



MEMORANDUM	
Date	2 August 2016
To	Global Poverty Project ID: REQ6618
SUBJECT	Project summary: Research on the legislative reform of gender discriminatory laws in Tanzania for NGO working to end extreme poverty and inequality

1. Background

1.1 You have informed us that:

- (a) "Tanzania - we are working with local partners to combat child marriage by modifying the 1971 Marriage Act, which currently permits girls aged 15 to marry with parental consent and boys to marry at 18 and also allows children aged 14 years to marry if court is satisfied that special circumstances exist. We are campaigning to reform the Marriage Act and ensure the new Constitution includes a uniform, internationally recognized minimum age of 18 for both boys and girls. We understand Tanzania is undergoing a constitutional reform process, which we would like to build on to reform the marriage act. In 2013, the Tanzanian government indicated that it planned to review the Marriage Act, based on recommendations by the Tanzanian Law Reform Commission, and would finalize a government paper for public consultation after the conclusion of the constitutional review process. However, the Constituent Assembly, tasked with writing a new constitution, missed an opportunity to include a uniform minimum marriage age in its October 2014 draft. Based on our discussions with partners, the government has yet to review the Marriage Act in a comprehensive manner to provide protections against child marriage. In addition, the reform process appears to have stalled and we would like to determine the appropriate process to reignite it."
- (b) "Accordingly, we would like lawyers to prepare a brief report for each jurisdiction that addresses the following:
 - (i) Mapping out the **national legal system**, including where 'dual' systems exist;
 - (ii) Identifying the **process for legislative change** and mechanisms for review and amendment;

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- (iii) Identifying the **key players** that are involved in the process for review and amendment of legislation;
- (iv) Summarizing the **legal history of the specific bills and laws** targeted and status of any legislative reform or enactments on the targeted issue (i.e. child marriage in Tanzania, and honour killings in Pakistan);
- (v) As appropriate, **advising on the best legislative reform strategy** for the particular issue and bills involved; and
- (vi) Flagging any **other local legal issues** we and our partners may need to be aware of in conducting these campaigns.”

2. National Legal System

- 2.1 Tanzania is a republic with multi-party democracy and a constitution with a federal system of government. The President of the United Republic is the head of state and government, and the Mainland of Tanzania and the Island of Zanzibar each has its own executive, legislative and judicial institutions with defined spheres of competence. There is a Union legislature, which comprises members of both the Mainland and Zanzibar legislatures, and 11 Presidential appointees (one of whom is the Attorney General).
- 2.2 The national language of Tanzania is Kiswahili (a Bantu language with extensive word borrowings from Arabic, Persian, Portuguese and other languages). English is commonly used in business, education and government. The language of record in the courts is English, though Kiswahili is used in the lower courts.
- 2.3 The Constitution of the United Republic of Tanzania (**Constitution**) is the fundamental law prevailing over all other legislation. It contains a justiciable Bill of Rights. The final draft of a revised Constitution, which was prepared by the Constitutional Assembly, was released to the general public in late 2014. The Government was expected to hold a referendum to approve the proposed constitution in early 2015. But it has been postponed because of delays in registering voters. The referendum has been postponed until the National Electoral Commission announces a new date.
- 2.4 Tanzanian courts exercise their jurisdiction in conformity with, among other things, the Constitution, all written laws, the substance of common law, doctrines of equity, international law (treaties and conventions) and customary law including Islamic Law. The application of the substance of common law and doctrines of equity is subject, however, to any statutes enacted by the Parliament that override the common law or equitable doctrines, and is applicable only so far as circumstances in Tanzania permit. The application of international laws relies on ratification of treaties and conventions to which Tanzania is a party.
- 2.5 Most statutes are available in English though some are in Kiswahili.
- 2.6 The Tanzanian legal system has evolved largely on the basis of English common law because of British presence in the country from 1919 until independence in 1961. In Zanzibar, the legal system has evolved from both English common law and Islamic law.
- 2.7 The highest court is the Court of Appeal, which has appellate jurisdiction over the whole of the United Republic of Tanzania. Under the proposed revised Constitution, persons will be able to appeal against decisions of the Court of Appeal by filing a memorandum of appeal to a Supreme Court (yet to be established).

- 2.8 The legal system of Tanzania has several tiers. At the apex there is the Court of Appeal, which exercise appellate jurisdiction from the High Court of the United Republic of Tanzania and the High Court of Zanzibar. There are High Courts on the Mainland and in Zanzibar and a system of District Courts and Resident Magistrates Courts for each of the 130 districts each under a District Court Magistrate. The High Court has separate divisions dealing with land, housing, tax, labour and commercial matters.
- 2.9 The Primary Courts are the lowest courts in the legal system. The Kadhi Court and Kadhi's Appeal Court operate only in Zanzibar and deal with matters arising out of Islamic law. There are also specialized tribunals dealing with land, housing and tax matters.
- 2.10 To date, the case reporting system in Tanzania is not co-ordinated. It is therefore difficult to be certain as to whether or not there is a specific Tanzania authority on a particular point. Although when dealing with a Tanzania law matter, one is advised to be as diligent as possible in obtaining as many authorities as possible through various means, it is not possible to rule out the possibility that one may have missed out an authority that may be relevant to the matters under consideration.
- 2.11 Where there is no local judicial authority, the Tanzania courts may consider case law from other jurisdictions, including England and other Commonwealth countries. As a matter of practice, English case law and cases from other Commonwealth countries are often cited in court proceedings. Judicial authorities from outside Tanzania are generally of only persuasive authority and are not binding.
- 2.12 Legislation relevant to child marriage in Tanzania:
- (a) Law of Marriage Act 1971 (CAP 29 RE 2002).
 - (b) Judicature and Application of Laws Act (CAP 358 RE 2002).
 - (c) Law of the Child Act 2009.
 - (d) Penal Code (CAP 16) Revised Edition 2002.
 - (e) Special Offences, Special Provision Act 1998.
 - (f) Education Act 1978.
 - (g) Education (Expulsion and Exclusion of Pupils from School) Regulations GN 295 2002.
 - (h) Written Laws (Miscellaneous Amendment) (No 2) Act 2016.
 - (i) Local Customary Law (Declaration) Order GN 279 1963 ¹
 - (j) Islamic Law.
 - (k) Islamic Restatement Act 1964.
 - (l) Hindu Law.

¹ Made under Section 12 Judicature and Application of Laws Act (CAP 358 RE 2002)

- (m) Hindu Marriage Act 1955.
- (n) Child Marriage Restrain Act 1929.
- (o) Prohibition of Child Marriage Act 2006.
- (p) Constitution of the United Republic of Tanzania 1977.

3. Law of Marriage Act 1971 (Cap 29 RE 2002)

- 3.1 The Act is the primary instrument governing marriage and family law in Tanzania.
- 3.2 Section 9: ² defines marriage as *"the voluntary union of a man and a woman intended to last for their joint lives"*.
- 3.3 COMMENT: On the question of voluntary consent, this is not necessarily the case in child marriage since on the one hand one can't impute free consent on a child. Further, section 17 of the Act empowers parents to issue consent for marriage of a girl below the age of 18. The section goes further to empower the Court to issue consent where a parent/guardian *"unreasonably"* withholds or *"it is impracticable"* to obtain consent.
- 3.4 Section 13 - Minimum Age – *"No person shall marry who, being male has not attained the apparent age of 18 years, or being female, has not attained the apparent age of 15 years"*. The section also provides an exception, where there exists *"special circumstance"* to make the proposed marriage desirable to permit male or female younger than 18 and 15, respectively to marry where they have attained the age of 14 with court's permission.
- 3.5 Furthermore, the Act permits a marriage to be conducted in religious or customary form, which may give leeway for some children to be married at even younger ages where such religious or customary practices allow. Section 25(1) states:

"a marriage may, subject to the provisions of this Act, be contracted in Tanganyika where the parties belong to a community or to communities, which follow customary law, in civil form or according to the rites of the customary law".

4. Judicature and Application of Laws Act (CAP 358 RE 2002)

- 4.1 The Act among other provides for the applicability of Customary and Islamic law under Section 11. However, under section 11(4) of the Act, it clearly states:

"Notwithstanding the provisions of this Act, the rules of Customary law and rules of Islamic law shall not apply in regard to any matter provided for in the law of Marriage Act".

5. Law of the Child Act 2009

- 5.1 The Tanzanian Law of the Child Act was promulgated to provide reform and consolidation of laws relating to children and protection of their rights.
- 5.2 This Act provides under section 4(1) that *"a person below the age of 18 years shall be known as a child"*. It goes further to state under sub section (2) that *"the best*

² Law of Marriage Act 1971

interest of the child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies". However, the Act is silent and does not expressly prohibit or address the issue of child marriage or forced marriage.

5.3 The Act tends to provide protection for the child in various circumstances such as:

- (a) Best Interest of the child being paramount as per Section 4(2);
- (b) Prohibition of cultural practice that affects the child as per Section 13; and
- (c) Prohibition of Female Genital Mutilation as per Section 158 A.

6. Penal Code (CAP 16) RE 2002

6.1 This Act is a penal legislation and creates various offences which include offences against a child.

6.2 Section 130 of the Act deals with the offence of rape, whereby "*it is an offence for a male to rape a girl or a woman*". However, under its subsection (2)(e) it provides that a man who has sexual intercourse with a girl below 18 years with or without her consent commits an offence unless the woman is his wife who is 15 or more years of age and is not separated from the man. Thus, the law acknowledges child marriage in Tanzania of a girl who is not below 15 years of age.

6.3 Section 138 which has been amended by the Law of the Child Act 2009 makes it an offence for a man married to a woman under the age of 18 to attempt or to have sexual intercourse with her, with or without her consent.

7. Special Offences, Special Provision Act 1998

7.1 This Act came to amend the provisions of a number of laws including the Penal Code and the Evidence Act in respect of the sexual offences and adducing of evidence in such matter and matters incidental to that.

7.2 The Act does not criminalise child marriage.

8. Education Act 1978

8.1 Section 35 makes it compulsory for children between the ages of 7 and 13 to be enrolled for primary education.

8.2 Section 60(1)(k), as amended by the Law of the Child Act 2009, makes it an offence to impregnate a pupil; but is silent on child marriage of a pupil.

9. Expulsion and Exclusion of Pupils From School) Regulations GN 295 of 2002

9.1 This Regulation has been made under the Education Act. It provides for expulsion of pupils from school where the pupil has committed offence such as theft, malicious injury to property, prostitution, drug abuse or offence against morality whether or not the pupil is being or has been prosecuted for an offence³ or where pupil is married.⁴

³ Regulation 4(b)

⁴ Regulation 4(c)

9.2 COMMENT: The regulations have led to increases in school dropout, expulsion of married children, discrimination of pregnant and/or married children while infringing on their rights to education.

9.3 At variance, in Zanzibar there is a law known as Protection of Spinster and Single Parent Act, 2005⁵ which allows young mother to return and continue with school after delivery. Further, Zanzibar Marriage law allows girls at the age of 18 and above to get married while still at school.

10. Written Laws (Miscellaneous Amendment) (No 2) Act 2016

10.1 The Act amends Section 60 Education Act Cap 353 to make it unlawful under any circumstance to marry a primary or secondary schoolgirl or boy and any person who impregnates a schoolgirl, commits an offence and is liable to imprisonment and or fine.

10.2 COMMENT: The Act fails to protect children who are not enrolled at school.

11. Local Customary Law (Declaration) Order GN 279 of 1963

11.1 Allows each ethnic group to follow and make decisions based on its customs and traditions.

11.2 COMMENT: This clause is particularly relevant to child marriage, since some communities in Tanzania favour early marriage due to various reasons, poverty being the major factor for child marriage.

12. Islamic law

12.1 There is no minimum age on Islamic law pertaining to marriage.

12.2 Islamic law allows an Islamic man or woman to contract marriage provided he or she has attained puberty.

13. Hindu Laws

13.1 The Hindu Marriage Act of 1955 governs Hindu marriages and provides the minimum age of marriage to be 18 years for female and 21 years for male under Section 5(iii).

13.2 Furthermore, Hindus have enacted laws to protect the children against child marriage; these include:

(a) Child Marriage Restrain Act 1929; and

(b) Prohibition of Child Marriage Act 2006.

13.3 The Acts provide further protection to the children. For instance a child can nullify the marriage after attaining the age of adulthood.

14. Constitution

14.1 The Constitution does not provide minimum age for marriage.

⁵ Act No 4 of 2005

14.2 Although the Constitution is silent on the age for marriage, it provides for the right to equality under Article 12 as follows:

"(1) All human beings are born free, and are all equal.

(2) Every person is entitled to recognition and respect for his dignity."

14.3 It also provides under Article 13 for protection and equality before the law ⁶ and protection against discrimination ⁷ and discriminatory law. ⁸

14.4 Despite the reassurance and the protection provided under the Constitution, there are still in existence several legislation which violate girls' right to equality before the law.

15. Process for legislative change

15.1 The power for legislative change in Tanzania in respect of all union matters and matter of mainland Tanzania is vested in the parliament⁹ and for all non union matters in Tanzania Zanzibar is vested with the House of Representative. ¹⁰

15.2 The process is conducted through debating and passing of bill tabled before it as per Article 97 ¹¹ which provides as follows.

"97(1) Subject to the provisions contained in this Constitution, the Parliament shall exercise its legislative power through the process of debating and passing Bills which eventually shall have to be assented to by the President, and a Bill shall not become law unless it is so passed by the National Assembly and assented to by the President in accordance with the provisions of this Article."

15.3 The Constitution further provides that a bill passed as aforesaid by parliament need to be assented by the President to become law. It also provides for eventuality and the procedure where assent has been withheld under Article 97(2), (3) and (4) states:

"(2) After a Bill is presented to the President for his assent, the President may either assent to the Bill or withhold his assent, and in the event the President withholds his assent to a Bill, he shall return it to the National Assembly together with a statement of his reasons for withholding his assent to the Bill.

(3) After a Bill is returned to the National Assembly pursuant to the provisions of this Article, it shall not be presented again to the President for his assent before the expiration of six months since it was so returned, except if at the last stage in the National Assembly before it is again presented to the President, it is supported by the votes of not less than two-thirds of all the Members of Parliament.

(4) If a Bill is returned to the National Assembly the President, and it is then supported in the National Assembly by not less than two-thirds of all Members of Parliament as provided in Sub article (3) and it is presented a second time to the President for assent within six months of its being so returned, then the President shall be obliged to assent to the Bill within twenty-one days of its being presented to him, otherwise he shall have to dissolve Parliament. "

⁶ Article 13 (1)

⁷ Article 13 (4)

⁸ Article 13 (2)

⁹ Article 64 of the Constitution of the United Republic of Tanzania, 1977 (as amended)

¹⁰ Article 64 (2) of the Constitution of the United Republic of Tanzania, 1977 (as amended)

¹¹ The Constitution of the United Republic of Tanzania, 1977

- 15.4 The Constitution under Article 97 (5) empowers the Parliament to enact laws which confers to any person or department of Government to make regulations, it provides:

(5) The provisions of this Article or Article 64 of this Constitution shall not prevent Parliament from enacting laws making provisions conferring on any person or department of Government the power to make regulations having the force of law or conferring the force of law on any regulations made by any person, or any department of Government”.

- 15.5 A bill can be tabled before the Parliament by the Government or any member of the parliament by way of a private MP’s motion.

16. Key players

- 16.1 The key players in legislative reform are varied from the level of the grass root to the President who ultimately assent the passed bill. The key players and their roles may be summarized as set out below.

- 16.2 Advocacy Groups are key to raise awareness, decimate information and gather support for the proposed changes from the grassroots, government to parliamentary level. Thus, it is critical to identify and involve key advocacy groups such as such as TAMWA, TAWLA, LHRC, CDF, etc.

- 16.3 Grassroots support for the proposed changes is very important. The proposed changes will touch upon some cultural and religious beliefs and resistance should be expected from some communities besieged with poverty and ignorance. The importance of advocacy will be seen here.

- 16.4 The Government in the form of key Government Ministries and Agencies need to be fully involved. The Government will not only be the proponent of the bill but its agencies will ultimately be the one to implement any new changes. The key players are (though not limited to these) are:

- (a) The Office of the Prime Minister
- (b) Ministry of Justice
- (c) Attorney General’s Chambers
- (d) Ministry of Education
- (e) Ministry for Health, Community Development, Gender, Elderly and Children,
- (f) Law Reform Commission
- (g) The Cabinet

- 16.5 Parliamentarians are also important not only because of their role of passing the bill but also will be useful to decimate the importance of the proposed changes to their constituencies.

17. Legal history of the specific bills and laws

- 17.1 Law of Marriage Act 1971 (Cap 29 RE 2002)

- (a) The law of Marriage Act has been in force for 45 years since its enactment in 1971. There have been several amendments to various sections of the Act but none addresses the issue of child marriage. There have been efforts to amend and raise the minimum age of marriage to 21 years. Efforts have led up to White Paper being tabled before the Cabinet in March 2010. However, it met with opposition which led to its withdrawal for further studies.
- (b) There is also the school of thought that piecemeal amendment of the Law of Marriage Act should not be encouraged. The proposal is for a comprehensive review. The Law Reform Commission and other stakeholders have pushed for the change.
- (c) Despite slow progress in the fight to amend the Law of Marriage Act to remove child marriage, the High Court has revived the fight by declaring the controversial sections 13 and 17 unconstitutional in the case of *Rebeca Z. Gyumi v AG*,¹² and recommended that the eligible age for marriage be 18 years for both boys and girls. This decision of the Court has prompted the Minister of Health, Community Development, Gender, seniors and Children to state that it intends to send a Bill to amend the Act.¹³ However, the Attorney General dissatisfied with the High Court decision has filed a Notice of Intention to Appeal to the Court of Appeal of Tanzania. This landmark case has therefore to reach its final conclusion.

17.2 Law of the Child Act 2009

- (a) The Law of the Child Act addresses the issue of child rights, promotes and protect the welfare of children and protection. This Act amended several provisions of the Law of Marriage Act but unfortunately the issue of child marriage was not addressed. Though it amended the Law of Marriage Act by defining a child to be a person under the age of 18, it failed to make any significant changes in relation to age of marriage.
- (b) Section 13 was left intact while section 17 which deals with requirement of consent for female below the age of 18, of the Law of Marriage Act was merely amended to remove the provision which stipulated if the parents and guardian are dead, no consent is required.
- (c) The Act has recently been amended by the Written Law (Miscellaneous Amendment) Act.¹⁴ The amendments among other things prohibited and penalise genital mutilation of female children.

17.3 Penal Code (CAP 16) RE 2002

- (a) The Penal Code has received many amendments. Recently it has been amended by the Sexual Offences Special Provisions Act 1998 and the Law of the Child, 2009. The Penal Code has imposed stringent penalties in relation to offences against children and morality offences. With the amendments introduced by the Law of the Child, under section 138, the age for the offence of defilement by a husband of a wife has been raised from 15 to 18. In effect, this section makes it an offence to have sexual intercourse with someone below the age of 18. It has brought a new welcoming dimension to the fight against child marriage in that

¹² Misc. Cause No.5 of 2016

¹³ *ibid*

¹⁴ No. 2 of 2016

though it does not prohibit child marriages, it makes it illegal to have sexual intercourse with a wife who is below 18 years.

17.4 Education Act 1978

- (a) The Act has seen several amendments. The notable amendment related to the current issue is the one effected by Written Law (Miscellaneous Amendment) Act No 2 of 2016, which prohibits and makes it an offence to marry or/and impregnate a primary or secondary school girl.

18. Best legislative reform strategy

- 18.1 Participatory legislative reform which starts from awareness building and acceptance of the proposed changes from the grassroots to the highest level should be encouraged. The proposed changes will ignite a debate as it touches upon cultural and religious beliefs. However, since "the best interest" of the child is paramount, proposed changes should prevail.
- 18.2 There may be proposals that the proposed changes to be included with other amendments to the Law of Marriage. This may consolidate the support and widen the advocacy group, which may lead to meaningful and substantive changes.
- 18.3 There will be a need to follow up and ascertain the status of earlier proposal which sought to include such changes in the proposed new Constitution.

19. Other local legal issues

- 19.1 The following issues need to be pondered upon:
 - (i) Need to address and harmonise laws which provide different definition of who is a child.
 - (ii) Reconcile and harmonise the definition of a child and marriage age of a child in mainland Tanzania and Zanzibar to ensure the spirit of protecting against early child marriage is throughout the United Republic of Tanzania.
 - (iii) Ratification of international instruments which ban child marriage.
 - (iv) Need to address pregnancy of school going girls which many times lead to marriage as a result of cultural and religious beliefs.