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*523 TANZANIA: BUILDING A NEW FAMILY LAW OUT OF A PLURAL LEGAL SYSTEM

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I. INTRODUCTION

This Survey highlights two closely related trends that have played a significant role in recent developments in Tanzania family law. The first trend is the sustained efforts of superior courts to create a new blend of family law out of a plural legal system. The second trend is that, despite the creative efforts of the courts initiated by the enactment in 1971 of the Law of Marriage Act (LMA), the delay in the enactment of uniform statutory provisions on property succession and on children's status has forced the superior courts to make crucial decisions concerning choice of law applicable to a given dispute. Judges have had to improvise by expanding certain provisions of the LMA so as to cover a wide range of disputes relating to inheritance and to children born out of wedlock.

This Survey also discusses the application of section 160(2) of the LMA, which governs the legal consequences that follow the rebutting of the marriage presumption. It is submitted that, because section 160 (LMA) has continued to generate much judicial disagreement, the time has come for the legislature to intervene. The last section of the Survey contains an overview of the Law Reform Commission's discussion paper on the proposed uniform law on succession.

II. BACKGROUND TO THE UNIFORM LAW OF MARRIAGE

When the Tanzania MA was enacted in May 1971, it was believed generally that the new law would go a long way towards reducing the problems of choice of law in private law disputes. Plural legal systems such as those found in sub-Saharan Africa are a product of colonial *524 occupation. [FN1] They exist simply because Western law was received into these states, while at the same time, the colonial authority granted limited recognition to existing indigenous systems of law and religious laws. This process resulted in something of a legal cocktail, which later evolved into a single legal system.

Judges empowered to administer these systems had to determine the proper law applicable to a given transaction or dispute-a particularly complex task in the area of private law. [FN2]

As would be expected, the majority of people for whom indigenous law was applicable were African, while Europeans and people of other cultures preferred Western law. Africans who adopted the Islamic faith also acquired an additional system of law (besides African customary law) that courts could apply to them in some contexts. [FN3] However, because of social and economic transformation, including the influence of Christianity, as well as the growth of urban centers, a number of Africans became partially incorporated into the Western system. Hence, although they remained largely traditional in outlook, they occasionally engaged in transactions that Western law governed. These include cases of individuals who contracted monogamous civil or Christian marriages or those who opted to transfer their property on death by testamentary disposition according to Western law.

A fascinating aspect of this historical development is the fact that people rarely confined their actions within one system of law. They tended to draw from all the various systems whenever it suited them best. Perhaps no one would have expected otherwise.

A man, for example, would contract a Christian monogamous marriage and, yet, several years later contract an additional customary *525 marriage without first seeking a proper divorce. The result was that, contrary to the couple's expectations, the second marriage would be void under the general law and the resulting children would also be illegitimate. Should the man die without leaving a will, the courts had to determine whether his way of life was such that he considered himself a member of his customary community. If so, customary law would apply, and if not, the general law would apply. [FN4] This is indeed what happened in the famous Kenya case of S.M. Otieno, in which the widow and the late Otieno's clan fought bitterly over the right to bury his dead body. [FN5]

On the other hand, certain crafty individuals would take advantage of this plural system to dispute their obligations to their customary law wives by claiming that they were not legally married to them. Very often the more experienced players in this choice of law game victimized the less experienced, especially the women and their children.

Lastly and by no means least, these various systems of law provided different remedies for comparable relationships. For example, a woman married under customary law or Islamic law could be divorced extra-judicially, thus blocking the state courts from determining matters such as reallocation of family property or custody of children. Therefore, it was rightly thought that the pluralistic legal system was discriminatory because it tolerated the existence of double standards in the administration of family law. [FN6]

It is against this background that the LMA was enacted in 1971. The LMA made provisions for the integration of a substantial body of laws and principles derived mainly from the Islamic law, African customary law and the English common law. Yet, the integration programme *526 also included a reformist agenda designed to improve the status of married women and provide greater protection for children.

In the pursuit of these twin objects (i.e. integration and reform) the LMA introduced a number of statutory provisions that are applicable to all married couples, irrespective of the form of marriage they may have contracted. These

provisions include, for example, the requirement for mutual consent to marriage, provisions regarding capacity for marriage (including minimum age), the abolition of extrajudicial divorce and the empowerment of courts to make orders regarding reallocation of property on divorce and the upbringing of children. But, the LMA also gave recognition to existing procedures for contracting religious and customary marriages and did not seek to abolish polygamy. Perhaps to avoid too sudden a break with the past, the LMA also required courts, where appropriate, to respect the customs and religious beliefs of the parties where these were not in conflict with the express statutory provisions.

It is submitted that the twin elements of the LMA, integration and reform, provide a very helpful guide to understanding the developments in the family law of Tanzania, not only in relation to the year under review but also in respect of the period since 1971. The aim of this survey , therefore, is to outline how the courts have performed this delicate procedure of molding a new family law through the process of reforming as well as integrating the various systems of law within the mandate of the LMA.

To illustrate this process, two areas have been selected, matrimonial property and inheritance, and the guardianship of children born out of wedlock. This survey will rely on these areas to argue that the task of the senior judges, already difficult, is rendered more complex by the delay in enacting uniform laws to govern property succession and to regulate the status of children born out of wedlock. If only to show that the situation is not entirely desparate, the survey ends with a short report on the current efforts to introduce a uniform law of succession.

III. THE ROLE OF THE COURTS IN THE INTEGRATION PROCESS

Although several studies conducted after 1971 show that the process of integrating family laws has not been a total success, no one has yet suggested that it has failed. Indeed, many studies show that courts have made significant contributions toward the process of reform and the integration of the three systems of law, despite the slow pace of *527 statutory reform. [FN7] In what follows, I will show how courts have performed this task during the year under review.

A. Division of Property

Recently, in Doitha Thuway v. Amathi Bura , [FN8] the High Court held that the assets that the court has power to distribute under section 144 of the LMA include land and cattle. This important legal development has expanded the range of available property to former wives, particularly for rural couples. In Doitha Thuway, Munuo J. dismissed a former husband's appeal against the lower court's order granting to a former wife five head of cattle from the family herd. The husband's main objection was that the cattle were not part of the matrimonial property, and hence, the court had no jurisdiction to distribute them. The husband had inherited the herd from his father. The wife contended that she had tended the cattle and that through her efforts the herd had increased in size.

Dismissing the husband's appeal, Munuo J. noted that although it was true that the appellant husband had inherited the cattle, "it is equally true that the cattle became part of the matrimonial assets upon which the spouses worked to generate family income and more cattle." The judge also affirmed the lower court's order, which granted the wife five acres from the family land for her own personal use.

This decision is significant because in certain Tanzanian communities land belongs exclusively to the lineage, and as such, it cannot be given away to a former wife. This feeling is so strong that in more recent years, the same rule of customary law has been extended ingeniously to non-lineage land that the husband might have purchased or inherited and that the whole family might have improved upon. Before this decision, objection to the distribution of family land could be based on the provisions of section 144(2) which state that in exercising the power conferred by sub-section one of section 114, the court shall have regard to the "customs of the community to which the parties belong."

*528 With regard to rights in cattle, some pastoral communities also exclude women from owning cattle. Here again, cattle wealth represents the traditional focal point of lineage survival and continuity. In these societies, cattle play a significant role in bridewealth transactions. The foregoing decision shows that the customary law governing property is undergoing a process of change and integration in that former wives are now permitted to acquire rights in their former husband's land and cattle. [FN9]

B. Property Rights of Cohabitants

Another area of quasi-matrimonial property law in which courts have played an integrative cum reform role concerns the property rights of cohabitants. Before 1971, the legal status of cohabitants was uncertain, and their relations existed outside the general law. Although the codified customary law contained limited provisions, especially those concerning the distribution of property at the end of cohabitation, these were considered unsatisfactory to the growing number of urban cohabitants who did not look to customary law for remedies. It was with the object of reorganizing the emerging class of unmarried couples that section 160 of the LMA was included.

The section provides that when two persons of the opposite sex cohabit as husband and wife for a minimum period of two years under circumstances in which they acquire a local reputation of being married, the law will presume them to be married, and it will presume their children, if any, to be legitimate until someone rebuts this presumption in a court of law. As long as no one rebuts the statutory presumption, the parties remain husband and wife. However, should someone rebut the presumption, the court that holds the said presumption rebutted has jurisdiction to determine issues relating to financial provisions and to the distribution of property and the custody of children. In such cases, the court exercises similar jurisdiction as if the relationship had ended through formal divorce.

What has been happening in recent years however, is that courts have assumed jurisdiction under section 160(2) to distribute a couple's property even in cases in which parties had no initial capacity to contract *529 a marriage. Some have alluded to the jurisprudential difficulties of extending this section to cohabitants who lack initial capacity to contract a marriage. I have argued elsewhere [FN10] that this interpretation is unfortunate, because those who, on a correct interpretation of the section, are excluded from the purview of section 160 are the very persons whose protection was originally contemplated. The basis of my argument against a wide interpretation of section 160 is that it seems absurd that the LMA should presume the existence of a marriage relationship, which it specifically prohibits and which it also renders invalid if formed in contravention with its provisions. [FN11]

The case of Joseph Sindo v. Pasaka Mkondola [FN12] provides the latest evidence that courts are reluctant to turn away applicants-the majority of whom are women-who seek the remedies that section 160 LMA allows to those whose marriages can be properly presumed. This case came to the High Court as a second appeal from the district court. The Court had to decide two main issues. First, the court had to determine whether the lower court had jurisdiction to dissolve a relationship of uchumba (i.e. cohabitation outside marriage), and second, it had to decide whether the court had jurisdiction to order the division of property the parties acquired during their cohabitation.

The appellate judge answered the first question in the negative, noting that because the parties merely had lived in concubinage and were not married, the court had no power to dissolve their union. Concerning the second question, the Court held that section 160(2) authorizes courts to order division of property "where it has been proved that both man and woman have contributed to the acquisition of such property." The significance of this decision and other similarly decided earlier *530 cases is that the post-divorce remedies available to married couples now have been extended to cohabitants and their children. This is a spectacular development of the law made outside the walls of parliament. In this respect, Tanzania law has been reformed well ahead of countries such as Britain, where despite the social acceptance of non-marital cohabitation, courts have no power to make property orders in favor of such couples. Until 1989, courts in England could not even make orders relating to the upbringing of children born out of such cohabitation. [FN13]

C. Co-Wives' Property Rights on Divorce

One important aspect of the LMA that has remained uncontested is the question of what guidelines courts are to follow in ordering division of matrimonial assets in cases where a polygamously married wife is divorced, while her co-wife or co-wives remain married to her former husband. This question is important largely because the LMA appears to contemplate only the divorce of couples who are monogamously married. The case of Maryam Mbaraka Saleh v. Abood Saleh Abood [FN14] and a senior co-wife's application for review, provide a timely opportunity for a brief exploration of this issue and also to point at the difficulties of blending differing systems of family law into a single system.

The marriage between Abood Saleh Abood (the husband) and Maryam Mbaraka Saleh (the wife) was dissolved in 1988. The couple contracted an Islamic union in 1978 and had one daughter. The major dispute between them related to the Magistrates' Court's order, which awarded the wife a fifty percent share in the house located in the City of Dar es Salaam. [FN15] The husband successfully appealed to the High Court against the lower court's decision, but on further appeal by the wife, the Court of Appeal held that the wife had made a contribution within the meaning of section 144 of the LMA, and therefore, she was entitled to a forty percent share in the house.

*531 What the husband's counsel apparently overlooked and was not drawn to the attention of the appellate court, or indeed even raised in the courts below it, is that the husband also was married (apparently before 1978) to Farkha Abood (the co-wife), with whom he still cohabited.

Following the final decision of the Court of Appeal, the co-wife applied to the Court of Appeal for review of its decision on the ground that she, as a senior wife, also was entitled to a share in the matrimonial assets. In effect, the co-wife sought to reopen the entire dispute over matrimonial

property, so the court could consider her share in the assets as part of the overall distribution scheme. After legal argument concerning preliminary technical issues, the Court of Appeal dismissed the co-wife's application with costs. The basis for striking the application was, inter alia , that the co-wife was not a party to any of the previous proceedings. [FN16]

The Abood decision has raised, albeit indirectly, the long-standing question of whether section 144 of the LMA protects the economic interests of the remaining co-wives as well as their children. The current law, as the Court of Appeal noted in the instant case, is that the court can exercise its power to distribute matrimonial assets only when it is terminating a valid marriage by a divorce decree, or when it is making an order for judicial separation or perhaps when it is pronouncing a nullity decree in respect to a voidable marriage. [FN17]

Under these circumstances, a co-wife, unless also divorcing, cannot be a party to such proceedings. [FN18] This conclusion suggests that when a co-wife petitions for divorce or judicial separation, she will have a priority right to a share of the matrimonial assets. Hence, unless co-wives *532 take care to ensure that the court safeguards the co-wives' undeclared property rights, injustice to the co-wives might result. [FN19]

At the present time, because co-wives cannot be parties to the original divorce petition, they have to depend upon their husband's skill to persuade the court that they too have made substantial contributions to the family assets, and the court should preserve their share. This is what seems to have happened in Abood , where Farkha Abood, the senior co-wife, realized too late that the court had awarded forty percent of the house, constituting part of the family assets, to the outgoing co-wife Maryamu Abood.

It seems that the reason why the application of section 144 of the LMA to polygamously married couples leads to such unsatisfactory results is that the section was drafted without consideration of the circumstances of couples who are polygamously married. Again, one would wonder why it took nearly two decades to discover this flaw. [FN20] The answer seems to lie in the history of section 144.

From 1971 until 1983, when the Court of Appeal in Bi Haiva Mohamed v. Ally Sefu [FN21] held that a spouse's housework and child care qualified as a contribution within the meaning of section 144, it was believed that housewives were not entitled to a significant share in the matrimonial assets on separation or divorce. That is probably why the problem was not discovered until Abood .

Another point to be stressed in this context is that very few women in Tanzania are willing and able to pursue their new matrimonial rights in the courts of law, even when these rights are spelled out clearly and are known to the women. In these circumstances, cases such as Abood and Bi Hawa Mohamed are significant exceptions rather than the rule. Indeed, our research in parts of Tanzania has shown that even in cases in which women take the initiative to petition *533 for divorce, many of them do not apply for division of family assets. [FN22]

It is submitted that the Aboods' case provides a timely opportunity for the legislature to make the necessary changes in the LMA to institutionalize appropriate protection for polygamously married spouses. In the next section, I will focus attention on the developments relating to children born out of wedlock and how courts also have endeavoured to bring them into the ambit of

the LMA.

D. Widows' Inheritance Rights

Another area that has attracted comparable judicial creativity concerns the inheritance rights of widows. This development is illustrated by the decision in Asha Mbulayambele v. William Shibungi , [FN23] where the High Court held that although under Islamic law, a widow is entitled to inherit one-eighth of her late husband's estate, there were strong reasons for allowing her to take fifty percent of the estate. The court reasoned that if it applied Islamic law of succession in this case, it would result in a distant cousin of the deceased inheriting a substantial share of the estate, thus leaving the widow with only a small portion on which to live. The couple had no living children nor any known close relatives other than the distant cousin.

Chipeta J. agreed with the widow's attorney that the court should apply principles contained in section 144 of the LMA to the case, instead of Islamic law. The appellate judge noted, "where there is clear statutory law governing a point, and such law is more in line with equity than some other law on the same point, such as customary or Islamic law, then statutory law should prevail." [FN24] In the judge's opinion, it would be highly inequitable to dispossess a widow of almost all her husband's property, which the spouses obtained through their joint efforts, simply because the marriage ended as a result of the husband's death instead of a divorce. [FN25]

*534 In the 1989 Survey , [FN26] I argued, in reference to the case of Scolastica Benedict , [FN27] that the apparent injustice of evicting a widow from the matrimonial home is more evident when one considers the provisions of the Tanzania new marriage law. The provisions protect the right of a deserted wife to reside in the matrimonial home, and they protect a divorced wife's property rights. The chairman of the Law Reform Commission expressed the same concern. He noted in 1993 [FN28] that one of the goals of the proposed law of succession was to ensure that the widow had no lesser property rights than a former wife under the LMA. Therefore, it is evident that the delayed enactment of a uniform law of succession is the major cause of this problem.

IV. GUARDIANSHIP OF CHILDREN BORN TO UNMARRIED PARENTS

The law relating to the guardianship of children born to unmarried parents in Tanzania has remained unchanged since the colonial era. Two parallel systems of law governing the guardianship of such children exist. On the one hand, there is the received Affiliation Ordinance, [FN29] which single mothers may utilize to secure nominal maintenance for their children. [FN30] The declaration of paternity under this ordinance does not remove the illegitimate status of such children. On the other hand, there is the Declaration of Customary law (1963), which permits putative fathers to legitimate their children by transferring a customary gift or cash to the woman's father or the maternal relatives. [FN31] The latter process may be accomplished easily out of court by the respective parties, but in cases of dispute, a local primary court may be asked to intervene. In either case, the guardianship of such children is determined by applying either the principles of customary law or the old English common law. Therefore, strictly speaking, the principle of the best interests of the child does not apply in these proceedings.

*535 A. The Welfare Principle: Good for All Children

The current state of the law governing children, as summarized above, has given rise to a situation in which the courts have felt the obligation to

extend the principle of the welfare of the child to disputes involving children born to unmarried parents. The decision in Halima Rashidi v. Amon Peter [FN32] provides a good illustration of the way courts have extended to all children the principle of the best interests of the child.

In this case, a mother successfully applied at a local primary court for an order of custody for her two children, born out of wedlock between her and the respondent. The children's father had taken the children from her when the couple's cohabitation ended. The children then were transported to another district to live with their paternal aunt. The father, who opposed the change in custody, successfully appealed to the district court against the order of the primary court, but its decision was subsequently overturned by the High Court on further appeal by the children's mother.

The High Court held that parental responsibility lies primarily with both parents, and therefore, it should not be delegated to a third party, such as a relative, unless exceptional circumstances exist. In the instant case, no such circumstances existed because the mother was willing and able to assume parental responsibility over the two children.

For its decision, the High Court relied on the provisions of section 125(l) of the LMA and on the principle of the best interests of the child, which the Act contains. Had the court applied the customary law of the parties, which traditionally is the proper law applicable to children born out of wedlock, the result would have been quite different. First, this is because under customary law, children either "belong" to the paternal side (if they are legitimate) or the maternal side (if they are not legitimate). [FN33] Second, the modern principle of the best interests of the child derived from English law applies only to children born in wedlock.

Halima constitutes another illustration of how senior judges are able to inject into customary law certain principles derived from English *536 law. [FN34] In this particular instance, the court has expanded the scope of section 125 LMA to enable courts to allocate parental responsibility without circumstances of the child's birth or by rules of customary law tying them down. Indeed, the appellate judge was quite aware of what he was doing when he pointed out that he knew the children were born out of wedlock and, therefore, were not entitled to benefit from the provisions of the LMA. However, he then argued, "the intention of the legislature in enacting the provisions of section 125 was to ensure that all children, irrespective of whether they are born to parents who are legally married to each other or to unmarried parents, are brought in and given maintenance to safeguard their welfare." [FN35] As noted above, this decision has opened new doors for children born out of wedlock, and if more judges endorse this view, it will constitute a positive move towards reducing the existing legal disability and discrimination illegitimate children suffer under Tanzania law. [FN36]

B. Inheritance Rights for Illegitimate Children

The case of Violet Ishengoma Kahangwa v. Adm'r Gen'l [FN37] points in another direction. It illustrates the fact that, unlike statutory reforms, changes made by judges are usually uneven and take much longer to accomplish. The case also reveals the difficulties judges who operate in a pluralistic legal system face.

In this case, two minors applied, through a next of kin, for a share of their late father's estate. The two main issues before the court were *537 first, to determine the law applicable to the dispute, and second, to

determine the status of these two applicants. The evidence the court accepted showed that Bruno Kahangwa, the deceased, married the children's mother in 1986, in accordance with the Haya customary law. This marriage was invalid, however, under the LMA because the deceased previously had contracted a monogamous marriage in 1982, and this marriage had not been dissolved legally. Therefore, in accordance with the LMA, the deceased lacked the legal capacity to contract a second customary marriage, and the children born from that union were illegitimate.

Notably, the probate court that decided the initial question of the applicable law to the distribution of the deceased's estate held that the customary law of the Bahaya community, to which the deceased belonged, was the proper law to apply. [FN38] However, when the question of distribution of the estate was considered, the same court held that the two children were not entitled to any share, because under Bahaya customary law, a child born to unmarried parents has no right to inherit his or her father's property on intestate death. What happened here is that a legal concept derived from the general law of marriage was superimposed on customary law to produce a result that disentitled two children from a share in their father's estate. [FN39]

Thus, the denial of inheritance rights to the applicants, though presumably sound in law, is a consequence of what might be called "runaway" legal pluralism. The feeling of uneasiness the final outcome of this case generates seems to have been shared by the Justices of Appeal who, in their effort to distance their judicial role from their own feelings as persons, noted that it would be advisable in such cases for fathers who feel morally bound towards their illegitimate children to make a proper testament before their demise. "That action would go some way to alleviate the hardship often facing illegitimate children; it would make easier the task of the courts in handling such cases when they came to court, and it would serve to put the conscience of the *538 putative father at some ease." [FN40] But, this is simply a cry in the wilderness, for as the Chairman of the Tanzania Law Reform Commission himself recently conceded, "most of our people do not know how to draw up a will that could be honored in a court of law because they are not aware of the legal requirements." [FN41] I dare say also that most people in Tanzania believe that drawing up a will is an invitation to death. [FN42]

V. THE LRC'S DISCUSSION PAPER ON SUCCESSION LAW

This survey would be incomplete if it did not reference the efforts the Tanzania Law Reform Commission (LRC) is now making to reform the law of property succession on death. The LRC officially commenced these efforts in January 1987, when the Tanzania government asked the LRC to "study and determine weaknesses in the present system of succession laws," and make appropriate recommendations for the enactment of a uniform law of succession comparable to the present structure of the LMA. In studying and making proposals for reform, the government directed the LRC to let the principles of equality and freedom of conscience guide it.

Since then, the LRC has held several public hearings throughout mainland Tanzania. In June 1992, the LRC published a discussion paper in which it outlined the main objects of the reform exercise. [FN43] According to the LRC Chairman, Justice R.J.A. Mwaikasu, the discussion paper has three main goals. The first is to state briefly what the present law of succession says and to point out its shortcomings. The second object is to communicate to the public the proposals for reform that the LRC wishes to make to the government, and the third is to generate further debate on these proposals before the LRC submits them to the government.

It is considered rather premature to give a detailed discussion of the LRC's paper here. This is mainly because one cannot predict what the final outcome of this exercise might be. The public consultations *539 are continuing, and it will be a while before the law of succession bill finally is presented to the legislature. This survey, therefore, will consider very briefly the major proposals and the objectives behind them. [FN44]

The LRC paper identifies four major weaknesses in the existing succession law. First, very often courts encounter difficulties in determining the system of law applicable in succession matters. Second, the rules applicable in cases of intestate succession are discriminatory to certain family members, such as women and children. Third, the rules governing the formal aspects of drafting a valid will are beyond the understanding of ordinary citizens. And finally, the current procedure used in the administration of estates, including the actual distribution of various entitlements to the beneficiaries, is unnecessarily bureaucratic and extremely slow.

It is evident from the LRC paper and from other published sources that the overall object of this reform is to provide an umbrella legislation, comparable to the LMA, under which the courts will accommodate and administer systems of succession law. But also, much like the LMA, the new law will eliminate certain rules that are considered to be discriminatory or simply exploitative and inequitable. [FN45] In the years following the enactment of new succession law, we will observe the courts once again engaged in what this survey has characterized as the delicate process of building a new succession law for a modern Tanzania.

VI. CONCLUSION

It is clear from the cases discussed above that the judge's creative efforts could not have been possible without the enactment of the LMA. What the LMA has done is to provide the framework in which judges can perform their judicial task. It is in this context that judges have tried their utmost to implement what they consider to be the intention of the legislature. The intention of the legislature, as has been noted before, is encapsulated in the twin objects of the LMA: the reform *540 and integration of Western law, customary law and Islamic law. Yet, as in all creative endeavours the risk of going beyond the mandate of the legislature is ever near. This is more so when it takes so long to provide a statutory solution to an urgent human problem. Hence, although in some of the cases we have considered, the judges have tended to overstretch the provisions of the LMA, this largely has been a consequence of the slow pace of the legislature in discharging its constitutional obligations. It is indeed to be hoped that when the new law of succession is finally enacted and the existing law relating to children is also reformed, judges will be able to perform their judicial roles effectively and without having to make too many improvisations.

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