CUSTOMARY MARRIAGE: THE EFFECT OF SOCIO-ECONOMIC CHANGE ON THE CUSTOMARY SYSTEMS OF MARRIAGE WITH SPECIFIC REFERENCE TO THE NANDI.

A

DISSERTATION IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE CONFERMENT OF A DEGREE OF BACHELORS OF LAWS.

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TO

'Fena,

My Mother.

CONTENTS:

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ABBREVIATIONS:

E. A. L. R.	:	East Africa Law Reports
K. L. R.	;	Kenya Law Reports
E. A. L. Rev.	:	East Africa Law Review.
N. L. R.	:	Nigerian Law Reports
E. A.	:	East Africa (Reports).
E. A. C. A.	:	East Africa Court of Appeal Reports
All A. R.	:	All England Law Reports
K. B.	:	Kings Bench.
A. C.	:	Appeal Cases.
Cap.	:	Chapter of the Laws of Kenya.
L. R. P. D.	:	Law Reports Probate Division.

INTRODUCTION:

A lot of research has been conducted on the various aspects of African Customary Legal Systems. Most notable among the leading writers on this subject include S.N. Allot on "Essays on African Law; Kasunmu and Selacuse on Nigerian family Laws, M.S. Langley on the "Nandi of Kenya", Arthur Phillips and H.F. Morris on "Marriage Laws in Africa: A Survey of African Marriage and Family Life". These are but the few writers on this important subject of customary systems.

However, but for Dr. Langley who has undertaken a serious study of the Nandi, not forgetting of course G. S. Snell, little has been done to expose the historical and economic influences; given the colonial experience; that underlie the Nandi marriage institution. This dissertation intends therefore to address itself to the effects of socio-economic change on the Nandi system of marriage.

It is interesting to note that despite the uniformity in the application of laws generally during the colonial era on all Kenyan Communities of African origin, there exists, to date, a diversity of procedure in the conclusion of marriages among these communities. The substantive of the Customary Law applied also manifests slight but fundamental variations and distinctions from one community to another.

Among the Nandi, there has evolved a unique marriage system whose legal and socio-economic basis is the main concern of this dissertation. There are as many systems of marriage among the Nandi as there are oin the republic. However, while in the national context customary laws is regarded as one system of marriage, amongst the Nandi there are several types of customary marriages any of which, parties to the marriage may choose to contract. In each case, there are definite legal implications attached thereto.

Although this dissertation is deliberately centered on the socio-econo effects of both the colonial and post colonial regimes on the Nandi marriage systems, it will only be fair to dwell also at length on the Nandi systems per se; drawing clear and minute distinction between one system and another. The system of marriage obtaining among the Nandi is mainly based on custom as it has evolved. These are the Monogamous Marriage, the Polygamous unions, the Levirite unions, Woman to Woman Marriage, and the "home marriage". Also relevant and indeed in operation are the Christian type of marriage which is statutory[1] and the English type of marriage as expressed under the Marriage Act.[2]

It is an undisputable fact in the Kenyan legal development that colonial imperialist factors greatly shaped the Law as it stands today. Most of the law applying is of course based on English notions and concepts of life as they existed or exist in England, and as interpreted by the English Judicial system. During the colonial era, the development of law generally was closely monitored from the English bench in England. The local courts, then manned by English judges as is Largely the case today in independent Kenya, strictly adhered to the doctrine of stare decisis as was confirmed in Nyali Limited V. A. G.[3]

In essence therefore, an analysis of the Laws of Kenya can only be in conformity to the English Laws. Nevertheless, this dissertation is not its purpose to express the legal status of Nandi marriages in that context but to present an overview of the factors that were mainly intrumental in shaping the law, particularly customary law, into what it is today.

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As will be discovered in the paper, christianity, a major colonial instrument, greatly influenced the development of family law. The colonial regime found that it was easier to impose English family law on the African through christianity than it was through the naked legislative-cum-administrative proce

It is also important to bear in mind the fact that the Nandi have economically transformed over the years from the nomadic pastoralistic way of life to the present settled mixed farming economy. This is the work of the colonialist who restricted Kenyan communities to Reserves during the colonial era. A lot of transformation was experienced as a result. Education on the other hand, as introduced by the colonizer has brought about tremendous and overwhelming change of attitude towards life and has had a great impact on the traditional institutions, marriage included.

Today, the central government has taken upon itself the task of regulating the movement of the Kenyan society. This over reliance on the state machinery for cultural, economic, social, educational and and even religious guidance has also immensely affected the development of African customs. The government has unsuccesfully attempted to introduce a new fam code which would regulate uniformly all marriages in Kenya. But before this is done, the Kenyan indegenous communities, who comprise by far the largest section of the population continue to be guided by customary law. The application of customary law has met with practical difficulties in respect to the marriage institution. This is why customary law development has assume peculiar outlooks which can neither be classified with the statutory marriages nor for that matter, the customary systems.

In chapter one, a general view will be presented. Here, the jurisprudential analysis of customary laws as they exist today will be attempte Also in this generalized exposition will be the social, religious and economic influences on the evolution of the Nandi systems of marriage with an aim of defining the legal basis of the customary marriage as analysed. In chapter two, the traditional Nandi systems of marriage law before the imperial domination took root will be sufficiently tackled. The analysis in this chapter will provide a comparative understanding of the socio economic position of the traditional systems in contra-distinction with the modern systems as they exist today.

The last chapter will concern itself mainly with the significance of customary marriages in the present society. In this chapter, some of the colonial by products of family law, policies and administrative functions will be examined e.g. Prostitutions, Pre-Marital pregnancies, family planning, bachelors and spinsters, women equality, illegitimacy of children, etc., It is also in this chapter that a brief study of other systems of marriages other than Nandi will be undertaken, with a view of contrasting them with Nandi systems. This will be with an aim of accessing the extent to which they affe or have influenced the status of Nandi marriage law.

CHAPTER ONE.

PART I

GENERAL REVIEW OF LEGAL EVOLUTION OF CUSTOMARY MARRIAGES AMONG THE NANDI.

The European imperial regimes sought to expand their influence all over the world. In the later half of the Nineteenth century, Africa became an inevitable target and victim of imperial policies. This led to the 1885 Berlin Conference whose aim was to achieve peaceful parcellation and distribution of African territorial resources amongst the British, French, Spanish, Portugese, Belgians, Dutch, Italians and Germans. The Americans, after the second world war have increasingly been seen to perpetuate colonial interests, particularly economic alongside their allies in Europe.

Kenya, as it is known today, came under British control. No sooner were the British in control thanthey introduced the English legal structure into the territory.[1] But prior to that date, there had been the imperial British East Africa Company which was in control of the British sphere of influence between 1886 and 1895 when it was wound up only to transfer to the British Government functions and administration of those areas which were not under the influence of the Sultanate of Zanzibar. By 1920, the British sphere, whic by agreement included the coastal strip, was annexed and became Kenya colony

The Law to apply as per the 1897 order in council was the English common law and statutes of general application and this law was to be applied by the courts established under the act together with native law in so far is m be in the interest of "justice, morality and good conscience".[3] It was envisage by British rulers that English law would apply over all the inhabitants of the territory. Indeed, during the period between 1892 and 1963, there were a series of legal, social, economic and cultural transformations which character the British domination of Kenya. By 1963, the Kenyan community had been totally baptised into the English systems of Government, justice, education and to a greater extent, religion: so much so that the post colonial governments have merely continued to apply law based on English principles and little has been done to minimize this foreign influence over the Kenyan way of life.

During the colonial rule, the lifestyles of most Kenyans changed and have continued to change. The colonial regulations and policies were based on biased and prejudiced principles and standards which led to the gradual erosion of Kenyan customs to give way to English modes of existance based on English principles of life and socio-economic relations. Lord Lugards "Dual Mandate" expressed the English desire to civilize Africans and no doubt, allevate them similar standards of living as the English.

The aim of this dissertation is to examine the effect of social, econom political, cultural and constitutional changes on the Nandi Marriage Laws. We shall have the opportunity to see also the legal basis of Nandi Marriages as they exist today in contradistinction with their original form. This chapter shall however present a general overview of the legal development in respect customary marriages. It is most relevant at this stage to mention that the Nandi, like any other community in Kenya suffered the bitter process of colonialism which entailed some fundamental legal transformation. It is the institutional structure upon which the Nandi custom and culture in general rest upon that was a victim of impository concepts and principles based on English legal philosophy.

During the colonial rule, the Nandi economy changed from the flexible pastoralistic form to the settled mixed farming economy which is in practice today.

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The promotion of colonial goals was largely assisted by the religious institution which has been established alongside colonial administration. Thus, the Nandi, through religious indoctrination were spiritually transformed to conform to christian doctrines which were in most respects similar to English concepts and principles of social and cultural relations. Marriage was therefore one of the customary institutions which was greatly transformed as a result of economic, religious and social experiences of the colonial era. It is worthy of note that although the majority of the Nandi people remained traditionalists, the economi and administrative order could not allow them to enjoy complete customary ordering of their affairs.

The aim of colonialism was to impose the will of the English crown o the Kenyan people. They sought to transform the African into an Englishman in his manner of thought, economic order, and cultural orientation. To the colonial rulers, a good life to them meant the English way of life i.e. cultura religious, economic, social, educational and legal relations based on English principles and concepts as they operated back in England. The most conspicuc of the institutions established by the colonial regime were the judicial system, the administrative machinery and to a lesser extent, the religious institutions which were mainly christian and engaged in missionary work. Colonial education was also largely responsible for the transformation that the Nandi culture experienced. The courts were manned by Europeans and applied English law. The political administration was wholly Anglicised. Missionarie whose main activity was the spread of christianity applied English concepts of religion and their institutions were based on English standards of christianity.

Gradually, these experiences affected the customary institution of marriage so adversely that the legal consequences are specifically the subject matter of this dissertation.

The constitutional development in Kenya may be traced back to 1897, the date when the legal structure was imposed on the Kenyans. It is through that years' East Africa Order in council, as well as many other statutes and regulations which followed that were the legal basis for any colonial act in Kenya. Land relations were altered to conform to colonial economic requirements. Particularly significant was the 1915 crown lands ordinance which declared the whole of Kenyan territory as crown land - land owned by the crown of England. Marriage laws were introduced which were to apply to the English subject residing in Kenya. The 1902 order in council, the 1902 Marriage Ordinance, the 1904 Native Christian Ordinance and the 1907 Courts Ordinance were pieces of legislations which introduced English systems of family law. The Native christian marriage ordinance was to apply to African who had been christenized and who wished to contract christiani marriages an abandon customary legal procedures relating to marriage. The more Africans were converted into the christian faith, the more christian marriages were celebrated.

The nature of English Marriages is different on African Customary Marriage. The principles which both marriages correspond to are respective based on English tradition and culture and African customs and traditions rooted in centuries of harmonious enjoyment of the rights and obligations so confered by Law. In colonial Kenya, the legal principles which guided the judges on marriage were clearly laid down. When a party contracts a marriage under the Marriage Act,[4] he contracts the kind of marriage as defined in Hyde v. Hyde.[5] In that case, Lord Penzane described and defined marriage as the "Voluntary Union for life of one woman and one man at the exlusion of everyone else". For those Africans who contracted marriages under the christian marriage ordinance, they similarly entered into a monogamous union within the meaning of the terms in Hyde v. Hyde.[6]

The position of customary law was always uncertain throughout the colonial rule. The colonial judges opinions were finally settled in R. V. Amkey where Hamilton C.J viewed customary marriages as not amounting to marriages within the meaning of the Indian Penal Code but to a wife purchase. For a comprehensive analysis of the position of Africans in colonial Kenya, the reader may refer to Okoth-Ogendo's thesis on the "Political economy of Land Law: An Essay in the legal organization of under development in Kenya". It is importan to grasp the conditions of living of Africans because this greatly determined the trend customary marriages had taken at independence. Marriage is more of a cultural, religious and social issue than it is legal; such that any legal regulation of marriage must reflect the other characteristics within it. Howeve socio-economic forces will fundamentally affect that character and form which marriages assume upon their conclusions.

Pastoralism among the Nandi was an economic practice which maintaine a cultural balance. Livestock were used both symbolically and materially as a central feature in cultural transcations of all types. The colonial programmes relating to land use, which placed more emphasis on estate and large scale agriculture in general than on African economies contributed to the destabalizati of the Nandi cultural economic base. This was followed by a period of general inactivity amongst the Nandi customary relations. The introduction of wage labour, led to increased urbanization and many Kenyans were detached from their customs thereby adopting new forms of human relations based on employm in colonial economic structures and urbanized relations. Marriage, like many other institutions based on customary law, had to change to conform to the general economic developments experienced following the introduction of colonial constitutional policies.

The extension of application of English law to the Kenyan community was based on the view laid down in the case of Cooper v. Stuart.[8] It was a view which guided the English illegal settlement of the acquired colonies in general. It was this view which validated albeit painfully, the colonial settlement of Kenya. However in Kenya, a more bold move was taken when the 1915 crown lands ordinance was promulgated.

In that case, the court had expressed the view that English law was to apply to areas without habitation within protectorates and colonies and that whe other systems of law applied then such law shall apply until the English law gradually overcame the other law and applied. But this was not what actually was the case in Kenya's land relations; for in the case Isaka Wainaina v. Muri wa Indagara,[9] the court refused to entertain any customary claim over what it (court) considered to be land belonging to the crown and which natives had no rights whatsoever over.

By 1920, when the Kenya colony order in council was promulgated, the two systems of marriage laws which applied in Kenya. Customary marriages were contracted as between the majority of Africans while English marriage law regulated the English marriages in Kenya. Moslem family law applied to the Muslim community in the protectorate i.e. the ten mile coastal strip which in law never came under colonial control although the administration of the strip was similar to the way the rest of the colony was administered. Hindu law wa given legislative expression and for the first time in 1946.[10]

As already mentioned above, the Native Christian Marriage Ordinance applied to African christians who wished to contract English type marriages. The same Act[11] provided for a situation where a marriage previously governed by customary law could be brought under the jurisdiction of the court as governed by the said Act.[12]

These Nandi christians had been ideologically and spiritually converted into accepting both the English religion as practised in England and also the English standards of existance as exemplified by the colonial settler community

residing in Kenya at that time e.g. manner of dress, thought, shelter, and even medication. Some christians Anglicised their cultural practises like circumcisio of the boys and abandoned the circumcision of the girls since the priests said it was sinful and contrary to civilized standards. The 1904 christian (Native) marriage ordinance together with religious teachings were particularly responsi for the Anglicisation of the African christian. As if this was not enough, a Divorce Act[11] of the same year was introduced to regulate the dissolution of christian marriages.

Both the celebration and the dissolution of a christian marriage had one thing in common. They were all regulated by the church minister of the denomination which the parties belonged. The reason for this unjudicial practi most probably lay in the fact that the colonial regime had discovered that the process of Anglicisation was more effective at the hands of the priest than it wa at the hands of the judge. It is not suprising therefore for christianity to be earmarked as a factor which essentially contributed to the transformation of the Nandi systems of marriage.

In 1931, the African christian and Divorce Ordinance was enacted to replace the 1904 ordinances.[12] In 1941, the Matrimonial causes ordinance also replaced the 1904 Divorce Ordinance. The aim of these later legislations was mainly to ensure closer supervision of the matrimonial union by the court. While these legislative changes were being effected, African customary marriage were not accorded any judicial recognition. According to English colonial jurist a marriage which was polygamous or potentially polygamous was not a marriage The purpose behind this view as enunciated in the Amkeyo[13] case was to contro and suppress the African conception of marriage so as to develop it to corresp to the English type of marriage.

In Kenya today, the laws under which a marriage may be celebrated include the Marriage Act,[14] which regulates English types of marriages, a purpose which the Act had all along intended to serve since the first marriage legislations of 1902.[15] There exists also the Hindu Marriage and Divorce Act o 1955 as revised in 1960; which regulates the Monogamous Hindu Marriage. Th Mohammendan Marriage, Divorce and Succession Act is used to govern Moslem Marriages. Lastly, customary law that applies to customary marriages continu to enjoy widespread application.

Customary procedures have undergone a lot of change so as to be able to conform in part to the religious and ideological concepts of the English way of life obtaining in Kenya following colonial rule. A marriage in Nandi today must fall within any one of the three systems in force, namely, the Christian Marriage, the Customary Marriage and the unions coming within the operation the Marriage Act. While the majority of the christians celebrate the christian marriage, the unconverted population which constitutes the largest group has insisted on celebrating customary marriages, as modified. It is mainly the educated and the elite in general who contract the hasty and less elaborate English type of marriage. This type only requires that statutory requirements are met as they are laid down in the Marriage Act.[16]

Both the christian and statutory marriages have, however, undergone procedural modifications. Both have received customary values whose basis is either customary law or an evolution of new values based on the modern socio legal realities. For instance, a christian marriage is regarded by the custom elders as validly concluded if on the one hand the church minister has presided over it and on the other if bride wealth has been paid. However, the concept bride price is not a requirement of the Act[17] nor is a church ceremony a requi ment of customary law. The exchange of rings is however not a new feature among the Nandi. Traditionally, a married Nandi had to wear a ring but not o the second finger as is the case with the English but on the wrist.

PART II

NANDI MARRIAGE IN CONTEMPORARY SOCIETY.

This chapter is mainly concerned with a general jurisprudential analysis and not the legal status of Nandi customary marriages as such which will be our main theme in the next chapter. Marriages today; their form, character and nature depend mostly on the view of the parties to it and not on the wishes of their parents as was the case heretobefore. This is mainly because a Nandi marriage today has ceased to serve the traditional purpose: that of the family being considered as the pivot point in the maintenance and protection of tribal stability.

Today in our world, lifestyles have changed. Economic trends have taken mysterious and completely alien dimensions and men and women have relaxed and remained flexible in their social, economic and cultural interractions Nevertheless, the complexities of social and economic existance have not displaced procreation as a main purpose for marriage. Procreation is so fundamental and central that human nature cannot allow men to depart from this noble purpose. ~~As we shall see in succeeding chapters, attempts attitudes that the majority of Kenyans have towards domestic economic relations~~. The desire to accumulate capital has obsessively increased that individuals have considered it wise to concentrate on this exercise more than they would in respect to marriages. In fact, the presence or absence of money has in most cases determined whether or not a person should get married.

Wealth has changed in form and appearance. Today, cattle are neither the medium of exchange nor are they a stabilizing social and cultural factor. Anybody who has accumulated enough capital can therefore proceed to marriage without having to be delayed by economic factors like the presence or absence of cattle for the payment of bride price. Money, as we shall see, has increasingly been substituted for cattle. Individuals have commanded so much independent existance and more often that not at a fairly young age. Thus, the clan, or family for that matter, can no longer claim to be playing a supervising role on customary unions. They have little say over decisions adopted by parties to a marriage.

Circumcision of females was a practice which was virtually controlled and regulated by the parents. The age of circumcision, the marriage negotiation that followed and the time the ceremony took place was regulated by the parents and the clan in general. The parents were thus in a position to influence decisively the nature and form of marriage through the practise of circumcision. Today, circumcision of females has been banned in Kenya following a Presidential directive to that effect. However, in spite of the changed social prerequisites of a marriage, parents still play an important role in negotiating for the payment of bride wealth. Invariably, parties to a marriage still submit to parental control in so far as bride wealth is concerned: although they are not obliged to. This autonomous character of a customary marriage is even reflected in the fact that a husband can permanently expel a wife from the home if she fails to give birth to a child or if they are fundamentally incompatible with each other without having to resort to parental arbitration.

One of the major features notable as a result of social and economic transformation in Nandi customary marriages is the increasing independence of either partner to the marriage. Women, particularly, have been over-excited by this social change, that they suddenly realize that their new position accords them power to have as much say in marital issues as their husbands. This has led to tremendous arrogance and pride on their part to the extent that they have abused or misused the constitutional rights, 18 bestowed on them by the constitution pertaining to liberty and freedom of conscience. Unfortunately, the social and economic naivety on the part of women due to many centuries of dependence has made them fail to grasp and appreciate domestic relations in their modern sense.

This has in turn led to increased instability in homes as evidenced by many unnecessary separations, divorces and general disintergration of marital relationships. Also notable as a factor contributory to domestic chaos is the absence of trust and confidence between parties to a marriage, mainly due to t unreliability on the part of women who have relaxed their moralsin the name of women liberation movements. Men have been greatly discouraged by this new feminine attitude of diversifying their appreciation of morals. Men have been reluctant to marry, others have delayed their marriages and many others have had to live with unstable marriages.

Pre marital pregnancies have been the biggest blow suffered by customa Nandi Marriage institution. While sexual intercourse before marriage was and is not expressly prohibited, a pre-marital pregnancy remains a shameful and degrading occurance on the part of the woman. In the past, a girl who got pregnant before marriage had very few chances of ever getting a husband or being married as a first wife. Alternatively, such a woman could either arrange to marry the man responsible for the pregnancy or get married to any other man but only through the method of elopment, which is a secret marriage arrangement between the parties to it. Such marriages, nevertheless, are recognized and ratified some time after the parties have united.

Today however, it is quite common to witness such women (mothers) celebrating a christian or even a customary marriage. This is because the christian marriage does not take into account the question of chastity. On the other hand, customary marriage rules have relaxed so much in that such mothers can enjoy the benefits of celebrity without much ado. But whether a mother is to be married in this fashion really depends on the mans' opinion an decision.

As we have seen, the English cultural and social values are deeply embedded in the Kenyan society. They are even reflected in the legal development of family relations. Colonial education of the African was particularly regarded as the most effective means of civilizing the Africans. The courts mistakenly believed that any educated African was in a position of unquestionabl accepting the English culture, As regards the promise to marry, the court held in 1970[19] that where both parties were educated and had promised to mar without specifying the type of marriage they intended to contract, then it is presumed that they promise to marry under the English law.

In the case of Laloke (Lanoiin) v. Obwoya,[20] a man had promised to marry a fello Ugandan lady who was a student in a Catholic School. The man later repudiate the promise, whereupon the girl filed an action for breach of promise. Under customary law, no action lies for breach of promise to marry (Mwinde v. Mwi In that Ugandan case, the court gave judgement in favour of the school girl saying that it could not accept the defence contention that the promise had been a customary promise. The girl received an award of Shs.2000/- in damages.

In this case,[22] it is not understood how the court applied the common law principles relating to promise to marry where two Ugandans, who were Acholi by tribe and custom, were involved. In the Nigerian case of Cole v. Cole[23], the court had emphasised the fact that christianity and education were the only means by which the African mind could be transformed to accept English values, and that when an African accepted the English values and standards of existance, it was deemed that English law was suitable for him. But surely this was not to be the case as was later exemplified by the 1904 Divorce Ordinance[24] or the case of Ayoob v. Ayoob[25] where the court held tha change of faith did not in effect mean change of family law.[26]

Although education and christianity has extended its roots of influence deep into all areas of Nandi, as far as marriage and marriage laws are concerned, the Nandi still prefer their customary marriage laws to any other.

They have come to accept the fact that English concepts of marriage do not provide the required harmonious and peaceful regulatory means of domestic relations. More Nandi marriages have of recent times taken a forceful plunge into customary system of law as modified to suit modern trends. Those who had previously married under the Marriage Act[27] or the christian marriage and Divorce Act[28], have found it culturally taxing to operate and maintain the Western concepts within an African setting. The trend today is a steady slow rise of instability and disintergration of Western style marriages. For those whose faith has remained fairly strong, and who are mostly aged persons; the marriages have continued to flourish in spite of renewed pressures from the younger generations to develop a negative attitude towards christianity. There are constant cries from parents urging their children to join the church and meaningfully participate in its functions. This cries are justified since the membership in most churches is dwindling and increasingly constitutive of old persons. The community is currently experiencing a gradual strengthening of modern customary law based on the values of the post independence generation

It can thus be stated that a Nandi customary marriage has undergone change within itself not withstanding other colonial economic and social influences. Of course the change is traced to colonial pressures and post colonial economic structures, institutions and policy. Under this new system, women and men wield a lot of power derived from their academic and econor prosperity. They use this power socially to determine, as between themselve what type of domestic relations they opt to adopt. Nevertheless, whatever values, new or old, they opt to dopt, are subject to the indegenous system operating generally. Although a Nandi customary marriage today in most cas excludes the will of the parents in its initial stage, the parties to it realize as the marriage matures, that it is inevitable to live and be subject to the marital standards generally accepted and recognized within the community.

As we have seen, women today are capable of not only holding high offices but are also able to attain tremendous and influential economic positio But this does not mean that the position of a woman as a central feature in a marriage ceases to be of any weight. Indeed, a woman who fails to get married is neither respected nor held in high esteemation by the members of the public. The Nandi rules pertaining to marriage are not rules of convenience but of necessity. In spite of western influence, the Nandi marria and particularly the values attached to the marriage shall remain embedded in the very purpose for which the marriage is celebrated. Laws may either change on their own accord, or may forcefully be transformed through legislation, but this cannot shake the institutional basis of marriage.

The colonial administration had sought to determine through law, the direction toward which African family law was to develop. The failure of the attempt and the Nandi resistance to the attempts are evidenced by the number of customary marriages celebrated today. The majority Nandi population celebrate customary marriages. It is thus advisable that the independent Kenya government must not interfere with the constitutional and natural rights of the individual to choose and decide for himself not only the manner and form in which he shall celebrate his marriage, but also the partner of the marriage. It is my submission that even the dangerous preservation of Publi Security Act cannot operate to negate the individual's inherent freedom to marry and marry at will. If Parliament promulgates a uniform legislation to unite the four systems of law, then such legislation shall be void ab initio in so far it is contrary to constitutional safeguards.

It is honestly conceded that the impact of colonialism on the domestic relations in Kenya cannot be underestimated. However, the extent of resistance the customary systems put up to counter the otherwise total European socio-legal domination must be admired. The question we should ask ourselves at this juncture is whether polygamy or monogamy is a favourable relationship.

Hyde v. Hyde[29] attempted to define what an English marriage amounted to. I deliberately use the word 'attempted' because in practice, not all English marriages which are purported to be monogamous and for life have lived up to Lord Penzane's definition in Hyde v. Hyde.

African forms of marriage took into consideration some practical economic and social factors and realities. Polygamy was and continues to be practised as an ordinary mode of existance. Ironically, the Western superstructural base in which monogamous marriages thrive has provided a completely new reason for the justification of the practise in present Kenya, where the superstructural base is similar to the English one. The centre of production in the modern system is the family. The family unit engages in diverse and complex economic ventures that to some men, polygamy is a safeguard to the external economic forces which may operate to negate the domestic harmonious existance. In this sense, domestic productivity is protected and kept within the required limits. Polygamy has always been explained on economic lines. In olden customary view, anybody who could afford in terms of provision for the family and also payment of bride-wealth, could take a second or even third wife Even in modern legal and social studies, polygamy is still explained on an economic basis.

Kenya is a united nation. But Kenya continues to experience a diversifi and sharply contrasting system of family Law. Attempts have been made by th independent Kenya government to consolidate and unify the marriage Laws obtaining[30]. This may import the belief that customary law are on the verge of extinction. This is not true since customary Law like any other custom, do not dissappear as such but merely undergo an internal transformation. The various English legislations and statutory provisions which operate in Kenya cannot simply overcome the customary rules in operation. It is absurd to contemplate on the extiction of customary Law. Customary Law is a way of lif it originates from the very nature and well being of the African at all material times.

African systems of marriage are simply transforming and adopting mode social and economic dimensions based on Post Colonial perception of human relations. Over a hundred years of British rule and imposition of British cultural values did not phase out customary African systems of marriage. Thu in contemporary Kenya it is essential to guard against any unjust imposition of Law through unconscionable means merely because such laws have been thought necessary by the impositor. Law must reflect and protect the status quo and stage of evolution of society. Marriage Laws will continue to reflect and conform to the superstructural base in society. They are part of it and spring from it. History is a continuous process and law, a tool of that continuity and change. Thus, customary marriage laws have evolved to suit the current statu of the family and the entire domestic structural orientation. In Mwagiru v. Mumbi[31], the court implied the fact that for a marriage to be valid, consent o parents is not necessary. At that stage in Kenya Family Law development, it was an established fact that parental consent was no longer necessary before a party entered into a marriage union.

The need to regulate marriages through law is therefore a constant desire of society. This is essentially explained by the need to keep marriages within cultural bounds.

PART III

CHRISTIAN INFLUENCE ON NANDI MARRIAGE LAW.

Christianity as is known to the African is a white man's religion. Indoctrination of the African through christian teachings was a forceful and clearly intentional process. The aim of the church was to transform the African through religion into accepting and adopting English notions of religion. The christian faith was developed by the missionary into a tool for blackmail. The acceptance of the christian faith by an African was expect to be accompanied by similar acceptance and accommodation of Western cultural values. Christians viewed female circumcision as sin or as being contrary to christian principles. Thus African christian were under a spiritual obligation to avoid the circumcision of females. This was the beginning of direct christian influence on the Nandi Laws of Marriage.

The attitude of christians towards African practises generally was so low that in respect to marriage, the payment of bride price, the practise of marriage tests and the levirite marriage were all considered as being contrary to christian principles. In communities where marriage tests are practised, the custom is to minimize frustrations of a marriage as was the case in K.v. K.[32] where a petition for divorce was granted. In that case, a marriage had been frustrated as a result of a physical infirmity which made the consumation of the marriage impracticable. Evidence in that case showed that the vagina of the respondent was $1\frac{1}{4}$ inches deep as opposed to the minimum legal requirement of $4\frac{1}{2}$ inches. Thus, divorce was granted because the marriage had failed to satisfy one basic requirement, namely, the Penetration of the male organ fully into the female sexual organ.

The declaration of Levirite unions as contrary to christian principles led to many christian widows remaining single hence their inability to maintain their homes. They were also denied emotional satisfaction which was a natural right to be enjoyed at will by any person. Although bride price was similarly viewed by christian tutors, the converted Africans continued to negotiate for the payment of dowry outside the christian marriage.

Although many Africans accepted to be converted into christianity many more were unwilling to accept those christian principles which contradic their cultural concepts which were central to their social structure. The Missionaries, despite the general feelings of the Africans, went ahead to believe that Africans had fallen prey to their bait of religious imperialism. The Missionaries engaged in vigorous missions of anglicizing the African culture to the extent that they contradicted their institutional constitution which regulated missionary activity of the church. The Vatican II Decree on the Missionary activity of the church in Africa expressed the adaptation of "variou cultural modes, to her own (church) enrichment and theirs too". The explanation given to this part is that missionary work had to operate to accommodate universal values. Gustar Voss wrote of missionaries:

> "... the missionaries, true children of their times ... shared the intolerant and prejudiced views of the conquistadores on the native cultures and religions. Moreover, imbued as they were with the Militant zeal of the ancient crusaders, the thought of accommodation and adoption could hardly enter their minds. They were unaware of the genuine religious value to be found even in heathenism, ignorant of the sentimental and emotional values bound up with its beliefs and rituals, and equally ignorant of the social structure and racial and psychological peculiarities of their new charges."[33]

In many African societies the role played by the church in the proces of anglicisation need not be underestimated. The promulgation of marriage Laws was done with close consultation with the church. The vital role playe by the church in the framing and implemention of the colonial policy led to the Bishops and priests to assume the position of honorary advisers to commissioners and Governors of the imperial government. To implement legislations which were against the wishes of the Bishops was unthinkable.

While Jesus christ was seen by the English religious community as th guarantor of perpectual life, to the African this was achieved through the procreative notion embodied in the concept of marriage. To the Nandi, marriage was appreciated on a religious basis. Procreation was never defeated even by impotence or barreness. The Nandi customary Law provide for situations which, technically speaking, enabled every person to enjoy the benefits of Marriage. It is this cultural legal basis of marriages that the spread of christianity sought to transform through the new faith into a standa acceptable to the English. However, to the African, he was prepared to accept the christian faith but with modifications so as to include African principles. But the missionaries were not prepared to do this. Instead, the set up schools and hospitals based on the English standards. One of the maj subjects taken in these schools was religious studies and a lot of emphasis was placed on it so as to achieve the desired goal. Thus, christianity took root, many were converted into the new faith. Many others underwent the christian marriage ceremony which under the 1904 ordinance, entailed many restrictions both of social, cultural and economic character.

One such restriction was on the institution of polygamy which hitherto allowed the marriage of one man to more than one woman. Christianity introduced by law the monogamous union. It is polygamy which radically distinquishes a customary marriage from the European one. It is polygamy which has constituted the point of greatest resistance to the teaching of christianity. Male dominance amongst the Nandi is still felt to this day. Th reason for clinging to this customary value can only be explained in a natural sense. It is the woman who yearns to have babies because it is natural to h It is the duty of the woman, before getting pregnant, to seek the protection and support of the man so that she may be able to execute her natural obligations of childbearing.

Marriage Laws therefore exist and operate to ensure that a willing ma does not breach his obligation under a marriage relationship. To the Nandi, this is achieved through the payment of dowry. Dowry, or bridewealth as I prefer to call it for the purpose of this dissertation served not only as a kin of replacement in wealth to the brides parents, but also as establishing legality to a certain extent. I do not agree with Prof. Radcliff-Brown's

assertain that

> *"In most African Marriages, ... the making of a payment of goods or services by the bridegroom to the brides kin is an essential part in the establishment of legality".* 34

In Nandi Marriage Law, dowry does not necessarily constitute legality. As we shall see in the next chapter, it is the stage of Katunisiet that legalizes a Nandi marriage.

Thus, the introduction of christianity and christian marriages in effect meant the relegation of customary marriages wherever christian norms applied. Christianity embodied the true imperialist marital concepts because it sought to impose concentrated christian concepts on the African without attempting to dilute the christian views with African values. Christianity and its principles h undergone some transformation at the hands of the African. And because of its exotic nature, and its incompatibility with African custom, christianity has become an unfavourable machinery for regulating social theory and practice. Monogamy and polygamy have been the main issues which have dominated the English - Christian debate by Africans on whether or not monogamy is a christian requirement. Or is it a requirement of the English Law and not a christian principle? When christianity landed on the British Isles, whether or not in it original form; did it prohibit the practise of polygamy. Was it restricted in its application as the English want us to believe? Or is it that the English used christianity as a shield and scapegoat for its imperialistic policies? The final question we may pose is why was there a distinction between the christian marriage laws as per the 1904 Ordinance and the English laws as expressed in the 1902 Marriage Ordinance? Was there really the need to draw this distinction when the two pieces of legislation were substantially similar in respect to Marriage?

Thus we can make reference to Harris, L., a prominent and industriou religious scholar who concluded in his studies that reconcilling christian principles and African traditions is but an illusion.
He says:

> *" It is a vain hope to think that there may be in the system of polygamy some saving clause, ... that will make its practise generally permissible to African christians"* 35

African concepts, particularly polygamy, have determined the extent to which christian and European notions of life in marriage laws have been affecte and influenced the position of customary law today. It is economic trends and not christian influences that have transformed polygamous tendencies today into what I may refer to as commercialized human sensations and cohabitation outside marriage. To the Africans, the Nandi not being an exception, polygamy is an inherent traditional and customary rights whose foundations christianity has failed to shake. Thus, the restriction of African christians to one wife ha led to husbands to diversify their sexual habits and desires. To the African christian, this does not amount to adultery and does not in any way threaten the African marriage, whether monogamous or otherwise. The European conce of morality and justice does not apply to Africans. Africans today hold the vie that one can profess the christian faith and at the same time enjoy his cultural values. The irrationality identified in the christian disciplines and which strengthen further our conclusion that christian marriage regulations were basically and essentially English, has been felt in three situations: (a) where a person is a party to a polygamous union and wishes to profess the christian faith. It is interesting to see how this would be argued out by christians who at the same time pays homage to the English marriage laws. (b) where a devoted christian contracts a polygamous union, and (c) what is the position of the wives of a polygamist who wish to accept christianity? We can therefore bravely state that the christian marriage and Divorce Ordinace of 1904 was contrary to the very requirements of christianity. The Ordinance was to

serve the Africans who contracted christian marriages so as to indirectly impose on them English concepts of law of marriage. So horrorfully and rigidly did the missionaries enforce the English legal policy through the christian marriage and Divorce Ordinance that Harris L, did not hesitate to write:

> *"Nearly all missions in Africa were agreed from the beginning that any baptised christian taking more than one wife must be excommunicated or otherwise disciplined".* 36

To conclude therefore, we can say that the Nandi forms of marriage have changed in accordance to the religious practise-particularly christian practise. If one is a christian then one celebrates a christian marriage following a procedure laid down by that particular church or denomination. The non-christians continue to celebrate either the marriage as laid down under the Marriage Act or continue to adhere to customary procedure which, as described in the next chapter have been modified to suit modern cultural circumstances.

The Contemporary Nandi society is composed of those who fell prey to the English concepts of life and who are mostly educated personalities, and have contributed to the expansion of English norms and their entrenchment into Nandi society. There are also those persons who have contributed to stick to their traditional systems of marriage because of their social, cultural, economic and religious reasons. This group which is by far the largest, apply customary law and credit is extended to them since without them, customary law would have faded into oblivion-possibly.

Following colonial rule, the Kenyan African experienced a bitter legal evolution. He was torn away from his conscience and left to culturally die out forcefully, through administrative oppression and morally through religious indoctrination. The African had no chance to recover and find his way a new; nor would there be any hope if the Kenyan African continues to function socially and economically in a neocolonial characteristic environment. To achieve sound legal reform, the African must tear away the colonial mask and mummy dress in which colonial forces have continued to preserve him.

CHAPTER TWO.

INTRODUCTION:

The contents of this chapter consist of mainly two issues divided broadly into two parts. Both parts however shall basically discuss the concept of marriage from the Nandi customary law view.

The first part shall approach the issue from two premises: the customary marriage in its traditional form; the character, form, and its reaction to social and economic changes. Also closely connected and apertinant to this premise is the contemporary legal status of the customary marriage which will be sufficiently analysed.

When reference is made to the Nandi it also includes the Terik. These two communities have so similar traditions and customs that the slight distinction discrible in the expression and character of the two cultures have led to my treating them as one.

The second part will consider the effects of marrying under statute. The extent to which statutory provisions have affected the essentials of a Nandi customary law shall be observed with an aim of uncovering the silent effects of the legal conflict of the marriage laws.

PART ONE.

Essentials of any customary marriage are more or less similar. Where differences are encountered, they usually occur in the proceedural perspective of the marriage. Courts have relied on the explanations posited by either legal experts or anthropological or sociological authors of customary law in order to ascertain the existance and validity of a custom which forms the basis of customary marriage.

The judiciary which is responsible for the application and interpretation of customary law has not been seen to present a fair evaluation of customary law. This has basically been due to the nature of judges who for a long time have manned the judicial organ of the state. The Judges and Lawyers in Kenya are products of the English legal system. The English philosophies and values as legally expressed totally differ with customs and cannot therefore be seen to determine the validity or otherwise of a customary marriage. The procedural aspects of a customary marriage are as varied as are cultures based on specific social and economic foundations. For example, in Agricultural and Pastoral economhoes and plants may be symbolically used to validate - a marriage at particulars stages e.g. the - validation of bethrotal, the confirmation of - the success of the marriage or more relevantly, the granting of consent; whereas in semi arid or arid areas, water may be the validating symbol. This of course does not in any manner alter the basics of a marriage, namely, agreement of parties, consent of both parties and parents, payment of dowry or transfer of bridewealt consumation of the marriage which is preceded by an elaborate ceremony.

Snell, G.S.[1], who has written on Nandi customary law, currently states that the political and economic structure of the Nandi provided an equitable distribution of wealth and rarely was a man capable of marrying more than three wives. Even persons who could not afford to provide the required bride wealth was not precluded from contracting a marriage. There were accepted procedures which such a poor man could follow in acquiring for himself a wife. The ability to acquire the wealth was the most important factor considered.

Thus, a Nandi marriage, other than being an institution of achieving economic and social balance also provided a situation from which law can be ascertained and applied in conformity to the requirements of the constitution. As we shall presently see, marriage and religion are two inseparable entities and the constitution has ensured that wishes, thoughts and values of a people are protected. Lawyers are in most cases at pains to establish the legal basis of the application of customary law. The constitution is the most apt souce of validity of customary law for it states in chapter five that the individual shall be protected from discriminative law and policies.[2] Sec. 82 prohibits discrimination by law which in effect allows and validates the four systems of family law operative in Kenya. Apart from the constitution which is open to wide interpretation, the Magistrate's Court Act[3] at s. 2 provides for the application of customary law in a definitive sense. It states that customary law shall guide the court in matters where one or more of the parties is subject to customary law. It goes on then to define what a customary claim includes. The Judicature Act[4] is also a source of basis of application of customary law. At section 3(2), it provides for the application of customary law in so far as it is not "repugnant to justice, morality and good conscience".

The evolution of the Nandi Marriage laws applicable today can only be explained in considerations of socio-economic changes experienced through history. The Nandi living on Marginal areas have interracted with other communities to the extent that marriage on this borderline areas has assumed a slightly different form. Particularly at play in these areas are economic relations which have made strict adherence to Nandi culture socially impracticable. Nevertheless, the basis of a Nandi Marriage still obtain. The Nandi customary laws remained flexible and have accommodated new changes to conform to the dictates of modern life. But the same law has also not been able to alter its substantive aspects. In part II of this chapter, we shall have occassion to analyse the legal significance of conflicts between customary and statutory marriage laws. For now it is only desirable that the conflicts between the two systems of law have arisen in practical legal confussions as to the correct and acceptable legal requirements which validate either marriages.

As we saw in Chapter one, the desire of the colonial regime was to anglicise the African through law. This attempt has continued to be pressed on by the adherents of English values of life in independent Kenya. It is my submission that if there arises a need to promulgate new marriage laws for the country[5], then, it would be wise to avoid any temptations that may lead the unification of the various systems of family law. Although law remains law whether or not it is just, the current social and economic trends do not allow manifest injustice being propergated through law. To achieve this purpo economic policies ought to be stipulated in a manner that they would accommo ate African values. In the long run, when the need arises to unite and intergrate family law in Kenya, it would not pose any difficulty to formulate laws which would be dominantly African - for that was the main purpose of fighting for and gaining independence.

Before independence was gained in 1963, the Kenyan Courts were to a large extent guided by English concepts of law. Whenever the customs and English law conflicted, the latter prevailed[6]. This attitude held and practise by the courts gave no chance to customary law to enjoy judicial use and application.. However, outside the courtrooms, natives of this country continued to apply their own personal law. But one is left wondering why the colonial courts did not recognize African Marriages and yet they were a reali just as is the case today. This may be explained probably due to their biase and prejudicial training and upbringing. Since most of the colonial legal experts were Europeans who manned a European system of justice in Kenya they may be forgiven for holding the view that African Marriages were [illegible] Marriages[7].

But it will be unconsionable to forgive them for applying English law on the indegenous people since they had no basis whatsoever for doing so. We of course realize the inevitability of this colonial approach. Their racial attitude and emphasis on European superiority was supposed to be reversed at independence or shortly thereafter. But it is unfortunate that the post ~~indepen~~ colonia~~ent~~ policies continue to protect the same colonial aspirations.

We now turn to the Nandi institution of marriage. Professor J. Mbi has given a true and correct view of what an African marriage is. This explanation also applies to the Nandi Marriage. There may however be a slig distinction in Nandi in respect to the function of each party to a marriage. He says:

> "For most Africans, marriage is the focus of existance. I is the Point where all the members of a given community meet the departed, the living and those yet to be born..... Marriage is the drama in which everyone becomes an actor or actress, not just a spectator". 9

Although this is totally true, to the Nandi, a woman plays a very insignificant religious role in determining the "focus point" mentioned by Mbit The procreative nature of marriage is seen to apply only to the man. A wom simply facilitates the immortal aspect of life. She is not considered to have relevance to the religious nature of marriage. It is the man who determines the status of any child. This is because the Nandi are strictly a patrilineal society. The children belong to the man.

A Nandi marriage is not merely for the purpose of companionship. The basic purpose of marriage is the birth of children. Failure to give birth may threaten a marriage although this does not necessarily invalidate it. Polygamy ~~is~~ May be also resorted to where there are only female children in a marri or where there aren't any issues of the same. The need to bear a son is so intense that the Nandi society has various legal methods of achieving this cultural desire other than through the normal ordinary marriage. Natural dissabilities are no bar to a marriage.

Pre-marital sex among the Nandi was strictly prohibited. Children born of such unions were either killed or adopted by a childless woman. Even today, such unions are strongly discouraged. However, with modern standard of living and excessive interraction between men and women, this practice is very popular particularly amongst the youth. Children born outside marriage are no longer discarded but remain with the mother unless the father so dema in which case a compensation is paid to the father of the girl. But the general rule is that children born outside marriage belong to the girl's parent and it is they alone who have the final say over the custody of such children.

The biological father has no claims whatsoever over the child unless of cours he opts to marry the girl in the event of which the legal ownership of the child passes to the father and his clan. Otherwise, if such a girl marries another man, then the husband may decide if he wishes, to adopt the wife's child as his own. Once he has accepted to do so, he is under an obligation to maintain that child which maintanance includes providing the child with land upon attaining majority age. If the child is a girl, then he and only hi has claims of dowry over the girl when she eventually marries.

In traditional Nandi, 'love' as we know it today was not expressed if it at all existed. A woman's love, i.e. desire to have a man - a particul man - remained in her unexpressed until she married. Once a woman was married, she was totally devoted to her new partner. She never had the chance to 'try' several men before she married. Her husband was the only man she had met after all. It is the joy a woman found in her husband during her first meeting with him that created that permanent impact on the bride's mind. From then on, a woman loved her husband. The position today is that parties must come to a sort of sexual or social consensus befo the decision to get married is made.

In the earlier days, a nandi marriage had to conform to a definite laid down procedure. Depending on the type of marriage a person wished to contract, there were stages which had to be followed in each case. When a man felt that he had prepared himself enough for marriage, he would inform his parents, in their absence an uncle or any guardian closely related to him Either the suitor pointed out a specific girl he had in mind or simply left th matter to the parents who would immediately set out to finding the relevant qualities and factors which they desired from a would be wife for their son. Matters relating to prohibited degrees, reputation of both the would be bride and parents and the relationship between the two families were closely scruti zed.

After singling out a specific lady, the parents would then adequatel prepare themselves with the necessary symbolic requirement and then, following the established order, would present their case, No immediate response was required from the girls parents. A date would be set when the two groups would meet and discuss the details of the arrangements whic included, and most importantly, the issue of bridewealth. After all is agree on, then a date would be arranged where the bride would be customarily handed over to the groom.[10]

The various types of marriages which are as valid as each one of them, were at the disposal of the parties to the marriage. In each case, specific guidelines were laid down by customary law as hereinunder discusse

The biological father has no claims whatsoever over the child unless of cours he opts to marry the girl in the event of which the legal ownership of the child passes to the father and his clan. Otherwise, if such a girl marries another man, then the husband may decide if he wishes, to adopt the wife's child as his own. Once he has accepted to do so, he is under an obligation to maintain that child which maintanance includes providing the child with land upon attaining majority age. If the child is a girl, then he and only hi has claims of dowry over the girl when she eventually marries.

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The most important essential of any of the type of marriage was one of capaci ; e.g. a wife whose husbands whereabouts were unknown and yet no report of death had been received, could not purport to enter into a levirite union. Similarly, it was extremely rare for a woman who had had a successful marriage to contract a woman to woman Marriage. A successful marriage means that which both male and female issues were present. The types of marriage that existed included monogamous unions which were a marriage between one man and one wife. We shall see presently at what stage such a marriage amounted to a monogamous union. There existed also polygamous marriages; Levirite unions; woman to woman marriages and Home marriages, popularly known in academic circles as forcible marriages.

The Monogamous marriage does not fall within the terms as defined in Hyde v. Hyde." In actual fact these marriages, upon the unilateral decision of the husband, could transform into a polygamous union. Strictly speaking, Nandi marriages is monogamous until a situation arises which necessitates the restoration of the social, religious or economic element lacking in the first union. The main reasons for resorting to a second marriage are: increased wealth of husband, failure to have a baby boy or any child for that matter, or merely to achieve domestic equilibrum - particularly where the first wife is unco-operative or cruel and wild. A much more recent phenomena is where christians upon marrying under statute are compelled to remain monogamous both by their christian principles and statutory requirements.

A monogamous marriage was and is mostly prefered on economic grounds. To most Nandi men, one wife and an average five children were enough to constitute a family. Most Nandi families even today are fairly small in size. Where a husband resorted to polygamy, then that decision rested solely on him, except where his first wife had commanded so much respect that her blessings were sought. There existed slight distinctions between one wife and another. However, the elder wife would enjoy some social privilleges e.g. when their husband died, he was buried at the homestea of the eldest wife.

A polygamous marriage arose where two marriages, separate and legaly valid but incidentally between the same man and two or more women were contracted. In such a union, a husband's duties and obligations are mor complex than in a monogamous union. Distribution of wealth and emotional interests must be done with utmost prudence. Many people refrain from entering such unions because of social economic consequences. When differences arise between members of a polygamous union, their legal consequences are far reaching. Nevertheless, people continue to enjoy the company of more than one wife under customary law. Legally, this type of union is as valid as any other and no reason other than social, has arisen to

restrict such marriages from coming into existance.

Whether or not a man was monogamous, he had the capacity as a responsible father to enter into a levirite union. These type of unions are slightly different from the two described above. They are not marriages as such since most of the essentials are not of necessity established. The most important purpose for such unions is the bearing of childred and the maintenance of the family of the deceased by the appointee. Levirite unions arise where a legally married husband dies and leaves behind a young wife who is still capable of bearing children. Where a widow is childless, normally, she would go back to her parents. Part of the dowry may be returned upon confidential arrangements between the parent of the spouses befallen with the tragedy. The levirite union is legalized by elders who take it upon themselves the duty to persuade the widow to accept a particular man of their choice. The man chosen would usually be a married man who has a reputation for responsible and mature marital responsibility. Polygamists, though not usually favoured, are normally the forerunners. It is important that the widow accepts to enter into such a union. If she declines the elderly suggestion, she is free to take care of the home and maintain the deceased's family without any support. Nobody would under any circumstances whatsoever question her desire. One important point: all children born under a levirite union are deemed to be children of the deceased husband; enjoying all rights and duties of the estate of the deceased.

The philosophy that surrounds this cultural value is worthy of some consideration. A Nandi wife is deemed to have been married into the family but under the strict care of her husband. Upon the death of her husband, it is the duty of the deceased's family and clan to take care of their wife and children. Normally it is the brother of the deceased or a member of the clan who, as it were, inherits the wife. He inherits the wife together with all legal obligations and duties which would otherwise have been on the part of the deceased. The death of a husband does not terminate a Nandi customary marriage. The "fire" of the deceased is continued on his behalf by his kith and kin. He lives on. A woman is considered to have an inalienable right of being supplied with physical and emotional protection and fulfilment.

Another important thing to note about levirite Marriages concerns the question of succession. It is only the children of the deceased and those born of the legal levirator who are entitled to inherit the estate. Children born by men from outside the family or clan of the deceased are not entitled to inherit.

The fourth type of marriage is the woman to woman marriage. No doubt this type of marriage is practised by very few communities. It is even

practised in Southern Africa. This custom is practised by the Nandi and is as valid in law as any other marriage so long as conditions precedent are met. But unlike other marriages already discussed, in this case, it is a woman who marries another woman. The legal relationship and the obligations arising therefrom are operative between the woman husband and the wife. However, the actual excecution of the biological relationship is between the wife and a man chosen by the woman husband. It is immaterial in law whether or not the 'husband' is married. Whether or not she has children of her own is not also a question of any legal significance. However, it is usual to find barren women; divorced or sonless mothers who are in the habit of contracting such unions.

There are several legal implications springing from such marriages which we shall presently discuss. But first, why is it that the Nandi practise this custom? It is a customary and religious requirement that anybody whethe woman or man ought to have an heir. The most favoured and prefered heir is a son. This is why widows who have daughters resort to this practise particularly if all the daughters are married. But in most cases, barren women request for a divorce and then go back home to settle on their father's land. For such barren women, their parents are under an obligation to provide her with land. Indeed it is the responsibility of the clan.

Once settled at her original home, she is then allowed by law to own property and 'marry' just like any other man. One of the prerequisite is that such a woman must have passed the age of childbirth. Once married, she is presented with an honorary masculine status. Eventually, she may even be allowed to attend male circumcision ceremonies which are strictly attended by circumcised male members of the community.

Through this type of marriage, the barren woman or sonless widow can enjoy the benefits of having a child, The issue of such a union belongs to the 'husband'. Like in the levirite union, the man assigned to do the biological duties of a matromonial union may have his own home, wife and property. He contributes nothing to the marriage and receives nothing in return other than sexual fulfilment. The 'husband' is responsible for the wife in all respects and the wife is in turn entitled to deal with the Lady's property just as an ordinary wife. She maybe divorced as well. On important condition is that for the children to be legitimate, their mother must remain in the matrimonial home while pregnant. Sometimes it is not legally necessary for the 'wife to get children from the designated man so long as she bears the baby while in the matrimonial home. The children in the marriage are entitled to the same rights of inheritance and usurfract.

The last type of marriage which for the purposes of this dissertation I shall refer to as the domestic or home marriage is also another interesting

one. Where a first marriage fails to bring forth a son, and the husband does not exercise the right to marry a second wife, the father of the home may marry her daughter to the home so as to get an heir. Normally, the last born daughter, who may be the only one as well, is requested to remain at the home. When this request is made, more often than not, the daughter has no alternative but to accept. Sometimes, such daughters may have recognized boyfriends. But in most cases, their boyfriends are unknown. After all, no one needs to know them. The children the daughter begets at the home become the children of the homestead. They enjoy the rights and obligations as if they were the children of the unsuccesful marriage. Sometimes, after the daughter has had one or two sons or daughters, she may be given the freedom to join her boyfriend in Matrimony.

In such a case, the children born while she was so restricted belong to the homestead and their biological father or even her, cannot claim any of them. One advantage that accrues to the man is that he is exempted from paying bride price but nevertheless contracts a legally valid marriage with his wife. After all, he surrender his rightful children to the father of the wife hence the cementing of a powerful relationship between him and the parents of the wife. He is just considered as another son.

These last two types of marriage considered are the least contracted nowadays. The main reason being that they are so incompatible with social challenges that sooner or later they will be regarded as formely extinct.

For any of the above marriages to be valid, there are formalities which must be followed. In the first place, the parties must have agreed to get married and be married. In the olden times, it was the parents who decided whether their son or daughter was ripe for marriage. The regulating factor here being the consent to be circumcised. No boy or girl could be circumcised without the express consent of the father and mother, or in their absence the guardian of the candidate.

The first and most cardinal prerequisite to the formation of a marriage was circumcision. Even today this still applies to the boys. Girls were married immediately after circumcision ceremonies were concluded, usually after one year. The boys married after serving in the standing army for a specific period of time. It is at this time that the boy acquired property for the eventual payment of dowry. As I briefly mentioned in the earlier pages of this chapter, relationship by blood or a criminal offence was a barrier to a marriage.

Once capacity is established, then the question of consent is considered next. As a general rule, parental consent must be sought. In the olden days

it was unimaginable for parties to marry without parental consent. However, the marriage by elopment was one where parental consent and knowledge was avoided It was and still is a secret way of getting married. The main reason why parental consent was customarily considered as necessary was because of the role played by the parent. Other than the actual consumation of the marriage, the parents were responsible for all the necessary requirements for the conclusion of a marriage.

Today, individuals wield so much economic and social power that unilateral decisions made by parties are the main factors that lead to a marriage. Parents only ratify marriages today. But it is advisable to discontinue a marriage which the parents objects to ratify either expressly or by conduct.

Bride price is considered as central in the conclusion of a Nandi customary marriage. It is bride price which binds the two families of the marriage. Although bride price does not invalidate a marriage if its not paid, partial or full payment or mere promise to pay is enough to validly conclude a marriage. It is the success of the marriage rather than the payment of bride price which legalizes a marriage. We shall soon see that conception is the point at which a marriage is declared totally binding in law.

Failure to give birth on the part of the wife merely renders the marriage voidable. Since there are alternatives for having children, a husband does not necessarily resort to divorce when the wife fails to conceive child. But if it is necessary to return the bridewealth so as to enable the man to remarry, then divorce may be resorted to. Customarily, the amount payable for dowry is averagely five cattle and a goat or two. But today, bride price may even be higher given the fact that money has been introduced to either supplement or serve as an alternative. The practise of payment of bridewealth is surely given more emphasis today given nature of society in which we live in today.

Divorce under customary law is granted when parties irretrievably differ for one reason or another. In olden times, divorce was publicly granted only when all efforts to strike a reconcilliation fail. In the event of divorce children remain with the father and no brideprice is returned. However, where custom does not adequately satisfy either party, the Magistrate's Court[12] are empowered to entertain such civil claims of a customary nature. More often that not female parties prefer arbitration by the courts to the elders arbitration process. This is mostly due to the question of custody of children which custom invariably grants to the father.

A Nandi marriage may be nullified on various grounds. Witchcraft is not at all tolerated under customary law. Where a party, (mostly women) one found to be wizards, then the only alternative is to terminate the marriage.

every Kenyan community to apply that law with which they are not only familiar with but also culturally relevant.

PART TWO.

EFFECTS OF MARRYING UNDER STATUTE ON THE NANDI CUSTOMARY MARRIAGE:

Marriages contracted under statutory provisions[1] have given rise to drammatic legal consequences whose effect on the Nandi customary marriage are worthy of consideration.

In chapter one, we analysed at length the general purpose of colonial imposition of English Family Law in Kenya. In part I of Chapter two, we also dwelt at length on the various features and essentials of a nandi customary marriage(s). It is thus noteworthy to take a brief look at the effects of marrying under statute and the extent to which this practise has radically transformed the basis upon which customary marriages thrive particularly in respect to situations incidental thereto.

The main purpose of colonial legal domination in matters pertaining to domestic relations was to totally anglicise the African so that he becomes wholly subject to English family law; indeed English concepts of justice in general. This was exemplified by the old Nigerian case of Cole v. Cole[2] whose findings were a clear judicial move to effect colonial desire in respect to religious and psychological stand taken by colonial rulers as regards African. In Kenya, the initial legislative pronouncements, namely, the Marriage Ordinances of 1902 and 1904 together with the christian missionary movement and supported by cases decided in Court were all collectively responsible for the partial fulfilment of this goal, i.e. the anglicisation of the African.

However, as the foregoing exposition has revealed, concrete economic, social and cultural realities did not make it possible for the colonizer to succeed in his ambition. Africans by and large, continued to be subject to African law as they individually perceived it in the light of overwhelming social and economic changes. This has largely continued to be the trend particularly because no attempts have successfully been made in the post colonial era to forge a policy which would culminate in the promulgation of a uniform legislation which would encompass the various African marriage laws so as to achieve the goals hitherto envisaged by colonial statutes. This failure to unify marriage laws in Kenya has in itself been a blessing to customary law since it continues to be applied unhindered by strict legislative provisions.

Under the Marriage Act[3], 'Marriage' is defined to mean the voluntary union of one man and one woman for life to the exclusion of all others. Section 37 of the Act make it legally impractical for a person to contract a valid marriage under Native law or custom during the continuance of such a marriage. It is thus clear that a statutory marriage is strictly monogamous and once contracted

is totally governed by the provisions of the relevant statute any other customary claim or interest incidental thereto notwithstanding. As the case of Ayoob v. Ayoob[4] has confirmed, where parties to a monogamous marriage change their religion to one where polygamy is recognized, such change of faith has no legal effect on a monogamous marriage. In that case, the parties had married under the Marriage Act in 1951. They purpoted to transform their marriage into a Moslem one by way of an Islamic Ceremony as required by Mohammedan law. In 1967, the husband purported to divorce the wife by way of Talak, a lawful means of dissolving Moslem Marriages. The husband then sought a declaration to the effect that their marriage had been dissolved by divorce by Talak.

At the court of first instance, RUDD, J dismissed the application holding that a Mohammedan Marriage and one under the Marriage Act entailed different incidents and could not be dissolved in the same manner. That an English marriage under Marriage Act could not be dissolved at will or by change of religion. On appeal, it was held inter alia, that,

1. a Marriage between two Muslims under the Marriage Act is not a Mohammedan Marriage under the Mohammedan Marriage, Divorce and Succession Act, sec.2 ; nor can it be converted into such a marriage by a subsequent ceremony purporting to be a marriage under Islamic law.

2. Where parties have validly married under Marriage Act, a subsequent purported marriage ceremony between the parties under Islamic law is invalid and of no legal effect whatsoever;

3. Although the statute law of Kenya affords partial recognition of religion as a factor in determining the application of personal law, the legislation restricts a person's changing his existing obligations by change in religion; and in particular a change in faith does not affect the consequences of a marriage or the reliefs available to the spouses.

In addition to this judicial pronouncement, the Marriage Act[5] provides at sec. 49 that any person who contracts a native or Moslem marriage and then whi the marriage subsists purports to contract a marriage under the Act shall be guilty of an offence punishable by imprisonment for a term not exceeding 5 years Sec. 50 of the same Act provides that any person who has contracted a marriage under the Marriage Act and then purports to contract a native or Moslem Marriage while the marriage subsists shall be guilty of an offence punishable by 5 years imprisonment.

It can thus be seen that statute rigidly protects the Monogamous English Marriage. This in effect means that Nandi spouses who have married under statute Law cannot enjoy any rights or interests as are expressed under customary law once they opt for the English type of Marriage.

The dissolution of such statutory marriages is only possible by way of statutory regulations as provided by the relevant statute[6]. No parties whose marriage is governed by the Marriage Act can dissolve their Marriage at will or by any other means other than that provided for by statute. The Matrimonial causes Act provides that a marriage may either be annuled or where nullificatio does not apply, then divorce proceedings are commenced to terminate the marriage. The common grounds for nullifying a statutory marriage are enumerated at S.14 of the Act, and which include (a) lack of capacity i.e. where it is discovered within the first year of marriage that the respondent, if a man, was impotent; that the marriage certificate was procured by means of fraud; that the union is adulterous i.e. one of the parties was validly marrie that the respondent was of unsound mind and that the mental ailment is incurable; that the respondent suffers from a veneral disease in a cummunicable form and wilfully and knowingly exercised the right to sexual intercourse; and, that the respondent, if a woman, was pregnant by another man who is not the party to the union. (b) Lack of consent. If it is discoverd that either party had been induced, or coersed, without the party's consent into contracting the marriage then it may be nullified. (c) That the parties fall within the prohibite degrees. If this is established then the Marriage is nullified.

Where the above three situations are proven, then three other conditions must be established before an order of nullity is granted. They include (i) That at the time of the marriage, the petitioner was ignorant of the facts.

(ii) That the petitioner has not exercised the right to sexual intercourse since the discovery of the facts is made.

(iii) That all these situations and facts occured within the first year of marriag

Where divorce is resorted to in the dissolution of a marriage, then the statutory grounds[7] which must be established include (i) Cruelty (ii) adultery, and that the petitioner has not condoned the same, (iii) dissertion for three years which dissertion must be wilful, (iv) Unsoundness of mind on part of respondent for five continous years and that the ailment is incurable. If the petitioner is the wife, then she has remedy against the husband if he is guilty or rape, sodomy or bestiality. The standards of proof are one of fact[8]. In Mathai v. Mathai[9], the court ruled that standards of proof are objective, those of a reasonable man. In that case the court pressumed the fact that adultery which was a ground upon which the court granted the divorce; had been committed given the circumstances with which the respondent conducted herself.

Under the Nandi customary law, adultery is a ground for divorce only if it reccurs repeatedly and if the husband takes the initiative to seek the remedy of divorce. Alternatively, a husband may claim compensation by

way of damages from the third party with whom the wife has committed the offence. The husband may also discipline the 3rd party if he finds him in the act of committing the offence. Conversely, a husband cannot be guilty of adultery under customary law which in effect means that a wife cannot make a customary claim against a third party with whom the husband has had sexual intercourse. Sec. 9, 11 and 23[10] are also relevant in regard to third parties in divorce proceedings under statutory provisions.

Matters incidental to the dissolution of a statutory marriage include maintenance of wife and children, custody of the children and property rights of the parties.

Under Nandi customary law, following the dissolution of a marriage, the husband takes custody of the children since by custom, the children belong to the husband. A husband is not under any obligation whatsoever to maintain his wife following a divorce. Divorce as we saw in Part I of this chapter occurs under very rare circumstances and when it does, then it is a permanent separation whereby no party owes any duty to the other. The woman may however, take with her any belonging which she may rightly claim to be hers. She may also take custody of the child who upon coming of age, shall rejoin the father's family, where the child shall have equal rights and claims over the fathers property rights.

The legal significance of a statutory marriage however in effect means that the marriage is regulated by statutory provisions and so custodial, maintenance and property rights of the parties are governed by statute as provided therein. Unlike customary law, where a husband is required to maintain his wife within the matrimonial union only, under statutory law, the wife is not only entitled to maintance during the subsistence of the marriage but also even after the marriage has broken down and if she took custody of the children. The wife may also seek maintenance rights pending the divorce suit. Under Sec. 30 (Matrimonial Causes Act), the courts are granted power to make orders from time to time for the maintenance, custody and education of children. The court also has power to suspend such maintenance rights.

Under the common law, a wife has the right to pledge her husbands' credit if the husband has not provided sufficiently for her upkeep. Reference may hereby be made to Nanyuki General Stores v. Mrs. Parterson[11] where the court held that a wife could pledge her husbands name to obtain credit for necessaries. However, this right is recognized only if the wife does not have a means of maintaining herself.

Under statutory provisions, there are three statutes which govern the law relating to maintanance: The surbordinate court (separation and maintanance) Act,[12] The Matrimonial Causes Act[13] and The Guardianship of Infants Act.[14] The main object of Maintanance order is to enable the wife and

children to lead a life usual for the married parties. In Kershaws v. Kershaw the court held that in determining the amount to be awarded for maintanace, the court will consider the means of each of the party to the marriage. Under Sec. 32 of Cap 152 and S.7 of Cap. 144, the court has the power to vary the maintanance costs depending on the circumstances of each case before the court.

The African Christian Marriage and Divorce Act[16] at Sec. 13 (i) Widows married under the Act are prohibited from cohabiting with the brother or relative of the deceased husband or any other person; but such widow shall have right to be maintained by such person. This of course contradicts and conflicts the customary law provision as explained in Part I of this chapter relating to widow inheritance. At Sec.13(ii) of the same Act, custody of the children remain with the widow and any customary rights accruing from such custody shall be enjoyed by the widow. This provision also conflicts with the Nandi customary rule that children of the deceased belong to the family and widow of such deceased, if she does not remain within the matrimonial home, has no right whatsoever over the children of her marriage. For details about widows under customary law, the reader is refered to Part I of this chapter.

Following a separation, the question of custody, which is the concept of rights over children, has been considered as the most sensitive issue. Under Statutory law, the question of custody is the responsibility of the courts

Sec. 17 of the Guardianship of Infants Act provides for the welfare of the child as a major consideration. 'Welfare' is defined to include house, food, moral, religious, cultural, educational and all other conveniences which a child may reasonably be required to need during his upkeep. All these considerations are taken into account when the question of custody of children is taken into consideration. The courts may exercise their power over this issue to either divide the rights over children between the parents or declare both the physical and maintanance control to be enjoyed by one party.

At common law and also under customary law, the husband has the right to custody of the children, the welfare notwithstanding. But the development of the English Law in the 19th century saw the increased inclusion of wives in matters of custody of children. In Kenya, the law that governs custody of children is strictly English Law although the courts have attempted to apply the law to suit particulars situations where Africans are parties.

The law that applies is to found under the Guardianship of Infants[17] Act which was initially intended to apply only to Europeans living in Kenya. The definition of father under the Act excludes the father of illegitimate children. A committee was set up in 1948, chaired by the late Humprey Slade to give recommendations as to the law to apply in Kenya. It reported its

findings in 1953 which report culminated in the passing of the Act. It was recommended by the committee that English rules were to be followed slavishly.

Thus, in Githunguri v. Githunguri[18] the court held that English rules said that a daughter must always be with the mother. But the court did not take into consideration the view as enunciated in the case of RE AN INFANT[19] where the court held that sometimes, rules of commonsense or prudence could apply and not necessarily rules of law. It is not a rule of law that children must always be with the mother. In Re B AN INFANT[20]. It was shown that even a father could be given custody of children. In 1979, Justice E. Cotran gave the custody of a young girl to the father.[21]

The English law of custody of children are relevant to the English systems where families break easily. But in the African setting, the question of marriage as we saw, belongs to the tribe and when the issue of custody of children is taken into account, the customs of the tribe still play a crucial and decisive role in determining the question of custody.

Under statutory law, it appears that the Welfare of the children is guaranteed only if the guardianship and custody remains with the wife following the husbands death. Likewise, if a wife dies, then, the widower is automatic custodian of the children. However, it is not unusual to find widowers or sometimes widows, placing the custody of their children under the control of institutions which bring up children on behalf of the parent(s). However, this view is restricted to the European society. In Kenya, children who are brougl up in such institutions are either ophans or their parents cannot be traced.

From the foregoing exposition, it can be discerned that increased unification of parties in marriage under statutory regulations has greatly influenced the transformative trends taken by customary marriages. On the one hand, customary marital unions have relaxed the essentials that validate a customary marriage as a result of continued legal encroachment by the statutory types of marriage onto the customary scene. On the other hand, parties who contract statutory marriages have had to incorporate customary concepts as a practise which appears inevitable in the light of social and cultural realities which take the upper hand in Nandi social life.

CHAPTER THREE.

It is not in doubt that customary institutions are increasingly and gradually being phased out. In their places, a combination of both customary and Western style institutions have been introduced. The most conspicuous and entrenched institution is the Judicial system which as we mentioned was first set up by the colonial regime in 1897. It is in the Judiciary that values and law reflecting English Standards have been maintained and accorded supremacy within the independent Kenya Judicial system. However, this does not mean that customary law has ceased to apply. In fact the majority of Kenyans are in one way or another guided by customary principles of law.

Marriage is truly a voluntary union of man and woman. The decision to enter into marriage is taken after serious considerations and in some case after a thorough debate between not only the parties invloved but also other persons who are directly affected by the decision taken. The colonial rule established marriage laws which although were not intended to apply to Africa operated complementarily with and within African systems of law. As was discussed in chapter one, christianity played a crucial role in the systematic and gradual erosion and disruption of the harmonious operation of customary legal systems. Christianity introduced English law under the guise of christian religious principles. African social views were thrown into a state of confusion. The introduced colonial economic practise was also responsible for the said erosion of customary values.

Thus, the customary social network was torn apart by colonial forces and the base foundation and structure of customary law was destroyed. The era of hypocritical application of customary law had set in. The forceful manner with which colonial laws were introduced left the African with almost no choice but yield to and accommodate English values into his system. The means of enforcing customary rights and duties was abandoned. Individuals and groups of individuals increasingly took upon themselves the task of applying customary law. It was imperative therefore that customary law could not be applied with the strict rigidity as was hitherto the case. Customary rules were increasingly breached and the most affected institution was marriage and to a lesser extent circumcision.

Due to imposed economic constraints, marriage transformed from being a social and religious phenomenon into a political and more importantly an economic issue. It was a social reality towards the end of colonial rule that new forms of social relations had been hatched. Education had developed

as a priority and it was seen as the only means of ensuring the success of the economic system. It was only through education that an effective manpower would be available to run the independent government. At independence, there was no way the society could return to customary systems in toto. The best that could be done was to attempt to incorporate as much custom as possible into the new system. Customary marriages were tainted with English values. After all, the family, as a unit had to reflect the socio-economic status quo. Thus it became a social and economic necessity that parents sought employment so as to provide for the family's financial and other basic requirements. New skills had to be learnt by women in order to cope with increased domestic demands. The family changed fundamentally in character.

The unavailability of job opportunities, the strange environment the inexperienced mothers encountered, and the uneconomic use of children because of academic persuits, all made the family administration so difficult and burdensome that adherence to customary requirements in marriage almost became impracticable. Bride price gradually became a luxury. The decision to make a home became a matter for the parties intending to marry. Parents could not be of any help in the new system other than provide the ancestral land and blessings. Marriage ceased to be an issue of the clan. In Nandi, the customary marriage law in operation is not what it formerlly was. Modifications have been introduced to cope with modern economic and social demands. For instance, the ceremony that concludes marriages is so brief nowadays because more often than not, the parties to the marriage have other pressing commitments elsewhere e.g. work in towns, academic commitments, etc. Moreover, as we have mentioned elsewhere in this paper, elopment is widely practised and recognized as a way of getting married. Thus, a short cut to a customary marriage is favoured because it saves one from the elaborate and financially demanding ceremonial marriage.

We can, therefore, say that customs, mores and values formerly practised by the Nandi are undergoing constant and drammatic transformations. The new customs developed and practised are not void in law as such merely because of loosing their similarity to original customs. Since new customs are recognized then they are valid in law. It is these new customs which ought to be given legislative expression since they are products and representative customary law of our time.

We have seen that economic change has brought about drastic modifications to customary law and the resultant social set up. It is worthy of note that due to this new forms of production and human relations, there has occured overwhelming interraction on the economic and social front between the Nandi and their neighbours either at home in the districts or in the

urban areas. Intermarriages have occured and we have witnessed an amalgamation of customs and culture in general.

The interraction with Luhyas has brought about conflicts of culture and particularly law whenever the customs of both communities are under consideration in any particular situation, But since the essentials of an African customary marriage are relatively similar, the main problem has arisen where the issue of procedure is presented. Each party would wish that each others regulations be followed. But since most African communities are patrillineal, the intending spouses have to settle for the man's customs. However, although this is invariably the case, room must be allowed for the woman's people to participate in a way usual to them and in a manner capable of maintaining the matrimonial balance of conduct. Since the parties make their domicile in the man's home, eventually, the woman is left with no choice but to adapt to the domestic ordering of the husband's family.

Nevertheless, the influence of intermarriage has already been felt on these marginal areas. The issues of the marriage, depending on the extent of assimilation into either community, will themselves be incapable of comprehending the customs in their pure form. In effect, a hybrid customary family system has evolved which regulates or which is prefered since it provides the cultural balance so badly needed in such situations. This has however been possible only between the Nandi and the Luhya.

As regards the Luo who border the Southern part of the District, little interraction has been experienced. This is mainly due to high level of cultural incompatibility. But wherever an intermarriage has taken place, which in any case has mostly been one sided i.e. Nandi girls marrying Luo men, little co-operation is evidenced in respect to the marriage. Many Nandi parents find it difficult, for reasons yet to be ascertained, to negotiate over the marriage of their daughter into the Luo community. In fact, no interest is shown on the part of Nandi parents to participate in the Marrying of the two customs. It is therefore difficult to access the extent to which one system of law has affected the other.

However, a lot of economic co-operation has taken place. And yet this has remained purely economic. There continues to be that social barrier between the two communities. Nevertheless, where parties to a marriage involve the two peoples, consent of parents is usually lacking, since in any case a Luo, from the Nandi point of view, lacks the capacity to marry. Such marriages are, generally speaking, void; unless they are statutorily contracted in which case their validity shall be ascertained from the relevant statute.

As between the Nandi and the Europeans, their interraction in marriage is fairly insignificant. But whenever they occured, as they did in the later part of colonial rule, they did not amount to marriages as such for in mos cases, they could aptly be described as having been cohabitation ~~nitside~~ outside marriage Nevertheless, custom was adhered to for the purpose of that particular union. There was rarely any comment from parents but since as a general rule, marriages which lack consent could be ratified, these marriages were so ratified by way of conduct i.e. the parents received dowry, and the conception o the women so married went a long way in according validity to the unions. All the same most of these unions broke down at independence but succession to real estates of the spouses by the heirs or issues, was generally speaking, effected statutorily or customarily. Whichever way, the issues of the unions inherited the estates and majority of them remained under custody of their disserted mothers.

Under a customary union today, individuals are no longer rigidly subject to customary law. Some of the unions precariously rely and depend on the will of either party. Customary divorces are nowadays summarily granted by the stronger party to the union. There is a total breakdown of customary marriage law, particularly where disputes arise. The attempts by either parents to reconcile the differing parties only meet success if the parties so wish to listen to the arbitration of the parents or the elders.

This situation has been brought about by the contemporary economic and social trends which do not provide enough security to individual customary unions, particularly the female parties. On the other hand, the general sense of equality in economic participation, academic opportunities and the social freedoms associated therewith, have also been responsible for the lack of harmo in the sphere of customary law relating to marriage. Women and men alike have ceased to attach emotional and physical priorities on each other such that this independence has resulted in the evolution of social, economic and cultural features which were usually absent in a customary setting. These features include pre-marital pregnancies, abortions, family planning techniques, legitimac of children, women liberation, cohabitation outside marriage and the increasing desire on the part of the youth to remain single.

The main purpose for a Nandi customary marriage is the bearing of children. In olden days, it was really seen as the only reason other issues incidental only viewed as inevitable. For this reason, the conception of a wife was a circumstance which called for jubilation. Indeed it was the legalizing factor in a Nandi marriage. It follows therefore that abortion was never know Today, the practise of this act, although done in secret, has predominated the lives of many young girls who conceive outside marriage. The obvious reason i

the need to maintain some dignity which one looses upon becoming pregnant outside marriage.

Whenever it has come to the notice of the public that a lady has aborted, she is regarded with so much contempt that her chances of getting married to the people who know her are diminished. Moreover, abortion or the abatement of the same is a crime under the Penal Code. However, it is not clear the extent to which abortion affects the marriage. But generally speaking, if a wife aborts without the confidential consent of the husband, it is likely to lead to divorce since the act goes to the root of the marriage agreement to the extent that it promptly erodes. the trust and confidence upon which the union is founded.

Although it is hereby conceded that individuals, whether married or not have the liberty to conscience and associated rights, it is unfortunate that so many youths have abused this constitutional rights, that it becomes difficult to ascertain rights which could justifiably be exercised by them in marriage. But one cannot independently act in a manner contrary to matrimonial ethics for this would no doubt shake the foundations of the marriage thereby posing serious lega consequences.

Pre marital pregnancies under customary law are viewed with the contem they deserve. They result in grave legal consequences whereby the chances of the victim ever contracting a customary marriage are very slim. Such a victim is generally seen as lacking the capacity to enter into a marriage for she has sh ttered one of the essentials of a marriage, namely, that the intending bride must hold a reputable status, which, by no means, a premarital pregnancy accords. The knowledge that a woman has previously given birth is enough to deny a party intending to marry her that parental consent. Moreover, where marriage has taken place between such a party and a man, even if the parents provide the consent thereafter, the bride wealth shall be reduced to a bare minimum. But where a girl has preserved her purity until the time she get married, in addition to the bride wealth, she personally receives presents variously. There was a case where a lady who was a virgin at marriage received 18 herd of cattle from relatives and friend on top of the dowry agreed on which was the highest in the accessment in the neighbourhood for a long time.

It can therefore be observed that purity of a lady to a large extent shall determine the importance that is to be attached to that particular marriage ceremony. It is the duty of any girl to preserve her chastity. Although the exercise of sexual rights is not expressly prohibited, the pregnancy of a girl before marriage results in dire social and legal consequences.

Family Planning programmes and techniques are also closely connected and related to the problem of pre marital pregnancies and domestic harmony. Under a customary marriage, or indeed any other marriage, family planning has

featured prominently due to the social and economic constraints that parties experience in marriage. The decision to family plan or not to plan has usually resulted in fundamental differences between the parties thereby threatening the basic foundation upon which marriages operate. Moreover, the freedom to exercise this practise among individuals whether married or not has led to increased sexual promisquity amongst the youth thereby resulting in loss of reputation which in essence determines to a great extent the coming into existance of customary marriage.

Under customary law, the practise of family planning is also regarde as contrary to the main objective of a customary marriage. Althought there were traditional and natural means of planning a Nandi family, the modern scientific methods are considered dangerous and unacceptable. This of course is the general view. Individuals who have attained certain levels of education are the common advocates of this practise. The majority of these persons do not as a matter of fact contract customary marriage since they view such marriages as being unnecessarily restrictive to personal liberties. Neverthele family planning has significantly contributed to the nature and character of customary marriages as they exist today.

The question of women liberation leagues (Movement) is mainly associated with property rights of women and also the opportunities available to them to exercise other rights which they are constitutionally accorded. Th question has presented serious conflicts at domestic and national levels as between the status of men and women. Although legislative measures have been taken to ensure equal succession and particularly the disposal of ones property rights, men still dominate the economic advantages that have accrued to them due to traditional distribution of property rights. Since the Law of Successio Act is phrased in a manner which leaves the holder of property with wide powers of alienation, it follows that by way of writing wills, men are still free to choose the type of law they would wish to govern their estates upon their demise. If one selects to have his estate governed by customary law, then it follows that men shall still benefit significantly over women in respect to succession rights. Eventually, women will be seen to prefer marrying under statute so as to protect adequately their rights. This will inevitably lead to an accellerated abandonment of customary regulation in basically all field to the advantage of statutory regulation of human relations.

Abstaining from marriage by either men or women is a new phenomenon under Nandi customary law. This has mainly occured due to delays in marriages. Others while so delaying to enter into a marital union have accidentally or wilfully mothered and fathered children whose status poses insecurity and undesirable legal consequences. In the first place,

amongst mothers to such children, the chances of getting married are grossly impaired by the very presence of such children who do not get the benefit of being born in Marriage. Since this is a new occurance in Nandi, customary law does not adequately provide for situations where the Welfare of such children is protected. One can only resort to other statutes of Kenya which also do not recognize the legitimacy of such children. In fact the Kenyan Courts do not recognize children born under any circumstances other than the legal way of marriage as having rights other than those derived from their very existance as human beings. In the cases of Re Estate of Boaz Ogolla and Re Estate of Ruenji, the court declared as illegitimate children who had been born of a second wife of a man who had previously contracted a statutory marriage. In each of those cases, it was held that only those children of the 'legal' wife were entitled to inherit the estate of the deceased.

Thus, under Kenya Law, children born outside marriage are solely the responsibility of the mother. However, where couples cohabit in the absence of a marriage, and it is evident that the general public has regarded them as a man and wife, the court proceeds on equitable principles and considers such unions as having validity like any other genuine marriage. Under customary law, where parties cohabit outside marriage, unless the parents of the parties expressly validate such unions through mere acceptance, the children are not allowed to inherit their father's property. In Nandi, the majority of men who cohabit outside marriage are in most cases legally married. There domicile is usually at the ladiy's residence whereas his legally recognized home is settled by the legal wife. In cases of young girls who bear children outside marriage, their problem is usually solved under customary law when they marry. Their husbands are under an obligation to care for not only their wives but their children as well. Consent to marry such a girl meant acceptance of all legal obligations and duties pertaining to that girl together with her child or children. It was not possible under strict customary law to marry a girl without accepting to adopt her child.

Under customary law, the Nandi men are under a duty to marry and maintain a home. There is no excuse entertained for failing to get married. Even impotence is neither a social nor a legal barrier since there are acceptable means of dealing with such cases. Usually, a brother of such a disadvantaged person would on his behalf bear children from the wife. In this manner, the impotent man is able to have legal control over the children who, upon his death, are entitled to inherit his estate. But nowadays, the social situations have changed. Impotence is a barrier to marriage since many girls or wives do not accept husbands by proxy. Such men find it less embarrassing to remain single that to undergo the matrimonial ridicule. This new development has brought

about a change of heart towards the appreciation of the character of a customary marriage.

To conclude, it is only useful to mention that both men and women abstain from marriage for mainly several reasons. (1) The economic ordering of modern society has brought forth unprecedented challenges which our youth are incapable of sustaining within a marriage relationship, (2) The increasing detachment of the youth from parental surveillance has led to irrational and hasty decision making in issues relating to marriage and associated domestic relations (3) Improved standards of living and educationa provisions together with other social amenities has resulted in an increase in the desire on the part of the youth to be self reliant and manage individua affairs. (4) For those employed women who are single and are mothers, the Welfare of their children takes priority and they feel that a marriage would only lead to undesirable social and economic difficulties.

This attitudes have had damaging impact on the customary institution generally such that the future of customary law will depend on legislative reform based on the promotion of customs and practical social, economic and cultural considerations.

CONCLUSION.

At this juncture, one may conclude from the foregoing exposition that the development and state of customary marriages in general and Nandi Marriages in particular has taken definite social and economic trends which have largely determined the state of the marriage laws as they exist today.

In chapter one, we saw that colonial domination, together with christian influence were the major factors that were responsible for the changes experienced on the legal, social and economic fronts of our society. Marriages were one of the customary orders that underwent not only deprivation and judicia abuse but also imposition of alien values which were meant to compete with customary values with the ultimate aim of rendering customary values redundant. As our survey has shown in this first chapter, the efforts of colonia administrators were grossly frustrated since the development of customary Marriage Law continued to take autochtonous trends despite the pressures which were at play to ensure the demise of customary structures.

The second chapter explored the various forms of Nandi Marriages noting with special emphasis the different types and ceremonies which follow any particular form of marriage. In this chapter, we also analysed the effects of increased interraction within Nandi Marriages and the current status of the same. We also considered the various by-products of new systems and the difficulties encountered in the conclusions of the modern customary marriage. We noticed that although essentials of a customary marriage have invariably remained similar, nevertheless there are significant modifications which have been adopted. These modifications include the point of validity of a customary Nandi marriage.

Contrary to the beliefs of many Western writers on the Nandi, we saw that bridewealth is not the validating factor of the marriage. It is in fact, the general success of the marriage, particularly the bearing of children or more relevantly, the conception of the woman in marriage that is seen as the point at which a marriage is legalized. Payment of bridewealth was merely a means of achieving equitable distribution of wealth and also served as a factor establishing a bond of convincing permanecy between the two families involved and immediately affected by the marriage. Payment of brideprice was a kind of contract which was not even repudiated upon the death of the wife. Any outstanding debt in the form of brideprice was paid any time after the marriage. It could even be handed down to the succeeding generations.

In the second part of the second chapter, we briefly discussed the effects on Nandi marriages by Statutory marriages. We attempted to show th extent to which statutory marriages contracted within the Nandi Culture have

legally affected the customary marriage. We noted that if anything, the conf between the two marriage systems have only led to the confusion of customar rules with statutory rules such that more often than not their occurs a mixture o both rules in the conclusion of marriages.

The Nandi were and still are very resistant to change. They valu their culture so much that decades of attempts to christenize, or rather, anglicise them have not been successful. In fact, the Nandi are a people wh would not accept any change that purports to abrogate their rights and cultural values as seen by them. Even education, christian influence and the contemporary exotic economic orientation has not fundamentally altered th Nandi traditional perspective. Indeed as Dr. Langley asserts in her book "The Nandi of Kenya", the Nandi are a people who live in two or more worl They care capable of absorbing and accommodating other values successfully like any other Kenyan but still accord respect and expression to their traditional and cultural values. That is why, generally speaking, Marriage an institution is still regarded with great respect in Nandi. It is not suprising therefore that the Nandi customary law had developed advanced means of effecting divorces.

FOOTNOTES : CHAPTER ONE.

1. 1897 Order in Council (East Africa).
2. Kenya Colony Order in Council.
3. S. 52, 1897 IOrder in Council.
4. Cap. 150 Laws of Kenya.
5. (1866) L. R. 1 P & D 130.
6. Ibd.
7. R. V. Amkeyo (1923) 7 E.A.L.R 14
8. 14 A.C. 286
9. ISSAKA WAINAINA v. MURITO WA INDAGARA (1923)9 II K.L.R. 102.
10. Hindu Marriage and Divorce Ordinance.
11. Christian (NATIVE) Marriage Ordinance 1904
12. Ibd.
13. R. V. Amkeyo, Supra.
14. Marriage Act, cap 150 Laws of Kenya.
15. Marriage Ordinance 1902, E.A. Order in Council of 1902.
16. Cap. 150, Supra.
17. Supra.
18. Sec. 79-83, Constitution of Kenya.
19. Laloke v. Obwoya (1970)3 E.A.L. Rev. 175
20. Ibd.
21. High Court Civil Case No.69 of 1979 (Nairobi)
22. Laloke v. Obwoya, Supra.
23. (1898)1 N.L.R. 15
24. The Ordinance provided for situations where, as amplified by the 1941 Matrimonial Causes Act, specific procedures were adopted in concluding and dissolving marriages. Change of faith was not therefore automatic and sponteneous change of law as Cole v. Cole, Ibd; makes us believe.
25. (1968) E. A. 72
26. The complete legal significance discussed in part two of Chapter two.
27. Supra
28. Supra
29. Supra
30. Marriage Bill (1979) Parliamentary Debates.
31. (1967) E. A. 639
32. (1960) E. A. 717
33. " A concise statement of the Roman Catholic Missions policy and practise in regard to African Marriages".
34. "African systems of Kinship and Marriage".
35. "Christian prohibition of African Levirite customs" a study by Kirwen, Michael c. 1974.
36. Ibd

FOOTNOTES FOR CHAPTER TWO:

PART ONE.

1. "Nandi Customary Law".

2. Sec. 82 of The Constitution of Kenya.

3. Cap. 10, Laws of Kenya.

4. Cap. 8, Laws of Kenya.

5. The Marriage Bill; Parliamentary Debates 1976 and 1979.

6. Marriage Act, Cap. 150 Laws of Kenya;
The African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya; Ayoob v. Ayoob (1968) E. A. 72

7. R. V. Amkeyo 7 K. L. R. 14

8. (a) As note 5 above has indicated, Parliament of Kenya has been so far unable to enact a single Marriage Statute to embrace all the existing systems of family law.

   (b) Re Estate of Boaz Ogolla, High Court Miscllenеous Civil case No. 19 of 1976;
   Re Estate of Ruenji, High Court Miscllenеous Civil Case No. 136 of 1975.

9. J. Mbithi: "African Religions and Philosophy"

10. Detailed discussion to follow in later part of the Chapter. Reference may also be made to Dr. Langley's Book, "The Nandi of Kenya".

11. (1866) L. R. 1 P & D. 1330 , 1133

12. Cap. 10, Laws of Kenya.

PART TWO.

1. Marriage Act, Cap 150; African Christian Marriage and Divorce Act Cap. 151, Laws of Kenya.
2. (1898) 1 N. L. R. 15
3. Cap. 150 , Supra.
4. (1968) E. A. 72
5. Supra
6. The Matrimonial Causes Act; Cap. 152 Laws of Kenya.
7. Cap. 150 Supra.
8. Sec. 10 Cap. 152
9. Wangari Mathai v. Mwangi Mathai, High Court of Kenya, Divorce Jurisdiction No. 64 of 1977
10. Cap. 152 Supra
11. 15 E. A. C. A. 28
12. Cap. 153 Laws of Kenya.
13. Supra
14. Cap. 144 Laws of Kenya
15. (1964)3 All E. R. 636; (1964) A. C. 619
16. Cap, 151 Supra
17. Supra
18. Court of Appeal at Nairobi, Civil Appeal No. 30 of 1978
19. (1958) 1 All E. R. 872
20. (1962)1 All E. R. 872
21. Civil Case No. 3785 of 1979.

FOOT NOTES FOR INTRODUCTION

1. African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya.

2. Cap 150 Laws of Kenya

3. (1956) K.B. I