LEGALLY UNREPRESENTED WOMEN PETITIONERS IN THE LOWER COURTS OF TANZANIA:

A CASE OF JUSTICE DENIED?

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1. Introduction

This article examines the application of the Tanzanian marriage law in cases where women litigants, who are the majority of petitioners in matrimonial causes (Rwezaura and Wanitzek 1988: 14), are not legally represented. It specifically examines the concept of justice and

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The case material used in this paper to examine the interaction between parties and magistrates is part of the data collected during a four and a half months' stay in Tanzania in the summer of 1986. This research formed part of a project on family law reform and socio-economic development in Africa, which in turn is part of the interdisciplinary research programme on 'Identity in Africa - Processes of Development and Change' (SFB 214) at the University of Bayreuth. The research was conducted together with Prof. B.A. Rwezaura. The areas from which the material used in this paper originates are mainly the Mara, Mwanza and Kagera Regions. For details on the methods applied and for the research findings in general, reference is made to our research report (Rwezaura and Wanitzek 1988). I would like to express my gratitude to Prof. B.A. Rwezaura for his cooperation and help with the collection and evaluation of the material and for his valuable advice on the various drafts of this paper, and to Prof. Anne Adams for her corrections of my English. I would also like to thank Ms. Antje Diwisch who typed the manuscript.

how it can be used to explain the manner of deciding cases in the lower courts of Tanzania. It is argued that there are different conceptions of justice at play and this difference must be appreciated if we are to understand the role and function of the Primary Courts in Tanzania and their effects on women petitioners.

Following the tradition of English common law, the superior courts in Tanzania adhere to the adversary system. This system is based on the assumption that truth will emerge from the confrontation of opposing versions by the parties. Thus the case is organised and the issues defined by exchanges between the parties. This necessitates legal representation, because the ordinary layperson would not be able to efficiently present the facts according to the highly sophisticated rules of evidence and procedure (Seidman 1975: 158). Therefore, the advocate is a central element within the adversary system (Schwartz 1979: 45). The trial judge, on the other hand, is a neutral arbiter, who decides questions of fact and law when appropriately raised (Schwartz 1979: 15). The judge must not only *be* neutral to both parties in order to be fair, he must also, both in words and acts, *show* clearly that he is neutral, i.e. he must give no indication that he favours one party. For justice must not only be done, but must be seen to be done.

The Primary Courts, by contrast, are conceived to be less professional institutions which apply simplified procedural rules and, in general, are more easily accessible to the parties. The different character of the Primary Court would appear to make legal representation superfluous. Instead, the magistrate is expected to assist the parties who come before him to accomplish certain functions which, in the higher courts, are usually performed by an advocate. However, this is not always the case in practice. Some Primary Courts try to operate like higher courts by insisting on formal procedural requirements, thus reducing accessibility, or by assuming the passive role of the judge in an adversary system. This has meant that parties, while being confronted with procedural requirements which are unknown to them, remain without any guidance or assistance, as legal counsel is not provided at the Primary Court level. It is argued that by trying to behave like superior courts, Primary Courts actually perpetrate a certain injustice in the name of the law. Although the procedural principles discussed in this paper are, theoretically, equally important for men and women, in practice it is clearly women who are more dependent on the courts' correct adherence to these principles and as our research shows, it is women who suffer more from the courts' departures from them.

This paper concludes that it is important that Primary Court magistrates be made more aware of their special functions within the Tanzanian court system, and of their specific reponsibilities in matrimonial causes under the Law of Marriage Act, which aims particularly at a better protection of women. It is also important that women, who the marriage law is intended to serve, are better informed about their rights, as it is often they who appear alone before the court.

2. The justice of legal representation

The term 'justice' has been widely used and many of its elements remain, even today, a subject of fierce debate and controversy (Perelman 1967; Lucas 1980; Moore 1985: 445 ff.; Lloyd 1985: 397 ff.). I do not intend to enter this debate but to indicate that the concept of justice is controversial and any attempt to use it must be preceded by a caveat pointing to the limited purposes intended.

Consistent with British constitutional tradition, the concept of justice implies that all people are equally subject to the ordinary law of the land which is in turn administered by ordinary courts (Dicey 1982: 114). Within this general concept, two elements can be identified which are relevant to our discussion. The first is the right of an individual to be protected by the law in the conduct of a civil or criminal trial. This right is identified by American jurists as 'procedural due process of law'.

The second element of the general concept of justice is that the ultimate object of the law through the judicial process is to redress wrongs in civil cases and to punish those proven guilty in criminal trials. This ultimate objective of the law is considered paramount. Where strict observance of procedural requirements by the courts does not lead to the attainment of this objective, it is considered proper to relax some aspects of procedure in order to do justice in specific cases (Rawls 1973: 59; Weber 1960: 281).

These two elements of justice must be kept in mind when examining the underlying assumptions of the Tanzanian judicial system, which has emerged from a colonial past, shaped by British legal traditions (Rwelamira 1981: 204 f.; Morris 1968: 1 ff.; Nwabueze 1977: 265 ff.). But Tanzania's legal history is also shaped by the influence of African ideas of justice, which today are combined with those from the English common law to form the modern legal system of independent Tanzania (cf. on Ghana, Schott 1980: 129 f.).

Certain distinct elements of traditional African legal systems existing at the beginning of colonial rule can be identified. The first is the absence of specialised institutions and personnel for the creation and administration of law. Parties to a dispute are not expected to be represented by a professional lawyer, nor is there a specialized institution such as a court of law to hear disputes. The procedure for arriving at any decision is relatively informal and generally known; many 'bystanders' may participate in developing the final settlement. Dispute settlement may take the form of mediation, where a third party is involved as a mere facilitator and adviser, or that of arbitration or adjudication, in which case the third party acts as the decision-maker (Gulliver 1968: 173 ff.; Roberts 1981: 72 ff.).

With minor exceptions, the distinction between crime and civil wrongs is not clearly drawn and the ultimate object of the process is to redress the wrong committed and restore the parties to their original state. In doing so, the history of a case plays a critical role, as status relationships determine rights and obligations (Moore 1986). Disputes often involve a multiplicity of issues, because the relationships between the people are functionally undifferentiated (Abel 1979: 170; DuBow 1974: 97). This means that a broad range of issues, which seem to be indirectly connected with the matter at issue, can play a role in the resolution. There is concern for consensus between the disputants, and care is taken to ensure that the agreed settlement is mutually acceptable. In such a system, the concept of justice is derived from what the entire society, or the sector of the society which is concerned, considers to be fair and just, and not what is fixed in advance by law (Comaroff and Roberts 1981: 9 ff.).

3. The special position of the primary courts in the Tanzanian court system

Since the enactment of the *Magistrates' Courts Act* in 1963 (MCA, No. 55/1963, now replaced by No. 2/1984), there is a unified court system in Tanzania. Prior to this, there had been two court systems, one of which was primarily concerned with the application of customary law and had jurisdiction over Africans, while the other applied the general law and had jurisdiction over all persons within the Territory (Morris and Read 1972). The *Magistrates' Courts Act* of 1963 abolished this dual court system with its discriminatory rules which had defined the jurisdiction of local courts in terms of race. It was replaced with an integrated system consisting of three tiers, first the Primary Court (P.C.), second the District Court (D.C.) and the Court of a Resident Magistrate (R.M.C.), and third, the High Court

(H.C.), to which was added, in 1979, a fourth tier, the Court of Appeal of Tanzania (C.A.) (art. 68A of the *Constitution*, as amended in 1979).

The provisions on the applicability of customary law, Islamic law and state law contained in sec. 9 of the *Judicature and Application of Laws Ordinance* (JALO, No. 57/1961), as amended in 1963 (by MCA, No. 55/1963), are equally relevant for all levels of courts. Sec. 9 JALO provides that customary law and Islamic law are applicable, under certain conditions, in respect to members of a customary or Islamic community. The *Law of Marriage Act* of 1971 (LMA, No. 5/1971) has a special position in this system of internal conflicts of law. It applies to everybody, and covers the whole area of marriage and divorce, including matrimonial property, maintenance and custody of children (sec. 9 (3A) JALO).

As the independent state's main concern was the integration and centralisation of the two court systems, it permitted the incorporation of certain traditional elements within the single court system (DuBow 1974: 19; Morris and Read 1972: 166). It is at the seam of the two legal cultures represented in the country, English common law and the various systems of traditional law, that the Primary Courts are perceived to have a special role. The measures undertaken to accommodate some elements which show affinity with traditional institutions and procedures in the Primary Courts, while at the same time adhering to a certain standard of formality and uniformity with the other levels of courts, are discussed below.

The dual nature of the Primary Court is seen in the provisions on jurisdiction. Primary Courts have unlimited jurisdiction in all civil cases where customary or Islamic law applies. Additionnally, and irrespective of the law applicable, they have jurisdiction to hear what can be called 'small claims' - all civil debts arising out of contract - if the value of the subject matter does not exceed 10,000 TShs. Furthermore, Primary Courts have criminal jurisdiction in respect of minor offences under the Penal Code and have concurrent jurisdiction in all matrimonial proceedings under the *Law of Marriage Act* (sec. 18 MCA, sec. 76 LMA). Primary Courts apply customary law and Islamic law as well as state law and are therefore in a position to apply a substantive law which contains elements of all three legal cultures.

The official language of the Primary Court is Kiswahili, the national language of Tanzania, which is spoken as a second language by the majority of the population (sec. 13 (1) MCA). The language of the

superior courts is English, or, in the case of the District Courts, English or Kiswahili (sec. 13 (2) MCA). The use of Kiswahili is an important element in the greater accessibility of the Primary Courts.

The Primary Courts follow a simplified procedure, while the superior courts, with some exceptions for District Courts, apply the *Civil* and *Criminal Procedure Codes* (No. 49/1966 and Cap. 20) and the *Evidence Act* (No. 6/1967), which are based on English principles of procedure and evidence. Simplified versions of these Acts were enacted specifically for the Primary Courts in order to make their procedure less formal and complicated (sec. 19 MCA; *Provisions Relating to the Civil Jurisdiction of Primary Courts*, 4th Sched. of MCA 1963; *Primary Courts (Evidence) Regulations*, G.N. 22/1964; *Primary Court (Civil Procedure) Rules*, G.N. 310/1964). This simplified procedure is intended to emulate the lower degree of formality of traditional modes of dispute settlement to which the people are accustomed, while, at the same time, keeping to a certain standard of formality and uniformity. The rules of natural justice, considered indispensable in English law, apply in Primary Courts: the principles *audi et alteram partem* (hear both sides to a dispute) and *nemo judex in causa sua* (no one should be a judge in his own cause: the 'rule against bias', Stevens 1982: 224; *Mwanza*, H.C. 7/81[2]).

There is a deliberate relaxation of procedural requirements, in so far as technicalities play a minor role in relation to the substantive content of a court decision (sec. 37 MCA). Where a matter originating from a Primary Court is decided on appeal by the High Court, the High Court shall not reverse or alter the decision of the Primary Court merely on account of an error, omission or irregularity in the complaint, any process or charge, in the proceedings before or during the hearing, or in the decision itself, and it shall not reverse or alter the decision merely on account of improper admission or rejection of any evidence, unless this error, omission or irregularity, or improper admission or rejection of evidence, has in fact occasioned a failure of justice. This provision captures the English legal principle of substantive justice described above, that procedure be relaxed in specific cases in order to serve justice. At the same time, it further supports the element of informality of procedure.

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2 The court decisions quoted in this paper are unpublished. The numbers indicated refer to 'Matrimonial Appeals' in the case of the High Court and to 'Civil Cases' in the case of Primary Courts.

Closely connected with matters of procedure is the question of the type of personnel serving in the court. While resident magistrates and High Court judges are university-trained lawyers, Primary and District Court magistrates are trained in courses offered by the Institute of Development Management at Mzumbe, Morogoro (Institute of Development Management, Prospectus 1981/82, 60 ff.). The theoretical part of the course for Primary Court magistrates takes six months, followed by three months' practical training. This course is supplemented on occasions by seminars, and, after some years of service, by a refresher course. Usually the magistrates have formal primary and partial secondary education, and a large number of them have served as court clerks before becoming magistrates (DuBow 1974: 22; author's interviews). Advocates are not admitted at Primary Courts; hence no legal experts are involved in the proceedings (sec. 33 (1) MCA; McAuslan 1966: 179 ff.; Msekwa-Report 1977: 147 ff.). However, representation by a relative or a member of the household is possible (sec. 33 (2) MCA). Primary Court magistrates sit with at least two lay assessors appointed from the local community, and the court decides by majority vote (sec. 6 (4), 7 MCA). In the superior courts the participation of assessors is not obligatory and their votes are not binding on the magistrate or judge (sec. 6 (1)(b), (c), 7 (3) MCA).

The absence of legal experts and the strong lay element in the Primary Court is counter-balanced by the availability of appeal and the revisional jurisdiction of the superior courts (sec. 22, 30, 31 MCA), which are staffed by trained lawyers. In addition, regular meetings of the Primary Court magistrates at District level, which are held under the direction of the District Court magistrate in charge, serve the purpose of maintaining a certain 'professional' standard (Moore 1974: 200 f.). Finally, it must be noted also that Primary Court magistrates are full-time civil servants and therefore under the state's supervision (DuBow 1974: 83).

Since the right to legal representation, as mentioned above, plays such a dominant role in the English concept of 'due process of law', the question arises whether the complete absence of legal counsel at Primary Courts is sufficiently compensated by other provisions, in order to guarantee the litigant's ability to present his or her case. The fact that the procedure at Primary Courts has been simplified reduces, to a certain extent, the otherwise strong demand for legal representation. The remaining level of formality of the procedure and the fact that a widely unknown substantive law is applied by the court makes it necessary for the parties to be assisted and advised on how to handle their case before the court. This has been catered

for by shifting part of the responsibility of assisting the party, otherwise carried by the attorney, to the Primary Court magistrate. The *Primary Courts Manual*, published and distributed to the Primary Courts by the Ministry of Justice in 1964, shortly after the enactment of the *Magistrates' Courts Act*, expressed this deviation from the function of the judge in the adversary system in the following words:

> 3. Basic rules for hearing cases ... (3) Direct action by court. Once a case has been made out, do everything possible to find out the truth about it. If the court considers that there is something in the complaint, and that the matter in dispute is of some importance, it should investigate it further. For example, it should visit the site of a disputed *shamba*, or call additional witnesses, or send for documents, if it thinks it necessary to do so in order to find out the true facts. It should not rely entirely and in every case on the parties only; often one of the parties will not realize how important it is to his case to call a certain witness, or produce a certain document, and the court should then itself take action ....

The encouragement to the Primary Courts to play an active role in the proceedings is enhanced by the provisons of the *Law of Marriage Act*. In matrimonial proceedings, this Act imposes on the court the duty to inquire actively into a case, and to act on its own initiative. In deciding whether a marriage has broken down irreparably, which is the criterion for divorce under the *Law of Marriage Act*, the court shall take into account all relevant evidence regarding the conduct and circumstances of the parties (sec. 107 (1) LMA), and the court shall inquire, so far as it reasonably can, into the alleged facts (sec. 108 (a) LMA). The court also has the duty, when hearing a petition for divorce, to inquire into the arrangements made or proposed with respect to the division of matrimonial property, maintenance for the spouse and the children, and custody of the children of the marriage. The court has to satisfy itself that such arrangements or proposals are reasonable and in the best interests of the children (sec. 108 (b), (c) LMA). Irrespective of whether or not an application has been made, a divorce decree shall include provision for the maintenance and custody of the infant children of the marriage (sec. 110 (3) LMA).

In sum, whereas on the one hand the Primary Court magistrate has to be neutral towards both parties in order to be fair, and must give no cause to anyone to think that he is leaning towards one side, on the other hand he has to assist and advise the parties. In

practice, the lack of legal representation can cause a certain dilemma for the Primary Court magistrates which makes it difficult for some to play their role adequately.

4. Problems faced by women petitioners

In examining the court practice, it is essential to observe that there are considerably fewer cases brought into state courts for remedy than are settled out of court. It is important, nevertheless, to examine case records to see what they reveal concerning the justice achieved there (among other reasons because of the presumed influence of court proceedings on settlements out of court, see Galanter 1981). This paper stresses the situation of women petitioners because examination of registers in all the courts visited showed that the large majority of petitioners in matrimonial causes are women. This finding is supported by the research of others in different areas of Tanzania (Rwezaura 1990: 153; Mitchell 1980: 14).

The problems women petitioners face when they try to pursue their claims in court include: lack of knowledge of their substantive rights; difficulties in articulating their claims; and ignorance of procedure. Many courts do not give them the needed information and assistance and sometimes show an authoritarian attitude to women, which is an additional barrier in the realisation of their claims. In addition, when the High Court deals with a Primary Court case on appeal, it does not necessarily adhere to the principle that substantive justice be done without undue regard to technicalities. This, indirectly, makes the Primary Courts feel bound to be more technical than they should be according to the law.

4.1 *Ignorance of substantive law*

Many women are not well informed about their substantive rights. For example, only a small minority of women claim maintenance, division of matrimonial property, custody and maintenance for children. Although a number of other reasons play a role, including the general reluctance of women to make a claim against their husbands in court (see also Rwezaura and Wanitzek 1988: 6 ff.), ignorance of their rights under state law is an important factor. However, in the large majority of divorce cases evaluated, the Primary Court magistrates did not introduce these issues into the proceedings. The courts neither inquired into arrangements or proposals on division of assets, maintenance and custody of children,

nor did they include provision for the children's maintenance and custody in the divorce decree. This finding is supported by other research. Barbara Mitchell, for instance, in her research in the Tanga Region, found that of all divorce cases in the Primary Courts, the issue of spousal maintenance was mentioned in less than 10%. If maintenance orders were made at all, the court granted only a lump sum and in no case were regular maintenance payments ordered (Mitchell 1980: 21; Rwezaura and Wanitzek 1988: 18).

There are cases in which the High Court has supported this tendency toward a passive Primary Court role. The decisions of some Primary Courts, which included provision for custody and maintenance for children in the divorce decree according to the *Law of Marriage Act*, have been reversed by the High Court on the ground that these remedies had not been applied for by a petitioner (*e.g. Mwanza*, H.C. 2/78, 15/79, 5/80). The High Court hereby applies the principles of the adversary system to Primary Court proceedings. More than 15 years after the enactment of the *Magistrates' Courts Act* and the *Law of Marriage Act*, the courts thus still ignore their special responsibility for the parties, and act instead in a manner which presupposes that parties are assisted by legal counsel.

4.2 *The articulation of claims*

Closely connected with the problem of ignorance of the substantive law are the difficulties petitioners face when they try to articulate their claims. These difficulties are not only caused by the general difficulty a layperson has in using the relevant legal terminology, but also by the fact that some of the rights and obligations provided in the *Law of Marriage Act* for women were unknown under traditional law. This is the case particularly with maintenance and the division of matrimonial assets. Some women have only a vague idea of their legal rights in this regard, which makes it impossible for them to articulate their claims under the *Law of Marriage Act*.

A common way of expressing a claim for maintenance and division of matrimonial assets is to ask for 'compensation': *e.g.*, 'compensation for the marriage', 'compensation for the work done during the marriage', etc. (see *e.g. Sengerema*, P.C. 41/79). These formulations and the views behind them appear to have their origin in traditional law, under which various kinds of compensation claims are provided, as modified by the layperson's knowledge of state law. This combination of ideas about the law leads to the assumption that, at the end

of a marriage relationship, a compensation of some kind must be due (Rwezaura 1984a: 190 f.).

The attitude of the Primary Courts towards such claims is usually rather untechnical and appears to depend more on the general attitude of the court towards women than on the application of specific legal principles. Some Primary Courts are sympathetic towards claims for 'compensation for being married'. They do not attempt to qualify the claim under legal categories but appear to have a rather 'humane' approach (*cf.* DuBow 1974: 98). They see, for instance, that an old, divorced woman, who has nowhere to go after many years of marriage, deserves a material contribution from her husband, by whatever legal provision this order might be justified. They therefore grant her a small sum of 'compensation' (*e.g.*, P.C. in *Bukoba*, H.C. 35/77; *Mwanza*, H.C. 7/85). However, other Primary Courts refuse the claim for 'compensation', often without giving any reasons (*e.g.*, P.C. in *Mwanza*, H.C. 304/75; *Sengerema*, P.C. 77/84). By so doing, they fail to fulfill their task to 'translate' the petitioners' simple language into legal terminology.

Another example of articulation problems is that in a number of divorce petitions by husbands, elderly wives refuse to be divorced, saying that they are too old either to be remarried or live on their own:

> My husband married me in 1953 and up to now we have eleven children. Two of our daughters are already married. My husband married three other wives, using the bridewealth paid for the marriage of our daughters, and other property we have acquired with our joint efforts in our business and farming. But since he married a second wife in 1966, he started mistreating me, he did not buy me anything, such as clothes, and he did not take me for treatment of my ill-health. I am now very old and cannot be divorced. All I want is a separation, a house of my own, far away from my co-wives. My husband has enough wealth and he should let me have part in it since I am his wife. He has more than 100 head of cattle and 60 goats. But since 1966, I have only been mistreated, as if I have no rights, and that is why I am asking to be heard by this court. (*Musoma*, H.C. 3/78)[3]

3 This and the following quotations from court records are translated from Kiswahili.

In cases where divorce is granted, the wife's fear of remaining without support after divorce would be reason enough for the court to examine whether by division of assets or maintenance the woman could be helped. Again, however, courts remain passive in this respect (*e.g.*, *Musoma*, H.C. 2/81).

A final example of articulation problems refers to the illiteracy of some older rural women. Women who do not read and write can rely only on their memories. Some courts, however, do not believe that they are able to remember many details, and request documentary evidence (*e.g.*, *Sengerema*, P.C. 76/83). In one case, a woman explained in detail how she and her husband had accumulated their matrimonial property, but the Primary Court did not believe her on the ground that mere memory was not a reliable source (P.C. in *Mwanza*, H.C. 28/80). To ask for documentary evidence in such cases means in effect to deny illiterate petitioners their right.

4.3 *Ignorance of procedure*

Some women petitioners complain that they are ignorant of certain procedures and are not able to present their cases effectively. Unfamiliar evidence requirements are often a barrier to petitioners' claims (*e.g.*, *Mwanza*, H.C. 14/79, 43/79). In a number of cases where women petitioners claimed division of matrimonial assets, they required guidance to know what facts were relevant, what kind of evidence was necessary to prove these facts, and how such evidence should be produced. For instance, some women indicated only the number and kind of items of the matrimonial property without telling in detail how and by whom these had been acquired. Others described how they had acquired the property, but missed some crucial points, such as evidence on the 'joint efforts' which are the precondition for a division of assets. Others made general claims, but did not present evidence to prove them:

> I was married to my husband about 1963. We lived together for more than 19 years. During that period, we were helping each other in various kinds of business in and outside our home. After 15 years of marriage, my husband started giving me a lot of problems, mainly because I did not get a child. Finally he sent me back home to my family. He claimed all his bridewealth back and got it. I asked my husband to give me a portion of the earnings acquired during our marriage in our youthful years, so that I could start to make a living, but he refused.

> Therefore I decided to take the matter to the court. (*Mwanza*, H.C. 7/85)

Because the courts usually do not consider it their task to call the petitioner's attention to the missing evidence, a number of claims by women for division of matrimonial assets have been rejected for lack of evidence, as in the foregoing case, where the High Court judge held:

> Going by the evidence, the appellant [the wife] and her witnesses made no mention of what sort of matrimonial assets were acquired by joint efforts. Her claim was therefore unfounded.

In other cases, claims for division of matrimonial property or for maintenance have been rejected by the court without giving reasons, or were simply ignored by the court, even though some of them were presented in a rather articulate and straightforward way (*e.g.*, *Magu*, P.C. 45/86; *Mwanza*, P.C. 74/75; *Sengerema*, P.C. 42/85). For example, in one case the woman complained in her memorandum of appeal against a Primary Court decision:

> [T]he Primary Court did not give me any guidance as to how I could bring before it my witnesses. After I had presented my case, the notes taken on my evidence were not read to me and so it was erroneously written that I did not have any witnesses. But the witnesses were there, only I was not given an opportunity to present them before the court. Because I did not know the procedures which are followed by the court when hearing cases I was unaware that, after the evidence was presented, I had lost the case and that I could not present my witnesses any more. (*Musoma*, H.C. 25/79)

The woman concluded her memorandum of appeal with a plea that if the law is fair her case should be heard once more so that she can bring her witnesses.

There are also complaints by women petitioners that courts ignore their assertions, or that they do not give them a chance to speak and make their point (*e.g.*, *Mwanza*, H.C. 12/81). Thus, in one case the woman appellant complained as follows:

> I did not have a chance to air my views in court because each time I wanted to say the most important thing I was silenced. (*Musoma*, H.C. 20/79)

This woman had brought her sister as a witness but the court rejected this evidence on the ground that her sister was only a young child of twelve years of age.

In all these cases a certain ambiguity is discernible in the Primary Courts' behaviour. On the one hand, they show a strict adherence to some principles of the adversary system, such as the rules of evidence; on the other hand, they ignore basic rules of the same adversary system, *e.g.* the rule that the judge must hear both sides. It appears, therefore, that they are not always aware of the relevance or irrelevance for Primary Courts of specific procedural provisions. There may be a misunderstanding among Primary Court magistrates that simplification and relaxation of procedure in Primary Court proceedings means a selection of some procedural rules and ignoring others without following known legal or other criteria.

5. Conclusions

The large majority of petitioners in matrimonial causes are women. There are a number of possible reasons for this, which cannot be discussed in detail in this paper (see, *e.g.*, Wanitzek 1989; for 'male claims' see Chanock 1982: 59 ff.). An important reason is that some of the informal mediation and arbitration institutions are generally sympathetic to the traditional dominance of men, which makes them unpopular with women whose concern is to obtain equal rights. "Such women," notes B.A. Rwezaura (1984b: 65),

> find it oppressive that their marital relationships should continue to be governed by values and ideals which originated from the traditional society and are now largely inappropriate for the contemporary period.

However, although the state courts, with the instruments provided by the *Law of Marriage Act*, could and should offer a more appropriate solution for women, this is often not the case in practice, as has been demonstrated in this paper.

Women are often reluctant to go to court, fearing social pressure or because of economic dependency, or due to a pessimistic assessment of their ability to present their case efficiently or to win it (see, *e.g.*, *Mwanza*, H.C. 4/81). Many women who finally do go to court have unsuccessfully tried many alternate avenues before - often after many years and only when problems culminate in a threatening way - taking the final step and going to court. This appears from many of the case histories we have analysed. It suggests that the high number of women litigants is not an indication that women are

more 'litigious' than men, but that they are more dependent on the state courts to realise their rights. This makes it even more imperative that these courts adhere to the principles discussed above and give women the necessary assistance in the realisation of their rights.

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