

F A C U L T Y O F L A W

A DISSERTATION

'CONVERSION OF CUSTOMARY MARRIAGES INTO
STATUTORY MARRIAGES UNDER SECTION 9 OF
THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE
ACT CAP. 151 LAWS OF KENYA'

SUBMITTED IN PART FULFILLMENT
OF THE DEGREE OF BACHELOR OF
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P R E F A C E

This dissertation discusses a point in law which is not the only one that has been abused due to imposition of new laws embodying different norms and customs in Kenya. It is intended to serve as an example of the many conflicts of laws and practice which are happening in Kenya. Why I chose this particular topic, 'Conversion of Customary Marriages into Statutory Marriages', is because I believe the family is the miniature form of the society. Anything that disturbs the equilibrium of the family therefore disturbs the society as a whole. The African Christian Marriage and Divorce Act Cap. 151 goes to the very core of the African Society in Kenya. It tries to lay down terms on the way Africans who contract their marriages under it will conduct their marriages. It is therefore important to see why such an Act was passed and how far it has been successful. If it has failed we should also know the reasons which have led to this failure.

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C H A P T E R O N E

INTRODUCTION : AFRICAN CONCEPT OF MARRIAGE

The ~~main~~ distinctive feature of a customary marriage is that it is potentially polygamous in nature. The spouses' families are involved at almost every stage in the matrimonial relationship between the spouses prior to marriage. Marriage is therefore not a union of one man and one woman for life to the exclusion of all others as defined by the famous case of HYDE V. HYDE¹ and as incorporated in the matrimonial Causes Act², but a union of families. The complex ceremonies which have to be observed before a valid customary marriage comes into existence are the concern of the families of the parties intending to get married. It should also be noted that in most African communities, and probably in all such communities in Kenya, the payment for goods or services in form of a dowry are paid by the bridegroom or his family.

Professor Mbiti³ says that African societies recognize procreation as the supreme purpose of marriage. He says that in many African societies, a marriage is not considered as complete until a child is born. This is the basic reason for the institution of polygamy-procreation. As a result, many marriages have broken down for lack of children, and it is normally the view that the more the children one has the better. In procreation you become a 'co-creator with God'⁴. Professor Mbiti admits that other aspects of marriage which could make a childless union valuable and enjoyable are ignored, or their importance less stressed.

1 HYDE V. HYDE 1866 L.R. 1 P 2D 130

2 Matrimonial Causes Act Cap. 152 Laws of Kenya, 52

3 Love and Marriage in Africa. Chapter 5 p. 42 (London)
(Longmans 1973)

4 Ibid

The English concept of marriage is very different. Procreation is not necessary for the consummation of a marriage⁵. The marriage is mainly seen as a companionship between two people and more so a relationship of one woman and one man for life to the exclusion of all others. This is the main reason why polygamy is not a necessity. Monogamy is not basically a Christian doctrine because the Bible, as an authority of the Christian doctrine never attempts to make Christian marriages monogamous.

Another main difference between the Western type of marriage and an African customary marriage is in terms of dowry. Dowry is supposed to be a unifying force between the families of the spouses. There is a proverb in Kikuyu that says that you cannot finish paying dowry. This in itself implies that as long as the two people are married, you cannot sever the relationship of their respective families. A person doing research in this field would also note that dowry is very connected to procreation and divorce. Since my field limits me to analyse the effect of the African Christian Marriage and Divorce Act⁶ in terms of conversion, I shall only try and bring out the nature of an African marriage in so far as it can be helpful in throwing light on the fact of what conversion was trying to achieve. It was supposed to change a customary marriage, which was based on a social kind of union into a Western type of marriage, which was set on a capitalistic background.

A. J. Temu says ~~that~~ polygamy was only a part of the beliefs, customs and traditions which indicated a different family life⁷, in terms of social code and morals among Africans. He goes on to say that polygamy was ingrained in the 'tribal social fabric', and carried prestige and was of great social and economic significance in the African society. He goes on to comment that when missionaries were demanding that converts refrain from polygamy, they were demanding a revolution that was impossible. It meant 'a whole disintegration of a tribal social structure'⁸.

5 Baxter v. Baxter (1948) Ac 274

6 of 1931 Now Cap 151 Laws of Kenya & 9

7 A. J. Temu British Protestant Missions (London)
Longman 1972 P. 107

8 A. J. Temu British Protestant Missions P. 108

A meeting held in Kiambu in 1912 between the missionaries, chiefs and converts indicated (on record) the converts as saying, in regard to their being forced to stay within the premises of the missionary centres, that they wished to live with their fathers and not missionaries⁹. In this meeting, the converts expressed their wish to enjoy a christian/Kikuyu customary marriage. This meant that they were to accept christianity as long as it did not jeopardise their attachment to the basic values of their community.

The above analysis, as indicated above, is nothing more than an outline on the outlook of a customary marriage and that of a Western society. It was necessary to have these observations in trying to analyse the possibilities of converting a customary marriage into a statutory marriage, which was meant and based on a different social and economic structure. It is also important in helping us understand the obstacles that beset the passing of the 1931 Act, The African Christian Marriage and Divorce Act.

The next chapter will try and trace the historical background of the 1931 African Christian Marriage and Divorce Act.¹⁰

9 Hobley to Chief Secretary: April 25th and 26th 1912 Coast/652.
Kenya National Archives.

10 Ibid.

C H A P T E R T W O

HISTORICAL BACKGROUND OF THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT CAP. 151 LAWS OF KENYA

In tracing the origins of the 1931 African Christian Marriage and Divorce Act,¹¹ one has to go back to the 1897 Order in Council. It is essential to relate the attitudes of the colonialists with the passing of various Acts and more so to those related to the Act under discussion. Law has been used as an instrument of legitimising practices, colonial and neocolonial. It is therefore important to look at law as an essential element in justifying various steps undertaken by the colonisers.

The 1897 Order in Council¹² gave Native Courts jurisdiction in native matters of both criminal and civil nature. There was an exception to that rule, where a native was a party to a suit against a non-native - meaning that English law would apply. There was a qualification to this right of trying native matters by native courts in that the Chief Native Commissioner had the powers to establish and abolish such courts and he could also overrule a customary rule which was in his opinion contrary to natural justice and morality. This was due to the colonial attitude of 'civilising' the Africans by letting them keep only what was good in the view of the colonisers. This kind of attitude persisted and can be seen today in the Judicature Act,¹³ which says that customary law will be entertained as long as it is not contrary to natural justice and morality. The natural justice and morality which has to be the attitude of the natives was that of the Western society. Passing of this Order in Council of 1897, and the attitude incorporated in it should also be seen in the light of the Western economic set-up of the period. It was the period of laissez-faire and this meant that the Africans would also be allowed some kind of 'freedom' in deciding their matters as long as this was not injurious to the basic aims of imperialism. What this means is that the Chief Native Commissioner acted as a watchdog in guiding natives into what was 'morally right'.

11 Cap. 151 Laws of Kenya

12 Section 51

13 S. 3 of the Judicature Act No. 16 of 1967.

In 1902, the attitude of the colonisers had changed. What was later to be known as Kenya was seen as an area of settlement by settlers. Whilst the 1897 Order in Council had advocated the usage of the Indian Acts in accordance with the imperialistic idea of the day, it was seen differently in 1902 when English Acts were to apply. The attitude of the whites had changed from that of imperialistic exploitation to that of settlement. That is why the 1902 East African Marriage Ordinance fully incorporated the English law of Marriage and Divorce to any person who got married under it. This Act can therefore be seen as the prelude of the present day Marriage Act.¹⁴ The 1902 Order in Council¹⁵ repealed the 1897 Order in Council. Section 20 of the 1902 Order in Council was similar to the present day Section 3 of the Judicature Act, which is discussed above. This ~~has~~ meant that customary law would be relied on as long as it was not contrary to the English notion of justice and morality. The fact that the provision is still entrenched in our laws means that the superstructure which is being served by those laws has not basically changed. ~~Laws are there to serve a system and laws will more often than not change with the readjustment of a system.~~

The 1902 East African Marriage Ordinance applied to all those who married under it. It did not only affect the marriage matters but even matters of succession including intestate succession. It meant that any person who married under the Act had changed his personal law in toto to English law.¹⁶ In the 1902 Ordinance therefore, where a person married under the Act or was an issue of such a marriage, the English law of distribution of his property would apply. That is why the writer made an observation above that, this Ordinance can be seen as similar to the present day Marriage Act, and as decided in *AYOOB V. AYOOB*.¹⁷ There were two exceptions in case of an African. Under this Ordinance, if an African married under it, and he later died intestate, and without an issue, the property would devolve according to customary law. Under the English system, where a person dies intestate and without an heir, the property goes to the state as the ultimate heir under the doctrine of bona vacantia. The second difference with the English law was that in case of real property, it was the customary law of succession that was to apply. The basic assumption made by this Ordinance was like that one made in Nigeria where in the case of *COLE V. COLE*¹⁸ the court held that when an African marries under the English statute, he removes himself from customary law both in matters of marriage and succession.

14 Cap. 150

15 Section 28

16 Section 39

17 (1968) E.A. 72

18 1898

THE 1904 NATIVE CHRISTIAN MARRIAGE AND DIVORCE ORDINANCE

Cases like BENJAWA JEMBE V. PRISCILLA NYONDO¹⁹ where an African married in accordance with Anglican Church Rites in Freretown and later went away to his native home and "married" four other wives under customary law might have led to the passing of the 1904 Native Christian Marriage Ordinance. This Ordinance can be seen as the first version of the Act under discussion; the African Christian Marriage and Divorce Act of 1931. The main differences between the two Acts is that the 1904 Ordinance did not have conversion provision or the so-called protection of widows provisions. It was a simplified form of the 1902 Ordinance and was supposed to cater for the "simple-minded" natives. Section 9 of the 1904 Ordinance repealed section 39 of the 1902 Ordinance, and this meant that all Africans whether married under the Ordinance or customarily had the customary law of succession as their law in determining heirs and distribution of property after the death of a person ~~from the African community~~. The similarity of the 1904 Ordinance to the present day African Christian Marriage and Divorce Act means that there has been a perpetuation of the colonial legal process and as observed above, one can say that the laws are serving a system which has^o basic similarity with the colonial one. If the base of the society has not changed from that found during the colonial era, then the law which was a product of that system must go on serving the present system. The imperialistic view of civilising is still with us. African values which are regarded as inferior must be suppressed by those endowed with the "civilising machinery." The courts have therefore acted as the instruments of enforcement in supressing customary law, and the attitude is that customary law is inferior.

REASONS FOR PASSING THE 1931 ACT

It is the failure of the 1904 Ordinance that led to the need to change the law by passing the 1931 African Christian Marriage and Divorce Act. As indicated above, the 1931 Act provided a conversion provision, where an African could convert a potentially polygamous marriage^m to one which was monogamous. The general attitude as brought out by the court in R V. AMKEYO,²⁰ where the court said that an African marriage is not a marriage in the real sense of the law, was that any prior marriage

19 No. 36/1912 C. A.

20 YEALR 14 ?

subsequent or prior to a Christian marriage was null and void, and as such, of no legal effect. Conversion to many Africans in effect was either by choosing one of his wives as the "ring wife" or converting his potentially polygamous marriage into a statutory marriage.

Although the legal consequences of the 1904 Ordinance were the same as those of the Marriage Ordinance of 1902, it was a more simplified form of the former, yet allowing the Africans to marry according "to English Law and Custom".²¹ The 1904 Ordinance tried to reduce preliminaries to marriage and certain other conditions which were considered as onerous and inappropriate for Africans. Such marriages were allowed to be celebrated in churches, accompanied by christian rites and church ministers being recognised as registrars. This could be seen as "revolutionary" because by 1904, African marriage was regarded as "no more than a promiscuous sexual immorality". The 1931 Act can be seen not as a change to the validity of the African marriage but tolerance in terms of indirect rule. It was therefore an exploitative tolerance. While the 1904 Ordinance can be seen as having catered for marriages of christian natives, the 1931 Ordinance can be seen as a step from this with the main aim as an accommodation of native monogamous marriages, The 1931 Ordinance was now applicable where only one party confessed the christian faith. That is still the situation.

MISSIONARIES' VIEWS

The general attitude among the Western colonisers was that polygamous marriages were abhorrent and had to disappear. The main advocates of this attitude were the missionaries. The christian doctrines are nothing more than a Western type of life. The missionaries therefore confessed that polygamous marriages were contrary to the christian doctrine. The converts therefore were expected ~~only~~ to have one wife ^{only} or where they had many wives, they were expected to chase all but one who became the "ring-wife".

From the above, it is in order to make the point that the fight against polygamy has been one of the main wars the missionaries ^{have} had to fight. It has also been the main obstacle in spreading the christian faith. The 1931 Ordinance was important from the missionaries point of

21 The Stress Is Mine.

view in bringing out those Africans that were serious in following the christian faith. They also backed the penal sanctions not only from the point of cultural arrogance of the whites in forcing Africans to what they considered good for them but also in hope that they would enable them to contain their converts. As we shall see later, the 1931 Ordinance did not live to the missionaries' expectations. They forgot the point that the African family is a part of a social structure essentially different from that one found in the Western countries. The 1931 Ordinance, in my opinion went beyond what had been asked for. Matters regarding succession were to be guided by customary law. Although the 1904 Ordinance was passed after a lot of disagreements, it was nevertheless silent in its provisions in regard to succession. Succession of African natives estates was to be in accordance with their respective customary law. The matters relating to marriage were left to be decided in accordance with the English law of marriage.

ADMINISTRATORS' ATTITUDE

The change in attitude towards the colonies can also be seen in the light of the general attitude towards colonies in 1931. Britain had come from a strict Victorian period to the 1930s which were the heyday of indirect rule. During this period, the officials were less enthusiastic in their "civilising" mission. The administrators who were staunch believers in the policy of indirect rule saw customary marriage not necessarily as a "relic of a barbaric past but also a vital social institution."²² Some of them saw the customary marriage as probably preferable to the alien form of marriage imported by the missionaries and the marriage ordinances.

JUDICIAL OUTLOOK

The judiciary did not share the above attitude. Although the courts were doing nothing about the contravention of the 1931 Ordinance in matters concerning bigamy, they were strict in their interpretations and never recognised marriages among non-Christian Africans as marriages.

Hamilton C. J. in the case of R V. AMKEYO²³ said that "wife purchase comes much nearer to the idea of a customary marriage than that of a marriage as understood among civilised people." He went on in his judgement to say that women in a customary union are called "wives" or "married women" for lack of a better word to use. The court refused to be influenced by an earlier decision from Uganda in the case of R V. OUMA S/O ACHADA²⁴ where court said that a "wife" and a "husband" included parties to a customary marriage.

The courts on the whole in East Africa have tended to rely on the strict interpretation ignoring the fact that the recipients have different values based on their social and economic setting. As recent as 1963 the court of Appeal for East Africa relied on R. V. AMKEYO in deciding the case of ABDULREHMAN BIN MOHAMMED AND ANOTHER V. R²⁵ and held that a Makonde customary marriage was of impermanent nature.

The Administrators being somehow/conflict with the Missionaries at one time gave consideration of adopting an ordinance similar to the Nyasaland Native Marriage (Christian Rites) Registration, which not only allowed clergymen to celebrate marriages between African Christians but also allowed such parties after marriage to retain their customary law as their personal law. Apart from registration, such marriages had no further legal effects. Missionary opposition made such a course impossible to realise. The 1931 Ordinance was based on the understanding that any African who married under the Ordinance had his personal law changed from customary or traditional to English law. The opinion of the administrators can be deduced by a remark made by Parr, the then Governor of Equatorial Province of Sudan in a Memorandum dated 1938. He made the remark that the imposition of marriage ordinances to the Africans ^{were} disastrous because they were inappropriate in an African context. This was an indirect rule attitude of exploiting the system the way it was without trying to reform it. The 1931 Ordinance to some extent acted as a compromise between the Administrators views and those of the missionaries.

Coming nearer to the passing of the Act, it is / to observe the various reasons put forward by both the administrators and the missionaries in justifying the passing and the importance of the 1931 Ordinance.

23 Ibid

24 1915 2 ULR 152

25 1963 E A 188

when

In introducing the bill²⁶ the Colonial Secretary observed the failure of the 1904 Ordinance, in dealing with native christians. His main reason for recommending the new ordinance was to enable native christians already married according to native rights to change their marriage in accordance with the tenets of their new faith.

In a nutshell, the 1931 African Christian Marriage and Divorce Ordinance apart from incorporating conversion provision had other notions of "reform" which do not fall within my discussion.

A Mr. Conway Harvey, a member of the Legislative Council thought that the Ordinance would be too complicated for the people who were just "evolving from a state of barbarism", and completely incapable of "living a twentieth century life."²⁷

Most other members led by the missionaries were opposed to the divorce provisions and there was fear among these members that such a provision would make "these simple individuals drift back to paganism." This is another aspect that does not concern our discussion but it throws light in that the passing of the 1931 Ordinance was not due to the realization that a customary marriage was at per with a western type of marriage but in essence, it was a paternalistic ordinance which acted as a condescension of the Western Colonisers on behalf of the natives. This remark is strengthened by Canon Leaky's attitude in the Legislative Assembly. He thought that the Act would make native christians identify themselves with other christians in the world. It is by analysing the comments made by the members that one sees the truth behind the Ordinance. The Acting Colonial Secretary for instance in his defence for recognising the status of women and their rights to owning property said that there was no cause for alarm in regard to this provision, because "native women basically remained chattels and their property if any was nebulous." The ordinance was therefore hypocritical and a bogus acceptance of the African institution of marriage. When the Ordinance was passed, it ~~incorporated~~ ^{covered} marriages which had been celebrated under the native christian marriage Ordinance of 1904, and as a result thereof, the 1904 Ordinance was repealed.

The recipients of the Ordinance were never approached for their opinions. The legislative Council was composed of whites - not ordinary whites but those who were entrenched in the colonial exploitation of this land. This commitment to their own system was definitely going to be reflected by the laws they were going to pass, and the 1931 African

26 Legislative Council Debates 1931 Vol. II p. 535

27 Legislative Council Debates 1931 Vol. II p. 536

Marriage and Divorce Ordinance was no exception. And while one can say that the 1931 Ordinance was a tripartite agreement between the missionaries, the Administrators and the Africans, the later who were to be affected by the Ordinance were never told to contribute to the Ordinance in its crucial stage of formation. They were supposed to be incapable of ~~thinking~~^{knowing} on what was good for them, hence the paternalistic view.

The next chapter will show whether the lack of involvement of the recipients had effect in the future application of the ordinance. It will also show how the new Ordinance "improved" conditions from those of the 1904 Ordinance by inserting conversion among its provisions. It became an offence to contract another marriage while already married under the Ordinance. Two further similar offences were distinguished. If one was married under customary law, he could not go through a statutory marriage with another woman, and finally, the offence of bigamy - marrying another woman while already married. ^{was} We shall see later the enthusiasm with which the administrators enforced these provisions. Failure to enforce them would surely make them a dead letter within the Ordinance.

In summing up this chapter, one observes that the administrators wanted the "reform" of the 1904 Ordinance because as illustrated above, it lacked some essential provision. In case of the missionaries, they welcomed the 1931 Ordinance wholly (except and very vehemently the provisions on divorce). The missionaries saw the Ordinance not only as a test for their true converts but also as a containing ~~ordinance~~ through sanctions ^{to apply against} for those converts who went astray.

The convert who was the recipient, was supposed to accept it without a hunch. It was a "civilising" ordinance and since the Africans did not or could not know what was good for him, he was supposed to accept it and practice it for his own benefit!

C H A P T E R T H R E E

At the beginning of this chapter it is necessary to summarise the major propuses of African Christian Marriage and Divorce Act of 1931. It was observed in the previous chapter that the ordinance was in essence paternalistic. The first objective put forward by the legislators as a purpose for the ordinance was to provide a simpler procedure for Africans Christians in marrying through licenced ministers of the church. Secondly it was contemplated that the conversion provisions would enable African Christians who were already married customarily to convert their marriages to be in line with their new religious faith. Thirdly, the status of the African Christian widows was recognised in law, which was supposed to mean that they could attain majority and could therefore have a claim for guardianship of issues to their marriage and could also own their own property. Finally, the access to a court in case of a dispute within such a marriage was made simpler.

My area of discussion concerns the provision on conversion,²⁸ as laid down by the African Christian Marriage and Divorce Act. This Act talks of converting a customary marriage to a marriage that "BINDS THE PARTIES LEGALLY." From the Act it can be seen that conversion involves the tranformation of a potentially polygamous union, which with all respects is viewed by the English legal system as creating no legal obligations, to a Christian marriage which is not only monogamous but viewed as being LEGALLY BINDING.

The constitution puts the four systems of family law at par.²⁹ The four systems are statutory, customary, mohammedan and Hindu. It is interesting to analyse whether the African Christian Marriage and Divorce Act is ultra vires the constitution and therefore null and void to the extent of the inconsistency, when it refers to customary marriages as not being legally binding. This would be an interesting digression, but not consistent with the provision under discussion.

While the Constitution puts all four systems at par, the African Christian Marriage and Divorce Act contemplates a situation where customary marriages are not legally binding and therefore weaker than the statutory unions. The effect of this Act is that it makes the situation anomolous in that an African goes through a customary marriage (which

28 Section 9 of Cap. 151 Laws of Kenya

29 Section 78, 5-82

Morris³⁰ calls customary consideration) and then the spouses go through a church wedding. This practice is still persisting.

As indicated in the previous chapter bigamy is a criminal offence. This is to be found in the penal code,³¹ and is punishable by up to five years imprisonment. This is a sanction that accompanies conversion.

The reaction of the court in this country has been that the conversion of a customary marriage to a statutory marriage also changes ones personal law. The case in point does not completely fall under our discussion since it was people who married under the statute and they later thought they had converted their marriage to a Moslem one. The court in holding that talak could not be effective said that ones personal law is decided by the law of marriage. This was the case of AYOOB V. AYOOB.³² The ratio decidendi of this case can be applied to our discussion in that ones an african converts his marriage to a statutory one, his personal law is the law of marriage, and therefore it is the English law.

OTHER COMMON LAW COUNTRIES

As it shall be seen later, other Commonwealth countries have had a different approach and in quite a number of cases, the courts held that a change in faith (Religious) does not necessarily mean a change in ones personal law. A Tanzanian case of RATTANSEY V. RATTANSEY³³ held that there was a change in personal law, when the marriage though contracted in accordance with the christian faith the wife changed her faith to Islam. The husband had been a Moslem prior to the marriage. The court in holding talak to be effective as a pronouncement of divorce made a remark that there is no reason why a marriage should be dissolved by the law that brought it into existence.

I relied on AYOOB V. AYOOB because it has not been so far challenged in Kenya and as such it has remained as the authority in stating the law in this field. Secondly, the African Christian Marriage and Divorce Act is similar to the Marriage Act in terms of consequences. Section 3 of the Marriage Act³⁴ contemplates a situation that no marriage existed

30 Morris : Indirect Rule And Search For Justice

31 Cap. 63 Laws of Kenya

32 (1968) E.A. 72

33 Rattansey V. Rattansey (1960) E.A. 81

34 Cap 150

between the parties before the statutory marriage. The African Christian Marriage and Divorce Act,³⁵ stipulates to make the parties legally bound implying that their customary marriage had no legal effects. It is my contention that the two statutes are saying the same thing in different ways.

PRACTICE BY COURTS

Courts diverted from the strict interpretation of the law as put forward in the case of AYOUB V. AYOUB in a number of occasions, although this was minimal, especially to avoid causing more harm. The court therefore in the case of OMBOYO MAIRURA V. BOSIRE ANGINDA³⁶ held that some African Christians are governed by their customary family law. In this case, the court found that although the parties had been married under the statute, they regulated their affairs in accordance with customary law, and therefore customary law and NOT statutory law applied to the parties. The court was influenced by the conduct of the parties and discounted the fallacy that once parties married under the Act, they "wanted" ^{to} conduct their marriage in accordance ^{with} to English values.

Another case where a similar holding was delivered was BENJAWA JEMBE V. PRISCILLA NYONDO, discussed in Chapter Two. The court in deviating from the strict statutory interpretation held that the law of succession of the African Christian was customary law. These two cases deviated from the Matrimonial Causes Act, which contains the body of law for the two acts; namely the Marriage Act and the African Christian Marriage and Divorce Act.

Later, we shall see why people who regulate their marriages in accordance with customary law want to convert them to become statutory.

While one can say that customary law is only applicable to customary marriages, one can qualify this statement further by saying that customary law will only be tolerated if it is not repugnant to natural justice and morality. Whose natural justice and morality? The inevitable answer is, the English. This meant that even where a marriage was not a statutory one, there were some aspects of that union that would be regulated by the statutory law. This strictly meant that

35 Cap 151 Section 9

36 6 Court of Review 4

any marriage contracted under the African Christian Marriage and Divorce Act or the Marriage Act was governed by Matrimonial Causes Act.³⁷ This Act defined a marriage as the union of one man and one woman for life to the exclusion of all others. This statement was extracted from the case of HYDE V. HYDE,³⁸ where the court said that it had no capacity to give a ruling in a polygamous union. This attitude of the courts in Britain persisted until nearly in the 1960s when the courts found out that they could not go on without recognising the existence of the polygamous ^{marriage} institution. The leading case in this point is CHENI V. CHENI³⁹ a 1963 case. The Privy Council had more tolerance and we see it recognising a "wife" of a polygamous union in R. V. MAWJI⁴⁰ in 1957. This point will be discussed ~~later~~ to show the change in judicial attitude.

The trend in East Africa has been one of viewing customary marriages as of being impermanent ⁱⁿ nature. In the case of ABDULSEHMAN & ANOTHER V. R.,⁴¹ the parties were married in accordance with Makonde customary law which is in nature monogamous. The court holding the wife of the accused a competent and compellable witness said that the marriage of such people was of an impermanent nature. This case was decided in Zanzibar in 1963 when all the East African countries had become independent politically. The court went as far as relying on R. V. AMKEYO,⁴² a 1917 case where Hamilton C. J. had said that an African Marriage was not a marriage in the true sense of the word. From this trend one can say that our family law as brought out by the attitude of the courts has not changed much. The superstructure and the base of the Kenyan society have not changed, and as a result, not only the family law that has not adapted itself to the mass it is supposed to be a product of but also other branches of law.

The question that follows is whether the law in the colonies changed simulteneously ~~ly~~ with change of law in the metropolitan. Normally what happened is if the people in the colonies were regarded as the subjects of the metropolitan, then the law changed simulteneously but if they were subjects, then law passed from the metropolitan was introduced to the subjects so long as it benefited the metropolitan. As a result the law would not change with that in the metropolitan. To be more specific, do we interpret our family law Acts in regard to the time they were passed or do we adjust our law with the English Acts which have evidently gone

37 Cap 152

38 1866 L. R. 1 P 2D 130

39 (1963) 3 ALLER 873

40 (1957) A.C. 126

41 (1963) E.A. 188

42 YEALR 14

through a lot of reforms? The case that provides the answer in Kenya is *CARNIE V. CARNIE*⁴³. The point above arose and the court was asked to decide which law applied in Kenya. The court held that the law applicable was the law at the time of enactment of that statute in Kenya.

If we fell back on the Tanganyika Matrimonial Causes Act, we could draw an analogy and see the law applicable to Kenya. Section 3 of that Act is similar to the one in the Kenyan Matrimonial Causes Act. This section as was construed in the case of *MATEMBA V. MATEMBA*⁴⁴ said that the law applicable is the English law at the time of enactment. This interpretation contemplates a situation where marriages in the colonies are consi/static or colonial legislative reforms are/ascertaining /not i to the changes taking place in the society. If the present laws were surely meant for the good life of the Africans, there would have been a provision which recognised the African concept of good life. The trend has been to decide what good life means to the African and as a result there was a wholesale orientation policy for Africans to be black Englishmen, and Englishwomen.

VIEWS OF OTHER INSTITUTIONS

As indicated above, in England, conversion of a potentially polygamous marriage into a monogamous marriage was recognised in the 1960s to try and alleviate hardships created by *HYDE V. HYDE*,⁴⁵ in regard to Matrimonial reliefs. The general principle is contained in the case of *ALI V. ALI*,⁴⁶ where the change of domicile was held to have affected the nature of the marriage /a potentially / union into a monogamous union.

The Privy Council has always adopted a liberal view towards non-monogamous marriages. Although the cases in point do not deal with conversion, they nevertheless indicate the judicial attitude. The case of *R. V. MAWJI*⁴⁷ *ATTORNEY GENERAL OF CEYLON V. REID*⁴⁸ and *DRAMMEH V. DRAMMEH*⁴⁹ indicate that the courts were tolerant and recognised other institutions of marriage especially where the parties come from a different background, from that one found in England.

In Ceylon (now Sri Lanka) conversion was allowed. The above case of *ATTORNEY GENERAL OF CEYLON V. REID* recognised the point that unilateral change of faith changes ones personal law. This case mainly dealt with ones liberty to worship as one wished.

43 (1966) E.A. 233

45 Ibid

47 Ibid

49 (1970) J A L

44 (1968) E.A. 646

46 (1966) 1 ALL. E.R. 664

48 (1965) 1 ALLER 812

In Tanzania, the case of RATTANSEY V. RATTANSEY, discussed above is the authority for the view that marriage can be converted where both spouses change their faith.

In Gambia as observed in the case of DRAMMEH V. DRAMMEH (mentioned above), change in the nature of the marriage could have taken place were it not the parties intention that their marriage was monogamous.

In Uganda, the trend was to replace customary law with statute law as observed in the case of YOSSAMU MWERERE,⁵⁰ while Nigeria in a slightly different case of COLE V. COLE, mentioned in Chapter Two, had the outlook that if one married under the Act, one changed ones personal law. The Nigerian and Ugandan attitudes have been the ones followed in Kenya. In so far as the change in personal law follows conversion, then the cases of RATTANSEY V. RATTANSEY and ATTORNEY GENERAL OF CEYLON V. REID become relevant because they deal with a situation not in isolation but are more realistic, and in line with the communities found in Kenya.

CONSEQUENCES OF CONVERSION IN KENYA

In the above discussion we saw the law applicable to Kenya is the law at the time of enactment of the statute under construction. We also saw that change in marriage through conversion also changed the personal law of the spouses.

Under the 1931 Act, conversion meant and still means that the wife to such a marriage and also the issues of such a union were entitled to maintenance. Under customary law, the right to maintenance for the wife existed so long as marriage was continuing. The right to maintenance is guaranteed by the Matrimonial Causes Act.⁵¹ Such a wife can even pray the court to raise the maintenance where the cost of living has gone up as was in the case of N V. N.⁵² In this case the parties were granted divorce when they had two young children. The woman prayed and was successful in getting a maintenance order of four hundred shillings per month. She asked for an increment later and the court raised the amount to five hundred shillings. Without going further to explain what the 1931 Act meant, one can easily say that it put a woman who has converted her marriage ^{rather} in the ambit of the Matrimonial Causes Act. Whether the woman took advantage of her "new rights" or not is not for this Chapter but the next. Suffice it to say that a woman who had converted

50 Discussed in the Monthly Bulletin of Judgements & Orders of High Court Of Uganda April 1971 P. 86-88

51 Section 25(2) and Section 30 of Cap 152

52 1973 KHCD 40

her marriage to a monogamous marriage under the Act under discussion was in a position to own her property, to pledge for credit of necessaries if neglected by her husband and could petition for divorce on any of the five grounds laid down in the Matrimonial Causes Act, namely, adultery, ^{desertion} ~~dissertation~~, continuous insanity of more than five years on the side of her husband, and if her husband committed any unnatural offence. It should be noted that though the Act might have provided a lot of "reforms" people went on regulating their affairs in accordance with customary law and more so in matters concerning property.

The main stress in this chapter has been to lay down what is expected when one converts /her marriage from a potentially polygamous union into a statutory monogamous union. I have also tried to point out what various groups expected from the passing of the 1931 Ordinance, and everything boils to cultural arrogance. In the past Chapter, I indicated how the economic outlook in Britain was a deciding factor in deciding what kind of law to use in the colonies. I also said that the passing of the acts should never be mistaken with accepting the African society as being at par with the colonisers but more so as a justification of whatever imperialistic manouvre was going on, with that, I intend to go to the next chapter which I consider of vital importance in my dissertation. The next chapter will bring out the success and failure of the 1931 African Marriage and Divorce Ordinance. I shall also analyse what I think were the causes of the shortcomings or the success of the Act. We shall in doing so analyse whether people fully understood the consequences of conversion or they were looking for some other benefits.

Conversion basically as stipulated by the Act under discussion means that one substitutes his customary law with English law. The courts more often than not have been advocates of this stand in Kenya.

marriage for
divorce (by)
community
God forbid!

CHAPTER FOUR

THE REALITIES ABOUT CONVERSION

The previous chapter analysed the consequences of conversion. The assumption is that the statute law applies to African Christians who are considered to have accepted the European way of life as implicitly portrayed by their acceptance of European religion. As indicated in Chapter One, the basic values of an individual do not change drastically and the notion that an African personal law changes on conversion to Christianity is a fallacy. The main abuse ^{of} the provisions of the African Christian Marriage and Divorce Act has been due to their wrong assumption. Those who have converted their marriages to statutory ones have as a result gone on conducting their affairs in accordance with the customary law. The superstructure on which the body of the statutory laws are a product was not meant for the benefit of the indigenous people. That is why the Africans have found it difficult to identify themselves with those Acts.

The basic role of the African Christian Marriage and Divorce Act is paternalistic. That is one reason why the Africans were not involved in its formation. The missionaries were supposed to speak on their behalf.

The other shortcoming in the Act is its definition of who is a Christian. The Act says that at least one of the parties to the conversion has to be a Christian. Who is a Christian? Arthur Phillips⁵³ says that a Christian could be one who is baptised, (according to Anglican and Catholic Churches), to one who intends to become a member either by baptism or by self-dedication in others. This broad definition has two effects. First, it is paternalistic in compelling Africans who have not gone through the full ceremonies of becoming Christians to be considered as such. The second, it is assumed that the one who professes the Christian religion also accepts the western values. This is what has happened.

People embraced the Christian faith without having fully understood its implications, and the result has been that they have abused the very rules they were supposed to embrace.

JUDICIAL APPROACH

The courts have looked at customary law as inferior as indicated by the Judicature Act.⁵⁴ Until a custom has become notorious, the courts are not ready to take judicial notice of it. Customary law has been quoted as being rejected as the central law in Kenya because, the legislature which has in the past been dominated by whites has said that customary law is too imprecise, and that it has too many gaps and it is "not adaptable to MODERN COMMERCIAL PURPOSES."⁵⁵ The attitudes of the court have been analysed in the previous chapter in regard to their outlook towards customary law. This complex situation is illustrated in the case of R. V. AMKEYO. It is also important to note that the English courts have been more progressive in their approach towards the African customary law than the courts in this country. It is ironical to see the Privy Council recognise a wife to a polygamous marriage as a wife in 1957 in the case of R V. MAWJI, and the East African Court of Appeal in 1963 refused to recognise the status of customary wife in ABDULREHMAN V. R (Supra).

The same negative was followed in deciding K V. K⁵⁶ and LK V CK⁵⁷ where in both cases, the parties married their second wives under the African Christian Marriage and Divorce Act after having been married customarily to the first wives. The court in holding the second marriages void ab initio, said that the parties had no capacity to enter into the second marriages. The tendency of marrying a second wife among the Africans should not be seen as a mere propensity to breach the statutory law but rather it is ingrained in the norms of the society. The increase in church weddings should be seen in the light of social attraction. Similar to the above are common and there has been an increase of customary marriages after statutory ones. While customary law stresses on marriage as an institution for procreation, and any other aspect being secondary, the statutory law is very particular on the technicalities of legality of issues. The case of OMWOYO MAIRURA V. BOSIRE ANGINDA⁵⁸ illustrates inter alia that as long as one is married to the other, the customary

54 Section 3

55 See Debates prior to the passing of the African wills Act 1961 Cap 169 Laws of Kenya. Note the remarks by the Attorney General Webb

56 KHCD Case 23 of 1972

57 KHCD Case No 102 of 1972

58 (1958) 6 CILR

law will treat the children of the wife - even if she is living with another person as those of the lawful husband. Exceptions to this rule have been introduced but fall outside the scope of this dissertation. As illustrated in the previous chapter, the court regarded the marriage as of a polygamous union due to the conduct of the parties even though they had been married under the African Christian Marriage and Divorce Act. This might seem as an abrogation by the court from the strict application of the statute. The court seems to be legitimising a right to enter into a polygamous union notwithstanding the existence of an earlier union, in which the parties bound themselves to the other for life. In the writer's opinion, this was a realistic approach, and in line with that taken by the court in the case of ATTORNEY GENERAL OF CEYLON V REID,⁵⁹ which admitted that the inhabitants of Ceylon had an inherent right to change their personal law. This meant that such parties could contract another valid polygamous marriage even though they had been married initially under the statute.

THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE

The Commission on the law of Marriage and Divorce,⁶⁰ admitted that

"it is not uncommon for Africans who have contracted marriages under the Marriage Act, or the African Christian Marriage and Divorce Act, and while those marriages subsist, to take other wives under customary law".

The Commission also observed that this was a criminal offence but the Commissioners never came across any incidence where prosecutions had been preferred against a party in breach of the relevant provision. Trimingham, in his book, Islam in East Africa,⁶¹ says that the Africans who observed Islam in the Interior had one foot in Islam and the other in the traditional society. This analogy could be used in describing the nature of the Christian faith as embraced by the Africans. They wanted to have a bite in christianity, at the same time retaining their traditions.

Arther Phillips in his Report on Native Tribunals⁶² says that among the Digos, even though about eighty per cent of them were Moslems, their

59 (1965) 1 AALLER 812

60 (1968) Paragraph 50

61 (1964) P. 64

62 1945 p. 128

Islamic faith was only skin deep. This illustrates the point made in Chapter One, that it is absurd to expect an African to shed his values in toto by the fact that he has accepted another religion. From the above observations one can say that in embracing the new religion orders, the African people did not want an overhaul of their values but they merely wanted a change of God.

Coming more specifically to section 9 of the Act under discussion, it is in point to observe a reaction of the Ugandan Court in the case of YONA V. YOSAMU MWERERE⁶³ Apart from this case having relevance to the section under discussion, it is also an illustration of what happened not only in Uganda but also in Kenya. In this case the court was dealing with a customary marriage which had been converted into a statutory marriage. The court held that the husband could not claim his dowry back until divorce had been granted. This was unfair suppression of an essential element in a customary marriage. Dowry played a great role in uniting people of different families. This was revealed by the fact that, when such a union was no longer viable, the dowry would be refunded on divorce, indicating that there were no more ties between the two families. Dowry as indicated in Chapter One was also closely tied with the issue of procreation.

The African marriages under both the Marriage Acts are preceded by what Morris⁶⁴ calls customary consideration. This normally a full customary marriage, but it has come to have no legal effect except in determining recoverable damages like dowry, in case of divorce.

The case of SULEIMAN MUWANGA V. JIVRAJ⁶⁵ indicates that the concept of the African family connotes a bigger unit than its counterpart in the West. The tendency has been to play down on the essence of dowry and parental consent by the Act. This is also stressed by the Report on the Commission on the Law of Marriage and Divorce.

The statute law has been viewed by the courts as superior to customary law. While the statute talks of an age when one has the capacity customary law viewed capacity not necessarily in terms of age but on whether you had gone through certain initiation ceremonies. One had also to perform some duties to prove to the community that he was capable of looking after his wife. This goes to illustrate the point further of the way a traditional African society looked at a marriage. It was never regarded as an individual act but a communal act.

63 Discussed in the monthly bulletin of Judgements and Orders of the High Court of Uganda April 1971 p. 86-88

64 Book entitled: Indirect Rule and Search for Justice

Article entitled: Indirect Rule and the law of Marriage

65 (1964) E.A. 171

CONFLICTS BETWEEN THE CHURCH AND AFRICAN COURTS

The administrators looked at marriages contracted by Africans in two ways. The first was to accept that Native courts had jurisdiction in matters concerning customary considerations like dowry, and could go as far as carrying out sanctions against those who were "guilty" of adultery, which is a criminal offence among many African customary societies. The second was to accept the jurisdiction of first class Magistrates courts in matters relating to dissolution of such a marriage contracted under the African Christian Marriage and Divorce Act. The church was very much opposed to the powers of the African Courts. The churches saw those courts as trying to undermine what they were trying to build. The Missionaries failed to realise that a change in ones faith is not tantamount to a change in ones personal law. The best illustration to this point is taking the case of divorce.

Traditionally, divorce was not a court matter. Cotran in his book 'Restatement of Customary Law' observes that people have gone on using the customary approach to marriage especially in involving the families to try and come to an understanding in avoiding divorce. Divorce among the Africans is not a matter between spouses but between their respective families. That is why in the previous chapter the writer preferred the decision in RATTANSEY V. RATTANSEY rather than the harsh Kenyan authority of AYOUB V. AYOUB. The Kenyan authority is bad because it ignores the largest part of the community in Kenya and completely closes its eyes to the realities of how they conduct their affairs from day to day. Another realistic case is the ATTORNEY GENERAL OF CEYLON V. REID, discussed above, because it puts the realities of the society the laws are supposed to be guiding before anything else.

It can be said that the courts in Kenya have been strict mainly because of racial arrogance. The composition of the judiciary has remained manned by foreigners who have brought up in the metropolitan and therefore removed from the realities of the indigeneous people. As such, we shall not expect the courts to adapt themselves to the true situation of the Kenyan community but the courts will/expected to perpetuate the colonial legacy.

The speculations raised in the Legislative Council debates of November 1931 in regard to what the Act would achieve have not been realised. The penal sanctions incorporated in the act have remained a dead letter and though the Missionaries have continuously condemned customary unions as unreligious and unacceptable, people and some of them very close to the churches have conducted their better part of life in accordance with their customary law.

The next chapter will look at the possible reforms in light of the failure of this Act (The African Christian Marriage and Divorce Act). In so doing the writer will look at the reforms recommended by the Commission of 1968 on the law of Marriage and Divorce.

CHAPTER FIVE

RECOMMENDATIONS TOWARDS REFORM

In talking about reforms, one has to see the failure of the objectives of passing the African Christian Marriage and Divorce Act as discussed in the previous chapter. If the object of the Act was to encourage monogamy then this was a failure because those who breached the provision were never charged with bigamy. The unfortunate thing that resulted is that there was indoctrination within the Africans that statute marriages were superior.

If we may borrow findings, of a research conducted in Uganda in 1939⁶⁶, it revealed that many Africans were critical of the church insistency of only one wife. What actually happened in practice was that women remained in fact their old husband's wives and the missionaries turned a blind eye to this. The Provincial Administration recommended that law regarding the offence of contracting marriages through customary law subsequent to a marriage under the statute to another woman should be repealed. Roman Catholic Church was inclined to strict enforcement of the provisions. The Protestant religions were more realistic than the Roman Catholic Church in that they gave an alternative of either enforcing the law or modifying it. The community of Lango observed that if the provisions were enforced no African would take christianity. This early attempt to reform the law met a lot of opposition from the Buganda Administrators who had been brought blindly to the new civilising culture, by the missionaries who believe in strict observation of rules imposed by the colonialists in creating a Western type of a society, and this resulted in the project being shelved. These reactions in Uganda could be used as an analogy to draw similarities with what would have happened in Kenya. Missionaries, as illustrated by those who represented Africans' interest in the Legislative Council never questioned the idea of imperialism. Indeed they were active supporters of the doctrine which embraced aspects like civilising the Africans. Religion has been used especially in the colonies to 'create' the African

66 Ugandan Reform Questionnaire by Mitchell, Governor of Uganda.

who is acceptable to the Western civilisation. He must not only embrace christianity as a new religion, but must renounce himself as an African or more appropriately as a native by having not necessarily a christian name but an English name, and advocating the marrying of only one wife.

The above attempt in Uganda, and its failure had a very strong bearing in Kenya. The Governor of Kenya in a dispatch dated 1/10/41⁶⁷ said that he was pessimistic about an outcome in Kenya if such a survey was done. He based his judgement on the basis that Kenya had a more complex social set up. My observation is that reforms were not difficult to implement if the people entrusted with that task were objective, but since those people who were supposed to bring reform already knew what kind of a society they wanted to build, then the building of that society was difficult and doomed to fail because of the different social outlooks of the various communities involved. That is why even though penal sanctions were supposed to be imposed on those Africans who failed to observe monogamy as a requirement of the Act, the section has remained the most abused and a dead letter. Most Administrators refused to implement them. They failed to realise that the fact that one marries in church does not necessarily change his personal law. Many people marry in the church because the marriages have become more prestigeous in terms of reference group or for the mere convenience and not necessarily because they believe that their personal law has changed so much as to have no relationship with their traditional community.

The Report of the Commission on the Law of Marriage and Divorce⁶⁸ admits that there is a lot of abuse on the statutory marriages. The main abuse, the Report notes is the marrying of another woman while already married under the statute. The Report notes that the penal sanctions have never been enforced and have on the whole remained a dead letter.

The National Council of women in recommending changes to the Commission said that the traditional role of a woman has changed and that while additional wives were brought in to help with cultivation, now the wife who remains in the shamba is normally neglected while the attention is given mainly to the woman kept in a town house. This surely is an elite class argument. When one observes the percentage of Africans who stay in the towns, it is a very small number when compared with those in the countryside. It is therefore an exaggeration. They take an example

67 Dispatch No. 153 of 1941 D.S.A. 25040

68 1968

from a small group and generalise. The fact is that the majority of the Africans are still living a traditional life.

The Report observes that the main supporters for polygamy were Muslims and traditionalists while the main opposers were Young Christians en masse. The supporters said that polygamy would reduce prostitution. There was also a notion, however mistaken it may be, that there are more women than men in any given community.⁶⁹ On the other hand, those who opposed polygamy said that polygamy and overpopulation are connected, although this point is refuted by a leading sociologist. They also questioned the love for both wives and their respective children as impracticable.

With these conflicting views, the Commission came to the conclusion that polygamy would die a natural death due to the changing social and economic factors for example rising standards of living and the cost of bringing up and educating children. They also observed the fact of the diminishing land reserves and the shift from relying on economy which is solely land orientated. Recommendation 10 therefore recognised and recommended the existence of the two institutions of marriage, that is, monogamous and polygamous. This was only possible because the Commission strongly believed that polygamy would die a natural death. The recommendation should be seen in the light of the Commission's stand in hoping that a Western kind of family would evolve in future but should never be seen as an objective analysis of the present situation of leaving the situation in status quo. The recommendation can therefore be said to be hypocritical. This can be seen from the fact that while Section 9 of the African Christian Marriage and Divorce Act has an express provision of converting a potentially polygamous marriage to a monogamous marriage, and the implicit provision within the Marriage Act⁷⁰ that an Islamic marriage may similarly be converted and also a provision in the Mohammendan Marriage and Divorce Act,⁷¹ implying that a customary marriage can be converted into an Islamic marriage, there is no provision of conversion of statutory marriage to either customary or Islamic marriage. The Commission did not draw its attention to this state of superiority

69 1962 Census puts the overall ratio of women to men as 96.9:100

70 Section 11(1)(d) Cap. 150

71 Cap 156

in terms of the particular law one gets married under. Recommendation 12 says that the nature of marriage should not change with the change of religious faith. This outlook of the Commission could/compared with the outlook of the Report on Native Tribunals, discussed in Chapter Two that instead of doing an objective analysis and making recommendations based on those facts, they did a research with prefixed ideas of not being bound by the findings because they knew what kind of a family was good for the Africans. The whole Report therefore becomes a sham, if the makers of it are not bound by their research.

There have been a lot of reforms concerning the status of the woman in this country. How far this has been successful in terms of real practice is another matter. It is also important to avoid the generalisation made by the Commission on the changed status of the woman due to political and socio-economic changes. It is important to observe that the women who have been the main beneficiaries of these reforms are the elite, and in terms of the women population as a whole in the country they account for a very small percentage. To them, the traditional outlook that a wife would welcome a second wife to relieve her of some of the household and agricultural duties has not changed. The urban kind of a wife is more concerned with the welfare of the immediate family rather than the extended family and the attitude of such women has played a great role in the decline of polygamy among the elite.

The Commission defines marriage in the draft Act as the voluntary union of a man and a woman, intended to last for their joint lives. This is an obvious correlation with the definition of marriage in accordance to the English Law. The Commission from the outset fails to recognise the distinct objectives of marriages as envisaged by the Western mode of family law and those encompassed by the African traditional society. It fails to see the polygamy system not only as a customary insurance but also faced with the duty of keeping the community alive through procreation. So when the Commission says that the marriage will be a voluntary union of a man and a woman, it does not solve the problems of why people get married customarily, or what does the community expect from such marriages. This point is discussed in a previous chapter and it might suffice by mere indication that the Commission falls short of realizing the objectives of a traditional society.

The Commission goes on to say that whether a marriage is monogamous in nature or not will depend on the agreement between the first two spouses. When marrying the parties will have the choice to say whether it is polygamous, monogamous or potentially polygamous. Such declarations shall be binding for life during the subsistence of such marriage, provided that a monogamous marriage could later be converted to a polygamous marriage and a potentially polygamous marriage could be converted to a monogamous marriage. To be capable of doing this, there must be mutual agreement between the spouses. The declaration has to be freely made in front of a registrar and recorded that they intended to change the character of their marriage. To continue to contract another marriage will continue to be a criminal offence. To me, the Commission learnt nothing from the past. It is impossible to run a society like a mathematical table, where by inserting certain figures you will get a certain result. The Commission was unrealistic in not having accepted the fact that drawing rules for the African society will not achieve a given result. A society's values are the result of its interpretation of the whole conglomeration of aspects be they social, political or economic. The society does not react in a certain manner without a reason. What is going to happen is that the society will go on reacting in a certain manner no matter what rules we make, especially if that trend of behavior by the society goes to the very core of its existence.

The best reform which will come will be by accepting the different outlooks to life by various communities without having the prejudice that a certain sector of the society needs to be "civilised".

Jane Heller in her thesis on the economic change and marital stability in Kenya⁷² makes an observation that the lack of economic success is the main cause for instability, in marriage these days. I think this point is not true. From my personal observation when I was attached to the court for six weeks, I noticed that some well to do families were coming before the court seeking either separation or divorce. In one case (which is still sub judice), the husband's monthly salary was £400 while the wives was £250! In another case the husband got an increment in his salary and the wives main argument was that she had not had the share of the increment!

Jane Heller contradicts herself also in that while she observes that the Commission on the law of Marriage and Divorce was composed of unrepresentative individuals in terms of the various communities distribution

72 1971 Thesis submitted to the Department of Anthropology for the Degree of B A Honors.

(6 Europeans, 5 Africans, 2 Muslims and 1 Sikh), she makes the error of committing herself in saying that the new law will act as a bridge between the concept of marriage in regard to the old values and new values. She falls in the problem of seeing western values in terms of modernising the Kenyan society. My opinion remains that peoples values change very slowly and the new law though bringing 'reconciliatory' measures as Jane Heller would have us see it, is nothing more than an imposition of western values under the guise of modernisation and it is inclined towards a monogamous system rather than accomodating values of a traditional society. In having a meaningful reform, we should have an act which embraces the traditional values because they go to the core of the concept of good life among the Africans. An Act which does not spell out these attributes of a community is bound to be unjust among the recepients and it is on the whole doomed to fail especially when it affects nerve line of a community.- the family. The family is the miniature form of a society and a law meant for the community will only be meaningful if it reflects what the family considers as good life. We should also bear in mind that no society is static and it will respond to changing circumstances political, social or economic. The speed at which the society adapts itself to those changing circumstances should not be dictated by passing alien Acts which embody values from a completely different community but the adaptation should be a natural or instinctive reaction to those changes by the society itself. Most of the so-called reforms especially in the colonies or even after those colonies attained political independence have been geared to westernisation of the community, hence the main cause of lack of effectiveness of such acts.

C O N C L U S I O N

In conclusion, we have seen how conversion under Section 9 of the African Christian Marriage and Divorce Act brings about a whole host of implications which the recipients are not even aware of. Also I have tried to analyse the reasons for having such a provision, based mainly on the cultural arrogance of the colonisers. I have also shown the way the statutes have functioned and the extent to which Africans have been subjected to those statutes and eventually I have said that any meaningful reform in this country has to embrace the African concept of good life.

My observations therefore are that the present statutes are a product of the western values, and they have been imposed on the Kenyan community because they are supposed to be superior. It is my contention that those statutes are not only being used in Kenya but even the so-called reforms have come to equate the usage of such statutes with modernization. The black man is therefore supposed to be reformed to a more superior being by embracing the western values. It is also my observation that customary law which embraces the African concept of good life has not been given an ample chance in influencing the recommended reforms and this has been the main reason why we see abuses of the statute by the very Africans who are supposed to have embraced western values. Christianity as a religion has been seen as a more refined religion than the traditional ones, hence the task of converting the natives into the western religion of Christianity. Finally as Kamau puts it in his paper 'Implications of the African Christian Marriage and Divorce Act and the Marriage Act', that there has been a conflict between the churches idea of what a Christian African is and what he really is and for these two attitudes to be compatible, there should be a re-examination of what an African Christian should be.

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