-in-law is entitled to such a claim as long as the relationship subsists. It can thus be assumed that all the other incidents will be recognised when they arise (but cf. *Muyanza Ngweba v. Siaya Mwananasi*, note 62 above). It will be interesting to inquire as to whether this position is appropriate in the new socio-economic circumstances and in the way the *mokamona* marriage has been transformed (sometimes being used essentially for economic motives), as Rwezaura's work has shown.

V. Conclusions

This paper had set out to show that there is a close link between law and language, and consequently between law and a people's culture. But this connection breeds its own problems, which raises the need to look at their correlation with a view to improving matters by adopting an appropriate language policy in all areas of the law, even when considers that legal language in any form is considerably different from ordinary language, the ease with which a speaker of a certain language can understand the legal form of that language is much more enhanced (Mukoyogo 1991). One must therefore acknowledge the importance of, and the advantages to be derived from, the increased use of Kiswahili as the principal language of the law in Tanzania. In a country where only a small minority of the population understands English, there is a strong case for, at least, translating the entire body of legislation into Kiswahili, which is widely spoken and understood in the country. Whatever may be the rationale for the continued use of English, it certainly does not match the overwhelming case for the use of Kiswahili at least as the more dominant language of the law.

On the other hand, the indigenous languages and the legal concepts they represent must be taken into account. We have in this paper tried to demonstrate the consequences of the lack of such an approach. The goal of the Law of Marriage Act was to improve the legal situation of women and children and to integrate the various legal systems coexisting in the country. But achieving this goal has had as its price that not all the sociological complexities of the average Tanzanian marriage (if such a marriage could be ascertained) could be fully grasped. Besides other factors, the complicated coexistence of Kiswahili and English as the languages of the law has contributed to problems in the implementation of the purposes of the Act in practice.

For an effective operation of any legal system, there is no doubting the importance of the existence of a line of communication between the legislator and the subjects. For, a law that is not communicated remains irrelevant (Omondi 1989: 19). In making this communication possible, modern society depends on language. Hence, whether written or spoken, the language of the law must remain a matter of the utmost concern for any nation. In a country like Tanzania, with its pluralistic legal system, linguistic and cultural framework, the 'need to communicate the law requires either the adoption of an indigenous language as the language of the law, or the translation of the laws from the legal language to an indigenous language for the limited purpose of communication' (Marasinghe 1977: 513).

The solution, however, lies not only in a language switch-over from English to indigenous (in the sense of a national) language,⁵⁸ but a bit further afield. Indeed, the expanded use of Kiswahili as a language of the law in Tanzania will improve matters considerably. But, as we have seen in the case of *mokamona* marriage, there is need to go a step further and take care of the multiple socio-legal pattern obtaining in the country.

⁵⁸ This could be enough in some societies: Cf. Marasinghe (1977) pp. 514 et seq.

Bibliography

- Allott, Antony. 1974. "Law and language in Africa." *Zeitschrift für vergleichende Rechtswissenschaft* 74: 124-136.
- Anyangwe, Carlson. 1989. *The magistracy and the bar in Cameroon*. Yaoundé: PANAN.
- Bierwagen, Rainer M. & Chris Maina Peter (n.d.). "The Constitution of the United Republic of Tanzania." Unpublished manuscript, 3 volumes.
- Crabbe, V.C. 1992. "Legislative drafting in developing countries: The problems of importing expertise." *African Journal of International and Comparative Law* 4: 630-648.
- Fortman, Baas de Gaay & Paschal Miho. 1993. "A false start--law and development in the context of a colonial legacy." *Verfassung und Recht in Übersee* 26: 136-156.
- Harries, Lyndon. 1966. "Language and law in Tanzania." *Journal of African Law* 10: 164-167.
- Kavugha, Douglas & Donald Bobb. 1980. "The use of language in the law courts of Tanzania." *Language in Tanzania*, ed. by Edgar C. Polomé & C.P. Hill, pp. 229-258. Oxford: Oxford University Press.
- Kegel, Gerhard. 1995. *Internationales Privatrecht*. München: Beck.
- Marasinghe, M.L. 1977. "Some problems associated with a language switch-over in the third world." *Verfassung und Recht in Übersee* 10: 507-530.
- Möhlig, Wilhelm J.G. 1973. "Die Erforschung der traditionellen Rechtssysteme in Afrika als Aufgabe einer speziellen Semantik." *Zeitschrift für vergleichende Rechtswissenschaft* 73: 229-244.
- Mukoyogo, M.C. 1991. "Can law be taught in Kiswahili?" *Eastern Africa Law Review* 18: 227-246.
- Omondi, Lucia N. 1989. "Language, gender and the law." *Women and law in Kenya Perspectives and emerging issues*, ed. by Mary Adhiambo Mbeo & Oki Ooko-Ombaka, pp. 13-28. Nairobi: Public Law Institute.
- Rwezaura, Barthazar A. 1985. *Traditional family law and change in Tanzania. A study of the Kuria social system*. Baden-Baden: Nomos.
- Rwezaura, Barthazar A. 1993. "Constraining factors to the adoption of Kiswahili as a language of the law in Tanzania." *Journal of African Law* 37: 30-45. Republished in modified form in: *Afrikanistische Arbeitspapiere* 37: 109-126.
- Scholler, Heinrich. 1983. "Die Rezeption westlichen Rechts in Äthiopien. Ein Beitrag zur Rezeptions- und Implementierungstheorie." *Jahrbuch für Afrikanisches Recht* 2: 119-140.
- Sippel, Harald. 1995. "Vom Vokabularium zur Jurisdiktion: Der 'Swahili Sprachführer' des Bezirksamtmannes Walter von St. Paul-Illaire als Quelle für die vom 'Eingeborenenrichter' behandelten Rechtsangelegenheiten in der Kolonie Deutsch-Ostafrika." *Sprachkulturelle und historische Forschungen in Afrika*. Beiträge zum 11. Afrikanistentag, Köln, 19.-21. 1994, ed. by Axel Fleisch & Dirk Otten, pp. 283-303. Köln: Rüdiger Köppe Verlag.

Weston, A.B. 1965. "Law in Swahili Problems in developing a national language." *East African Law Journal* 1: 60-75.

Weston, A.B. 1967. "Letter to the Editor." *Journal of African Law* 11: 63

APPENDIX**THE MAGISTRATES' COURTS ACT****(Act No. 2 of 1984)****Section 13:**

- (1) The language of primary courts shall be Kiswahili
- (2) The language of courts of a resident magistrate and of district courts shall be either English or Kiswahili, or as the magistrate holding such court may direct; save that in the exercise of appellate, revisional or confirmatory jurisdiction by a district court (in which case the record and judgment may be in English or Kiswahili), the record and judgment of the court shall be in English.

TANZANIA COURT OF APPEAL RULES**(G.N. No. 102 of 1979)****Rule 3A (as amended by G.N. No. 451 of 1985):**

The language of the court shall be either English or Kiswahili as the Chief Justice or, as the case may be, the presiding Judge holding such court shall direct, but the judgment, order or decision of the court shall be in English.

THE LAW OF MARRIAGE ACT**(Act No. 5 of 1971)****Section 2:**

- (1) In this Act, except where the context otherwise requires - ... 'marriage' has the meaning attributed to it in section 9, and any reference to a marriage means a marriage whether contracted before or after the commencement of this Act and whether contracted in Tanganyika or elsewhere;

In Kiswahili:

- (1) Kwenye Sheria hii, ila iwapo maelezo yake yatahitajia vinginevyo- ... 'ndoa' maana yake ni kama vile ilivyoelezwa kwenye fungu la 9, na kutajikana kwake kokote kuwe maana yake ni ndoa, ikiwa ndoa hiyo imefungwa kabla au baada ya kuanza kutumika kwa Sheria hii, na ikiwa imefungiwa hapa Tanganyika au mahali penginepo;

Section 9:

- (1) Marriage means the voluntary union of a man and a woman, intended to last for their joint lives.

In Kiswahili:

- (1) Ndoa maana yake ni muungano wa hiari wa mwanamume na mwanamke unaokusudiwa kudumu kwa muda wa maisha yao.

Section 81:

Subject to the provisions of section 93--

- (a) every proceeding for a declaratory decree or for a decree of annulment, separation or divorce, shall be instituted by a petition;
- (b) every application for maintenance or for custody of children, or for any other matrimonial relief whatsoever shall, unless included in a petition for a declaratory decree or for annulment, separation or divorce, be by summons in chambers

In Kiswahili:

Pamoja na kuzingatia masharti ya fungu la 93--

- (a) kila kesi ya kutaka tamko la amri ya kuthibitisha au amri ya kubatilisha ndoa, kutenganisha au ya talaka, lazima ianzishwe kwa barua ya mashtaka
- (b) kila ombi la kutaka masurufu, au la ulezi wa watoto au la haki nyinginezo zo zote zinazohusika na ndoa, litaanzishwa kwa kuitwa waliyohusika kwa mashauri ya faragha mahakamani, ila iwapo ombi hilo limechanganywa katika ombi la kutaka tamko la amri ya kuthibitisha au la kubatilisha ndoa, la kutenganisha au la talaka

Section 99:

any married person may petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down, but no decree of divorce shall be granted unless the court is satisfied that the breakdown is irreparable.

In Kiswahili:

... mke au mume aweza kupeleka lalamiko mahakamani la kuomba amri ya kutengana au kuachana kwa sababu ya kuwa ndoa yake imevunjika, lakini hakuna amri ya kuachana itakayotolewa isipokuwa mahakama hiyo inatosheka kwamba kuvunjika kwa ndoa hiyohakutaweza kutengenezwa tena

Section 101:

No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a [Marriage Conciliatory] Board and the Board has certified that it has failed to reconcile the parties.

In Kiswahili:

Hapana mtu anayeruhusiwa kupeleka lalamiko la kutaka kuachana isipokuwa kwanza amepeleka shida ya ndoa yake kwenye Halmashauri [ya Usuluhishi wa Ndoa] hiyo iwe imethibitisha kwamba imeshindwa kuwasuluhisha wafunga ndoa hao.

Section 108:

It shall be the duty of the court hearing a petition for a decree of separation or divorce--

- (a) to inquire, so far as it reasonably can, into the facts alleged and to consider whether those facts, or such of them as are proved, show that the marriage has broken down;
- (b) to inquire into the arrangements made or proposed as regards maintenance and the division of any matrimonial property and to satisfy itself that such arrangements are reasonable;
- (c) to inquire into the arrangements made or proposed as regards the maintenance and custody of the infant children, if any, of the marriage and to satisfy itself that such arrangements are in the best interests of the children; and
- (d) in the case of a petition for divorce, where the court is satisfied that the marriage has broken down, to consider whether the breakdown of the marriage is irreparable.

In Kiswahili:

Itakuwa ni wajibu wa mahakama inayosikiliza lalamiko la kutaka amri ya kutengana au talaka--

- (a) kuchungua, kwa kadri iwezavyo, mambo yanayotuhumiwa na kufikiria kwamba mambo hayo, au baadhi ya mambo hayo, kama yatakayothibitika, yanaonyesha kwamba ndoa hiyo imevunjika;
- (b) kuchungua matengenezo yaliyofanywa au yanayokusudiwa kufanywa yanayohusu utunzaji au ugawaji wa mali yote ya ndoa na kutosheka kwamba matengenezo hayo yafaa;
- (c) kuchungua matengenezo yaliyofanywa au yanayokusudiwa kufanywa yanayohusu masurufu na ulezi wa watoto wadogo, ikiwa wapo, wa ndoa hiyo na kutosheka kwamba matengenezo hayo ni yenye manufaa mema kwa watoto hao; na
- (d) katika lalamiko la kutaka talaka, iwapo mahakama inatosheka kwamba ndoa hiyo imevunjika, kufikiria kama kuvunjika kwa ndoa hiyo hakutaweza kutengeneza tena.

Section 114:

- (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts ...

In Kiswahili:

- (1) Mahakama itakuwa na uwezo, wakati wa kutoa amri au unaofuatilia kutolewa amri ya kutengana au ya talaka, kuamuru wagawiwe mke na mume mali yo yote waliyoipata wakati wa ndoa kwa juhudi zao za pamoja ...

Section 115:

- (1) The court may order a man to pay maintenance to his wife or former wife ...
- (2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband ...

In Kiswahili:

- (1) Mahakama itaweza kumuamuru mwanamume alipe gharama za utunzaji wa mkewe au alieyekuwa mkewe ...
- (2) Mahakama itakuwa na uwezo kama huo wa kumuamuru mke amlipe mumewe au alieyekuwa mumewe masurufu ...

Section 167:

- (1) The Minister shall, as soon as may be practicable after the publication of this Act, cause this Act to be translated into Kiswahili and such translation to be published in the *Gazette* ...
- (3) Where there is any dispute as to whether the translation of any of the provisions of this Act is a correct translation, the matter shall be referred to the Attorney-General whose decision thereon shall be final ...

In Kiswahili:

- (1) Baada ya kutangazwa kwa Sheria hii, Waziri anayehusika, mapema kama itakavyowezezekana, ataamuru Sheria hii ifasiriwe kwa Kiswahili na tafsiri hiyo ichapishwe katika Gazeti la Serikali ...
- (3) Iwapo kuna ubishani wo wote kwamba tafsiri ya sharti lo lote katika masharti ya Sheria hii ni tafsiri iliyo sawa au si sawa, basi jambo hilo litapelekwa kwa Wakili Mkuu wa Serikali ambaye uamuzi wake juu ya tafsiri hiyo utakuwa ni wa mwisho ...

