
Maintenance of ‘illegitimate children’ in Tanzania: A right or rhetoric?

A review of the Affiliation Ordinance Chapter 278

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Abstract

This paper examines the efficacy of the law providing for maintenance of non-marital children in Tanzania. It looks into the Affiliation Ordinance of 1949 and reveals its limitations in providing for maintenance of non-marital children. It demonstrates that the law is archaic and provides for inadequate maintenance to non-marital children. The paper discusses several limitations in the administration of justice by courts that adversely impacts on provision of maintenance to non-marital children. It shows that the operation of the law does not conform to provisions of the Constitution of Tanzania nor to various international human rights instruments guaranteeing the rights of the child which the country has ratified. The paper points out some factors such as the government's lack of political will, socio-religious prejudices and ineffectual operation of non-governmental organizations in advocating for the rights of women and children, which account for the subordinate position of non-marital children and their mothers. The paper recommends that the government repeal the ordinance and enact new legislation providing for the rights which are similar to those contained in the international human rights instruments guaranteeing rights of the child. It is also recommended that the courts be provided with adequate resources to enable them to handle cases effectively and efficiently. The report recommends further that non-governmental organizations should re-think their role *vis-a-vis* protection of the rights of women and children, including non-marital children.

Introduction

The Government of the United Republic of Tanzania has adopted several measures guaranteeing the rights of the child in the country including the child's right to secure maintenance from his or her parents or guardians. Firstly, the country has adopted the Child Development Policy of 1996 that, *inter alia*, gives direction to how children's issues should be handled and given priority. Secondly, the government has enacted laws providing for the rights of the child that, *inter alia*, protect children from discrimination and impose duties on parents or guardians to provide the children with maintenance. These laws include the Constitution of the United Republic of Tanzania of 1977¹, and the Affiliation Ordinance of 1949 (the ordinance)² which regulates the law pertaining to maintenance of non-marital children. Thirdly, the country has ratified international human rights instruments that guarantee the rights of the child, notably the United Nations Convention on the Rights of the Child of 1989 and the African Charter on the Rights and Welfare of the Child of 1990.

There are also other international human rights instruments that contain a catalogue of human rights which apply to 'all human beings' and therefore implicitly to all children. These include the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966, the Convention on Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW), and the African Charter on Human and Peoples' Rights of 1981.³ Tanzania has ratified the above-named human rights instruments without any reservations. Ratification of the above legal instruments by the government without reservations demonstrates the willingness of the country to be bound by the provisions of such instruments.

This paper examines the ordinance with a view to elucidating efficiency in providing for maintenance for non-marital children. It also looks into the extent to which the legislation conforms to the Child Development Policy, the Constitution of Tanzania and international human rights norms that guarantee the rights of the child. This paper also analyzes implications of non-compliance of the affiliation law with the constitution and international human rights norms for the

¹As amended from time to time.

²Chapter 278 of the Laws of Tanzania.

³The Charter is also known as the Banjul Charter.

rights of non-marital children and their mothers. Moreover, the paper presents some recommendations as to how the present unsatisfactory situation can be tackled.

In terms of methodology, I have applied two theoretical perspectives, namely legal centralism and the women's law approach. The legal centralist approach is a perspective that focuses on the state law or state-recognized and enforced law and mechanisms, and institutions for interpreting these norms (Bentzon *et al.*, 1998:31). In applying legal centralism I examined the state laws and norms that are applied by the courts which include legislation and case law relating to the rights of non-marital children. I also analyzed legal publications dealing with the subject. The objective is to analyze what the law provides and uncover gaps in the state laws. On the other hand, the women's law is a legal discipline that explores realities of women's lives and from that perspective interrogates and investigates the law (Bentzon *et al.*, 1998: 26). In applying the women's law approach the objective is to demonstrate how the state recognized laws are out of touch with realities of mothers of non-marital children. It is hoped that information from this report can be channelled back into the law in the form of legal reforms that will address the needs of non-marital children and their mothers with a view to improving their position in law and society.

The primary source of data for this paper was library research which involved perusing and analyzing international human rights instruments, domestic legislation, law reports, textbooks, journals, newspapers, court records and materials from the internet. I also applied legal knowledge from my experience as a legal practitioner, where I have been providing legal services to non-marital children and their mothers, including representing them in affiliation proceedings. I was interested in challenging the operation of the affiliation law using the Constitution of Tanzania and international human rights law. The paper summarizes the main contentions against the operation of the ordinance. It appears that few studies have looked into the problem from a human rights perspective. Therefore, I wanted to critically review substantive and procedural regulations and the institutional framework in protection of the human rights of non-marital children in Tanzania. The objective was to uncover how the regulations and institutional framework militate against the right of non-marital children to secure maintenance from their fathers. This may help to enhance the understanding of the plight of the children and their mothers. More importantly, it is hoped that this information will make non-marital children and their mothers more visible, and this will assist the policy makers and implementers in adopting efficacious intervention strategies to protect human rights of non-marital children and their mothers.

This paper is divided into four parts. The first part presents a discussion of the salient features of the ordinance and its limitations in providing for maintenance for non-marital children. The second part critically examines the extent to which the ordinance conforms to the Child Development Policy, the Constitution of Tanzania and international human rights law that guarantee the rights of the child. The third part looks into some factors that account for the subordinate position of non-marital children and their mothers in the country. The last part presents concluding remarks and recommendations as to how the problems can be addressed.

The Affiliation Ordinance

The Affiliation Ordinance was enacted in 1949⁴. It was amended by the Affiliation Ordinance (Amendment) Act of 1964⁵ and consists of 14 main sections. The main objective of the legislation is '...to provide for the maintenance for illegitimate children'. I have decided to avoid using the term 'illegitimate' children because I consider it iniquitous and for that reason I shall use the term 'non-marital' children instead. I believe that labelling children born to unmarried parents as 'illegitimate' is demeaning and stigmatizing. Therefore, the continued use of such deprecatory terminology is unfair and inappropriate.

⁴ It became operational on 15th July, 1949. This legislation regulates affiliation proceedings other than those governed by the customary law, namely the Customary Law (Declaration) Order, Government No. 279 of 1963.

⁵ Act No. 14 of 1964.

Ideally, the objective of the affiliation law is to give a mother of a non-marital child the right to be maintained by his or her putative father. The law gives the right to the mother to apply to the court for an order compelling the putative father to pay maintenance for the child.

The ordinance provides that a district magistrate shall have jurisdiction to entertain affiliation proceedings.⁶ However, vesting exclusive jurisdiction in district magistrates who preside over district courts, is problematic because it prevents applicants who reside far away from district courts from accessing justice. The applicants, especially mothers who do not have financial resources, cannot travel long distances to institute affiliation cases or attend affiliation proceedings. As a result, some mothers fail to institute cases or attend courts regularly to claim maintenance for their non-marital children. Generally, non-attendance of the courts by the mothers results in the dismissal of the cases for want of prosecution. Accordingly, the non-marital children may be deprived of the right to secure maintenance from their putative fathers.

Section 3 of the Ordinance provides that any unmarried mother who may be with child (pregnant) or may be delivered of a child can apply to the court for a maintenance order for the child.⁷ The application can be instituted before the birth of the child or within twelve months from the date of birth of the child. The application can also be instituted at any time thereafter where the alleged putative father, who was paying maintenance, stops paying the maintenance. However, the application must be made within twelve months from the date the alleged putative father stopped paying the maintenance. Further, the application can be commenced within twelve months from the return to Tanzania of the alleged putative father of the child where it is proved that he ceased to reside in the country twelve months after the birth of the said child. The mother must make an application on oath to the district magistrate for a summons to be served on the alleged putative father.

Upon the application being instituted, the court can issue the summons to the alleged putative father if certain conditions are fulfilled. Firstly, the court must reasonably believe that the alleged father is in fact the father of the child. Secondly, the application should be made in good faith, that is to say, it should not be made for the purpose of intimidating or exhorting the alleged putative father to pay maintenance. Thirdly, the applicant should have requested that the alleged putative father make provision for maintenance and education, but he neglected or refused to provide or provided insufficient maintenance.⁸

Section 5(1) of the ordinance provides that upon the mother of the non-marital child presenting evidence, which needs to be ‘... corroborated in some material particular by other evidence as she may produce...’ the court may, after hearing evidence tendered by or on behalf of the alleged putative father, adjudge the person summoned the putative father of the non-marital child and proceed to make an order for payment to the mother or custodian of the child the sum not exceeding one hundred shillings (US\$ 0.1) per month for maintenance and education of the child. The putative father may also be ordered to pay expenses incidental to the birth of the child and funeral expenses if the child dies before making such an order. He may also be ordered to pay costs incurred in obtaining such an order. However, in lieu of ordering payment of monthly maintenance, the court may order the putative father to pay a lump sum not exceeding fifteen thousand shillings (US\$ 1.5) and that the same be expended on the maintenance for the child. It is further provided that the court may vary the maintenance order, increasing or decreasing the amount payable, but under no circumstances shall such amount exceed one hundred shillings per month.

⁶ Section 2.

⁷ Under section 2 of the Ordinance the term “unmarried mother” includes a married woman who is living apart from her husband and a widow.

⁸ Section 4.

It has been observed in the case of *Cole v. Manning*⁹ that it is necessary for evidence of a mother of a non-marital child to be corroborated in some material particular ‘...in order to prevent the danger which would arise if [her] statement ... were admitted without confirmation...’. In some cases it may be difficult for a mother of a non-marital child to secure evidence to corroborate her claim about paternity of the child. Firstly, there may not be an independent witness to prove paternity, especially where the sexual relationship was carried out in secrecy, and the alleged putative father denies the responsibility. Secondly, the mother cannot use birth registration to prove paternity because the law prohibits registration of the father’s name without his acknowledging paternity and signing the birth register.¹⁰ In such a situation the space for the father’s name in the child’s birth certificate is left blank. Secondly, documentary evidence, for instance, clinic cards, which are commonly used as corroborative evidence, cannot be easily secured. This is because some mothers do not attend antenatal clinics. Thirdly, it seems that modern methods for testing paternity, for instance, the DNA profiling technique, are not available to the majority of the mothers in the country.¹¹ Failure to present corroborative evidence may result in the dismissal of the case. In the case of *Hulda John v. Stanley*¹² the High Court of Tanzania (hereinafter referred to as the High Court) held that if the applicant fails to present corroborative evidence to support her allegations of fatherhood, the claim against the alleged putative father should be dismissed.

The ordinance provides that a maintenance order shall not be made if the court is satisfied that subsequent to making the application the mother of the non-marital child has married another person or resumed cohabitation with her husband.¹³ It is also provided under section 14 of the ordinance that the court shall not make a maintenance order if the applicant has obtained, in proceedings instituted in accordance with customary law, an order for payment of money or other provision for maintenance or education for the non-marital child. Moreover, the court shall not grant the order if it is satisfied that, in any proceedings instituted in accordance with customary law, the court hearing such proceedings, ruled that the person against whom the order is sought was not the putative father of the child.

It is my observation that the ordinance does not provide for maintenance of a mother of a non-marital child during pregnancy. This is because the legislation does not state expressly that in addition to paying maintenance and education for the non-marital child, the putative father is liable to pay for expenses connected with pregnancy of the mother. Makaramba (1999) remarks that the law does not provide for maintenance expenses connected to the pregnancy of the mother of the non-marital child. However, the Legal Aid Committee (1992) and Women’s Legal Aid Centre (2003) maintain that an unmarried mother may apply for an order that a putative father should pay money for her maintenance, in other words during pregnancy and for the maintenance and education for the child after its birth, but cite no law to support their proposition.

I also maintain that the amount of monthly maintenance for non-marital children, set by the ordinance, is unreasonably inadequate. Due to that fact, it is very difficult, if not impossible, for unmarried mothers to apply for the money for maintenance and education of non-marital children as envisaged by the law. Several studies seem to agree with the above view (Legal Aid Committee, 1992; Rwebangira, 1996; Makaramba, 1999; Rwezaura, 1998b; Hudson, 1999; Women’s Legal Aid Centre, 2003). One report observes that: ‘...a maintenance order under section 5 [of the

⁹ [1877] 2 Q.B.D.611 at p.614 per Fielder, J when interpreting section 4 of the Bastardy Laws Amendment Act of 1872 of England that required the evidence of a mother of a non-marital child to be corroborated in “some material particular” by other evidence.

¹⁰ Section 12 of the Births and Deaths Registration Ordinance, Chapter 108 of the Laws of Tanzania, provides that a person is not bound as a father to register the birth of a non-marital child, and that a person’s name shall not be entered in the register of birth as the father except at his own request and upon his acknowledging himself to be the father of the child and the signing or affixing his mark to the register.

¹¹ DNA profiling technique entails the examination of generic samples such as blood specimens, semen, saliva and hair roots. It analyses deoxyribonucleic acid in chromosomes that contains an individual unique pattern of characteristics transmitted by his/her parents. Thus, the child’s DNA will include patterns identical to those found in his/her parents’ DNA.

¹² [1968] H.C.D.253.

¹³ Section 5 (1A).

Ordinance] is not worth the paper it is written on let alone the time and efforts involved in securing the order' (Rwezaura, 1998b: 90). Regarding the same issue, newspapers have quoted lawyers and members of parliament as saying that the above-mentioned statutory sum is unreasonably small and unrealistic.¹⁴ Also, in 2001 the Attorney General of Tanzania is reported to have informed the parliament of the United Republic of Tanzania that the country's laws on child care expenses for non-marital children would be amended.¹⁵ He was responding to a member of parliament who remarked, *inter alia*, that the laws on child-care expenses for non-marital children were 'outdated and useless'.¹⁶

Due to the dearth of the statutory maintenance for non-marital children, some courts have been awarding sums that by far exceed the amount set by the ordinance. For instance, in *Mosi Saidi v. Simon Ligangula*,¹⁷ a court ordered a putative father to pay a monthly sum of 40,000 shillings (US\$ 40). In another case of *Hellen Swai v. Joseph Malunda*,¹⁸ another court ordered a putative father to pay 50,000 shillings (US\$ 50) per month. The courts deviate from awarding the amount stipulated by the ordinance because the amount is obviously inadequate to cater for maintenance and education of the non-marital child.¹⁹

Section 5A of the ordinance provides that the court may make an order discharging the putative father from paying maintenance on the grounds that subsequent to granting the maintenance order, a mother of a non-marital child married another person or resumed cohabitation with her husband from whom she was separated. It is also provided that the order will not be in force upon the non-marital child attaining the age of 16.²⁰ Additionally, the law provides that if the putative father makes an application and shows a good cause, the court may order that the maintenance order should cease when the child attains the age of 14.²¹ However, the ordinance does not define the expression 'a good cause'. Also, the case law has not defined what constitutes a good cause.

I maintain that there is no connection between the mother's decision to marry another person or resume cohabitation with her husband and the putative father's duty to maintain the child. I also argue that maintenance of a non-marital child ceases at a critical moment — when the child attends school and needs the money for education, medical services, food, clothing and other necessities. Additionally, the law is silent on who should provide maintenance for the non-marital child after the discharge of the putative father. It is logical to presume that the mother will be solely responsible for maintaining the child.

The High Court has held that maintenance of a non-marital child stops on the death of the putative father if he dies intestate.²² This was stated in the case of *Violet Ishengoma & Another v. The Administrator General & Another*²³ where the court ruled that a putative father's obligation to his non-marital child is personal and ends with his death. In reaching its decision the court relied on the decision made in the English case *in re Harrington (Wilder v. Turner)*²⁴ which held that the liability of a putative father under a bastardy order²⁵ is purely personal and if the father dies the mother has no right to claim from the deceased's estate, either arrears or future payments. Decisions of the authoritative English courts, like the above, are binding on the courts in Tanzania

¹⁴ See the *Majira*, Tanzania, December 12, 2001 and the *Majira*, Tanzania, May 28, 2001.

¹⁵ See the *African*, Tanzania, June 14, 2001.

¹⁶ The sums which the mother may recover from the putative father have remained the same since 1964 when the Ordinance was last amended.

¹⁷ Affiliation Cause No. 53 of 2000, Kinondoni District Court.

¹⁸ Affiliation Cause No. 5 of 2001, Ilala District Court Registry, at Kisutu.

¹⁹ The statutory monthly sum paid as maintenance is not sufficient to buy a loaf of bread which is sold at shs 300(US\$ 3).

²⁰ Section 6.

²¹ Section 6.

²² A person dies intestate if he/she dies without leaving a will.

²³ [1990] T.L.R.72.

²⁴ [1908] 2 Ch.687.

²⁵ Similar to an affiliation order.

by virtue of provisions of section 2(2) of the Judicature and Application of Laws Ordinance²⁶ which authorizes the courts to apply decisions on common law, doctrines of equity and statutes of general application in force in England before July 22, 1920. The above cases also held that the non-marital child has no right to inherit his or her deceased father's estate.

The ordinance provides further that when making a maintenance order and upon finding that a mother of a non-marital child is not a fit and proper person to have his or her custody, the court may appoint another person to be a custodian of the child. This is illustrated by the case of *Margaret Andrew v. Bakari Mbagha*,²⁷ where the appellant instituted affiliation proceedings applying for maintenance of a child whose father was the respondent. The district court ordered, *inter alia*, that the child should remain in the custody of the respondent. The appellant appealed against the order for custody. The High Court ordered that the child be placed under the custody of the respondent, because it was found that the mother was not the proper person to have custody of the said child, and that it was in the interest of the child be with the father.

The maintenance order against a putative father of a non-marital child can be executed in several ways. Firstly, the putative father can pay the money into the court and the same will be paid to the mother or custodian of the child. Secondly, in case the putative father neglects or refuses to pay, the court may order distress and sale of his goods and chattels to satisfy the order. If no sufficient property can be obtained, the court may order detention of the putative father as a civil prisoner for a term not exceeding three months unless he pays the money due.²⁸ My observation is that an unmarried mother may secure an affiliation order but fail to enforce it. This is because the putative father may not be able to pay the money due or may not have any goods or chattels to be attached and sold. The court may also not be able to trace the putative father to enforce the order. In such situations, the non-marital child and his or her mother will be left without any remedy. Also, imprisoning the putative father does not guarantee that he will pay the maintenance for the child, especially where he really does not have resources. Thus, imprisonment of the putative father may not be relevant to the child and his or her mother where the imprisonment does not facilitate payment of maintenance for the non-marital child.

Also, the ordinance provides for penalties for neglect or desertion of a non-marital child by his or her mother or custodian. The mother or custodian of the non-marital child who is found guilty of the above offences shall be liable to pay a fine not exceeding two hundred shillings (US\$ 0.2) or imprisonment for one month, or to both the fine and imprisonment.²⁹ Additionally, the mother or custodian who misapplies monies paid by the putative or who withholds proper nourishment for or maltreats the child, commits an offence. If found guilty the offender shall be liable to pay a fine not exceeding two hundred shillings (US\$ 0.2) or imprisonment for one month, or both such fine and imprisonment.³⁰ The penalties are clearly lenient and cannot deter the would-be offenders from neglecting, deserting and mistreating non-marital children, or misapplying monies paid by the putative fathers. Also, the ordinance does not provide for refund of the monies misapplied. Again, payment of fines or imprisonment of the offenders seems to be irrelevant to non-marital children because it does not assist them recover misappropriated monies or indemnify them for damage suffered due to neglect, desertion or mistreatment.

Further, the ordinance empowers the High Court to enact rules prescribing fees and costs payable in any proceedings under the ordinance. These rules include those prescribing remission of fees payable in any proceedings and costs when persons liable to pay cannot do so.³¹ Although the

²⁶ Chapter 453 of Laws of Tanzania.

²⁷ [1969] H.C.D. 3.

²⁸ Section 5(2) and (3).

²⁹ Section 9.

³⁰ Section 10.

³¹ Section 13.

experience has shown that the majority of the applicants cannot pay the fees and costs, the courts require them to pay the fees and costs. Due to poverty it has been difficult, if not impossible, for some applicants to institute affiliation cases to secure maintenance for their non-marital children. However, a few mothers of non-marital children institute affiliation proceedings *in forma pauperis*³² after being granted legal aid certificates by some non-governmental organizations that promote and advocate for the rights of women and children, for instance, Legal and Human Rights Centre, Tanzania, Women Lawyers Association and Women's Legal Aid Centre.³³

Moreover, inordinate delays by the courts in determining cases is another obstacle that discourages mothers from using the law to realize the rights for their non-marital children. Records indicate that it takes on average one to three years for a court to resolve an affiliation case. This problem is attributed to several factors including re-assignment of cases (following the death, transfer or resignation of presiding magistrates), lack of or limited facilities (for example, court rooms and stationeries) and negligence or sheer lack of concern for and sensitivity to the rights of non-marital children on the part of some judicial personnel. This can be evidenced by, for instance, misplacement or loss of case files which result in delays in determination of the cases. Sometimes, counsels apply for adjournments of the cases on flimsy grounds and the courts grant the applications. Sluggish determination of the affiliation cases amounts to misadministration of justice whose victims (non-marital children and their mothers) suffer enormously. It has also been observed that delays through inefficiency, negligence and other avoidable causes result in grievous injury to the rights of the affected parties (Legal Aid Committee, 1992:42).

Furthermore, ignorance of the law on the part of mothers of non-marital children hampers efficacy of the affiliation law. This is because it is difficult for mothers who lack or have limited knowledge of the law to fight for the rights of their children. This problem is due to limited legal literacy campaigns undertaken by the government to educate people about their rights. There are also few non-governmental organizations that carry out legal literacy campaigns and the majority of these organizations are urban-based³⁴ and have limited operation in the rural areas. Consequently, some uninformed mothers fail to institute cases against putative fathers because they are not aware of the avenues that allow them to do so.

The ordinance and the rights of non-marital children

It must be pointed out that the law draws a distinction between children born to married parents and those born outside marital unions. Non-marital children are accorded a lower status than marital children. Firstly, whereas a specific amount of maintenance is fixed for non-marital children, no fixed amount is set for marital children. The Law of Marriage Act 1971 provides that '...it shall be the duty of a man to maintain his infant children...either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof'.³⁵ Secondly, whereas under the Law of Marriage Act the father of a marital child has to provide maintenance for the child until he or she attains the age of 18, under the ordinance the putative father is discharged from making provision for maintenance when the non-marital child attains the age of 14 or 16. Thus, unlike the marital child, the non-marital child is denied the right to secure maintenance before attaining the age of majority. This contradicts the provisions of the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child that provide that childhood extends to 18 years.³⁶ Thirdly, upon death of the putative father, a non-marital child cannot claim maintenance from the estate of his or her deceased father and that the child is excluded from inheriting the estate of the

³² This is a relief that enables a person to sue or defend an action as a pauper.

³³ In few cases the applicants are granted assistance whereby they are provided with legal representation in courts of law.

³⁴ See the African, Tanzania, September 15, 2003.

³⁵ Section 129(1). The Law of Marriage Act of 1971 regulates, *inter alia*, provision of maintenance to marital children by the parents.

³⁶ Article 1 of the CRC and Article 1 of the ACRWC.

deceased. A marital child has the right to inherit his or her deceased father's estate. It seems that non-marital children are discriminated against on the grounds of their birth status — because they are born out of marriage, or because of their parents' status — their parents are not married.

My view is that the Convention on the Rights of the Child establishes the principle that all children should be treated equally. This is because Article 2(1) of the Convention on the Rights of the Child explicitly provides that '...the rights set forth in the present convention applies to each child...without any discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's ... birth or other status'. In other words, the child's right to be provided with care and maintenance, laid down in the Convention on the Rights of the Child, extends to all children (marital and non-marital children) without discrimination of any kind. Thus, the Convention on the Rights of the Child grants equal rights to children born in or out of wedlock. The convention rejects the very concept of the illegitimate child (Lopatka, 1992b: 63). Also, the African Charter on the Rights and Welfare of the Child provides that the African child shall enjoy the rights and freedoms set out in the charter without discrimination, *inter alia*, on the grounds of birth, status or other status or that of his or her parents or status.³⁷

Inadmissibility of discrimination in any form, including discrimination based on birth status, and obligation of states to ensure equality of all persons in the exercise of economic, social, cultural, civil and political rights, are re-affirmed under the provisions of various international human rights instruments to which Tanzania is party. These include the Universal Declaration of Human Rights,³⁸ International Covenant on Civil and Political Rights,³⁹ International Covenant on Economic, Social and Cultural Rights,⁴⁰ and the African Charter on Human and People's Rights.⁴¹ Also, the Convention on the Rights of the Child⁴² and the African Charter on the Rights and Welfare of the Child⁴³ prohibit discrimination against a child on the grounds of birth or other status. Thus, the ordinance contravenes the human rights law referred to above.

Also, stigmatization of children of unmarried parents is one of many areas in which non-marital children experience discrimination. The stigmatization contravenes the Constitution of Tanzania that provides that all human beings are born free and equal.⁴⁴ In addition, it abrogates the constitutional provision that states that all persons are equal before the law and are entitled, without discrimination, to protection and equality before the law.⁴⁵ Implicitly, the constitution protects non-marital children against discrimination.

Payment of inadequate maintenance by putative fathers has an adverse effect on the survival, protection and development rights of non-marital children in the country. The majority of the mothers who apply for maintenance of non-marital children, have limited or no financial capability to maintain the children appropriately. Consequently, these non-marital children are deprived of the opportunity to secure adequate and nutritious food, suitable clothing, essential health care and other basic facilities, like shelter. These children are also denied the opportunity to access education and acquire knowledge, skills and values through educational channels. This may result in non-marital children becoming illiterate and disempowered. This is a violation of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child that provide for the child's right to education,⁴⁶ and provision for insufficient maintenance

³⁷ Article 3.

³⁸ Article 2.

³⁹ Article 2(1).

⁴⁰ Article 2(2).

⁴¹ Article 2.

⁴² Article 2.

⁴³ Article 3.

⁴⁴ Article 12(1).

⁴⁵ Article 13.

⁴⁶ Article 28 of the CRC and Article 11 of the ACRWC.

for non-marital children violates the provisions of the these two conventions that guarantee the child's survival, protection and development rights.⁴⁷

In other words, provision of insufficient maintenance to non-marital children in Tanzania adversely impacts on the survival, protection and development rights of the children. Not only does the ordinance contravene the above-mentioned human rights instruments but also it goes against the spirit of the Child Development Policy that recognizes and promotes, *inter alia*, children's right to survival, protection and development in the country.

The ordinance and rights of mothers of non-marital children

Due to the fact that the law provides for derisory maintenance, mothers of non-marital children disproportionately shoulder the responsibility of maintaining the children. This is contrary to the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child which recognize the principle that both parents have common responsibility for the upbringing and development of a child.⁴⁸ Also, it abrogates the provisions of Article 16 (d) of the CEDAW, which calls upon state parties to establish measures to eliminate discrimination against women and ensure equality of men and women and the same rights and responsibilities, irrespective of their marital status, in caring and maintaining their children.⁴⁹

In addition, by imposing on unmarried mothers the entire responsibility of maintaining non-marital children, the law does not conform to the Child Development Policy which emphasises, *inter alia*, joint responsibilities of both parents (men and women) in caring for and bringing up their children.

Moreover, discharging a putative father from paying maintenance for a non-marital child when his or her mother marries another man may force the mother to refrain from getting married to another person for fear that the putative father will stop paying maintenance for his child. Thus, operation of the ordinance controls the woman's human right to marry and found a family. This contravenes the provisions of Article 23 of the International Covenant on Civil and Political Rights and Article 16 (b) of CEDAW which guarantee the woman's right to freely marry and found a family.

However, the law does not impose similar conditions on a mother of a child born to married parents even where the said parents are separated or divorced. For instance, where the parties are divorced, the ex-husband is duty-bound to provide maintenance for the marital child until he or she attains the age of 18 years, and has the duty to maintain the child regardless of the fact that the ex-wife gets married to another man.⁵⁰

Thus, the law relating to maintenance of non-marital children marginalizes the children and their mothers, and this adversely impacts on them. Operation of the law has hampered provision to non-marital children of basic human needs which are necessary for their subsistence, safety and growth. In so doing the law imposes a burden on non-marital children and the mothers and this prevents them from attaining equality with other groups in the society. The Ordinance can be regarded as 'misery creating or enhancing' legislation, because it causes or perpetuates misery to non-marital children and their mothers in Tanzania. Obviously, these two groups are treated as underclasses. As shall be shown below, the law reflects or is based on the acceptance of the exaggerated stereotypes about the disadvantaged groups — the non-marital children and

⁴⁷ Article 5(2) of the CRC and Article 6(2) of the ACRWC.

⁴⁸ Article 27 of the CRC and Article 20 of the ACRWC.

⁴⁹ The CEDAW in its preamble re-affirms that the "...upbringing of children requires a sharing of responsibility between men and women ...and a change of the traditional role of men [and] women in society is needed.... to achieve full equality between men and women...."

⁵⁰ See section 129 read together with section 2 of the Law of Marriage Act of 1971.

unmarried mothers.

Factors accounting for the subordinate position of non-marital children and unmarried mothers

I have demonstrated that the above state of affairs is unsatisfactory and militates against the rights of non-marital children and their mothers. The above situation, which has existed for quite a long time, can be attributed to several factors.

Firstly, it seems that the government has deliberately failed to protect the rights of non-marital children to maintenance. Since 1964, when the ordinance was last amended, the law has not been updated to conform to the Child Development Policy of 1996, the Constitution of Tanzania and the Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child and other international human rights treaties protecting rights of the child. Also, despite creation of a special ministry to co-ordinate activities relating to, *inter alia*, promotion and protection of rights of child in the country i.e. the Ministry of Community Development, Gender and Children, little effort has been made to change the legal position of non-marital children in the country. Additionally, in spite of the establishment of Tanzania Law Reform Commission in 1980, the Ordinance has not been amended.⁵¹ The Commission came up with the Report on the Law Relating to Children in Tanzania of 1996, but its recommendations were not very substantial. For instance, the Commission suggested that "...the amount payable [as maintenance for a non-marital child] should at least be 1/8 of the putative father's gross salary or six hundred (600/=) where [the] income cannot be assessed."⁵² One newspaper reported that participants of a workshop observed that "...the proposed 600/= is not adequate considering the standard of living and the needs of the child."⁵³ Nevertheless, it seems that government has not worked on the Report.

My view is that the above problem is attributed to lack of political will on the part of the government to take the necessary action to protect the right of non-marital children to secure adequate maintenance from putative fathers. This is because despite the issue of the Report by the Commission calling for the amendment of the Ordinance, there has been no plausible explanation as to why the government has deliberately failed to amend the Ordinance, which was enacted during the colonial era, whose amendment was done about 40 years ago. There is an impression that the Got is paying lip service to the right of non-marital children to maintenance and fails to translate this conception into practice when formulating plans and programmes concerning welfare of the children.

Secondly, it appears that the above situation is a result of internalised discrimination, which takes place because of prejudices that are often unquestioned and unrecognised by the society of which politicians are a part. This discrimination reflects prejudices against non-marital children based on, *inter alia*, religious beliefs. For instance, Christianity accords non-marital children a lower status than marital children. It is said that non-marital children are born of "illicit" sexual relation, and therefore incur loss by not inheriting their fathers' property.⁵⁴ Likewise, under Islam, non-marital children are not recognised or allowed to inherit their deceased fathers' estates.⁵⁵ In fact, both religions prohibit pre- and extra-marital relationships of which, the non-marital children are the product. Therefore, it seems that an unmarried woman is being punished for breaching the "religious" rule, which states, "Thou shalt not commit adultery." However, the man responsible for

⁵¹ The Law Reform Commission of Tanzania was established under the Law Reform Commission of Tanzania Act of 1980. Its main task is provided for under section 3 as..."to take and keep review all the laws of the United Republic [of Tanzania] with a view of its systematic development and reform.

⁵² See the Report on the Law Relating to Children in Tanzania of 1996 at p. 12.

⁵³ See the *Guardian*, Tanzania, February 21, 2003.

⁵⁴ There are several verses in the Bible where discrimination against non-marital children can be inferred. For instance, Genesis 21: 9-14, Deuteronomy 23: 2, Judges 11:1-2 and Galatians 4:30. See also Summa Theologica, Should Children Suffer any Loss Through Being Illegitimate? at www.newadvent.org/summa/506802.htm

⁵⁵ See Hussain, D, *The Islamic Laws of Inheritance* at www.Islam101/sociology/inheritance.htm

pregnancy is not punished.

Thirdly, it is my view that provision of insignificant maintenance by a putative father is linked to the man's reluctance to pay money to a woman with whom he does not have sexual relation. Generally, a putative father is prepared to pay maintenance for his non-marital child where the parties have sexual relationship. Thus, payment of the maintenance is linked with the putative father gaining control of the mother's sexuality (Hudson, *op.cit.* 39-40). Normally, where the mother engages in sexual intimacy with another man, the putative father refuses or is discharged from paying the maintenance. This is reflected in the Ordinance where it is provided that maintenance of a non-marital child will cease when his/her mother marries another man or resumes cohabitation with her husband.⁵⁶

Fourthly, it seems that women and human rights organisations have not done enough to promoting and advocating for the rights of non-marital children and their mothers. The organisations have failed to capitalise on information from the studies referred to above to push for legislative reforms. Also, the organizations have not worked closely enough to lobby for reform of the law. Third, they have not been able to use test case litigation as a strategy to challenge provisions of the Ordinance. It would appear that they have failed to attract interest or concern of the policy makers, legislators, and judiciary. Not surprisingly, the work of these non-governmental organizations has had no impact in facilitating the law reform. It seems that the problem is attributed to limited number of personnel who have lobbying skills. In addition, it appears that the organizations have inadequate personnel who specialize in the area of human rights of children and women. These organisations include Kuleana Centre for Children's Rights, LHRC, National Organization for Children Welfare and Human Relief (NOCHU), Tanzania Media Women Association (TAMWA), TAWLA and WLCA just to mention a few.

Conclusion and recommendations

In the proceeding parts I have presented the discussion on the Ordinance and highlighted some weaknesses that undermine its efficacy in providing for maintenance of non-marital children. I observed that the law provides for meagre maintenance for non-marital children. I also noted that the law does not seem to provide equal treatment of all children; it discriminates against the non-marital children. Further, I showed that the law works against the unmarried mothers in that it imposes on them the entire burden of maintaining non-marital children and restricts the mothers' right to freely marry persons other than putative fathers. It is my view that statutory provisions, which discriminate against non-marital children and violate rights of unmarried mothers should be repealed or challenged in courts of law and declared null and void.

Based on the findings from the proceeding parts, I would like to make several recommendations. First, there is a need to reform the law by enacting specific legislation to provide for rights of children in Tanzania similar to those contained in the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child. The legislation shall guarantee the rights to Tanzanian children similar to those provided for in the above international human rights instruments, which essentially treat children equally regardless of their status. Such legislation should abolish discrimination against non-marital children based on their birth or marital status of their parents. This will safeguard their right to adequate maintenance from their fathers.

Secondly, the government has to ensure that it implements its obligations under the international human rights instruments guaranteeing and protecting human rights. This can be done by amending the Constitution of Tanzania to provide that where the country ratifies an international treaty, the treaty should form part of domestic law and override conflicting domestic laws. Also,

⁵⁶ Section 5(1A).

the government should provide legal assistance to persons who need assistance and lack financial resources to institute and prosecute affiliation proceedings. In addition, the government should provide adequate financial resources, equipment and competent personnel to the judiciary, which will facilitate speedy determination of cases, including affiliation proceedings.

Thirdly, if the government is to deal with discrimination effectively, it must not only enact laws promoting equal rights of all children and challenging all forms of discrimination, but it must ensure that these laws are implemented. It must allocate sufficient resources to promote public human rights education aimed at challenging prejudices and discrimination against disadvantaged groups, including non-marital children and their mothers. Promotion of the education can be done through conducting radio or television programmes, public meetings and distribution of simplified publications to the populace.

Meanwhile, when interpreting unincorporated international human rights which the country has ratified, the courts should interpret municipal law in such a way as to avoid contravening the international law.⁵⁷ This is because the principle that the legislature does not intend to legislate in a manner conflicting with international law is well accepted in most common law jurisdictions (Rwezaura, 1998c: 29). Also, in order to have expeditious determination of cases, the judiciary should take appropriate action against its negligent, reckless and unscrupulous personnel and disallow unnecessary delays or adjournments of cases. It is expected that this will enhance efficacy of the courts in Tanzania in determining cases, including affiliation cases, within the shortest possible periods.

Fourthly, non-governmental organizations in Tanzania should lobby for the reform of these laws that are prejudicial to the rights of children and women in the country. Alternatively, the non-governmental organizations can use the test case litigation strategy to challenge laws that militate against the rights of children and women in the country. They can apply several precedents which have applied international human rights law to challenge the provisions of the ordinance. For instance, they can cite the decision in the case of *Bernado Ephraim v. Holaria Pastory and Another*⁵⁸ where the High Court of Tanzania applied international law to hold that a domestic law that discriminated women in matters of inheritance was *ultra vires* the Bill of Rights in the Constitution of Tanzania. In arriving at the decision the court relied on several unincorporated international legal instruments, which prohibit discrimination against women, which Tanzania has ratified including the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Discrimination Against Women and the African Charter on Human and People's Rights. Further, non-governmental organizations should continue to provide legal assistance to poor women and children in the country and continue carrying out legal literacy campaigns to sensitise and educate the public, especially women, about their rights. They should expand their networks to the rural areas. This could be achieved through setting up mini-centres in rural areas and training community educators.⁵⁹ These educators could disseminate information to the people and even handle uncomplicated legal procedures. It is hoped that once the mothers of non-marital children are educated about their rights and legal procedures, it will be possible for them to assert their rights and those of their children.

⁵⁷ The general principle applied in Tanzania is that unincorporated treaties may not be relied on before domestic courts directly to found a cause of action, but they may nevertheless have an indirect impact on the interpretation and application of domestic laws.

⁵⁸ (PC) Civil Appeal No. 70 of 1989, High Court of Tanzania, Mwanza District Registry. Also, reported in (1990) LRC(Const) 757 (High Court Tanzania).

⁵⁹ These are sometimes referred to as paralegals or community legal educators.

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