

THE APPLICATION OF AFRICAN CUSTOMARY LAW IN KENYA

Dissertation submitted in partial fulfillment of the requirements for the LLB Degree, University of Nairobi.

By

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18th May 1984

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### ACKNOWLEDGMENTS

I hope that this paper will prove a tribute to those who, over the last few years, have shared and reinforced my conviction that African Customary Law is not a living source of law in Kenya. This work could not have been a success without the assistance of many individuals.

My greatest intellectual debt is to MR. NDERITU of the faculty of law, University of Nairobi, whose wide-ranging legal thoughtfulness has been an incentive to me to pursue my work. I am also much indebted to him for the unsparing and genourous attentiveness which he gave to my work.

I wish to express my thanks to Mrs Mary Malia of Ministry of Works, Housing and Physical Planning, Miss W. Sila of Kiatineni Secondary School, and Miss Lucy of faculty of Science University of Nairobi for their secretarial assistance.

I want to record my debt to my parents for making extra funds available for meeting typing costs.



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Another area is the field of labour law. According to the traditional notions, work was so much of earning a living. The idea of contract in which one undertook to work for a stranger for a wage was unthinkable in the African traditional set up. A new labour law had therefore to be established once there was a polarized work force. Labour conflicts were unknown in the African traditional set up and there was no indigenous law so far as this field was concerned. Laws therefore had to be passed to resolve master-servant conflicts.



## INTRODUCTION

While modern Independent Sovereign African legal systems do incorporate some elements of traditional customary law, they inevitably tend to reject what was the real essence of Custom. Before the advent of the European bourgeoisie community in Kenya, custom was sufficient for the regulation of aspects of social life. It settled all, social, political and economic problems as well as family matters, community exchange and criminal law matters.

The coming of the British and also the Development of the present monetary economy (market economy) diminished the efficiency of African Customary law as a source of law in Kenya. Due to speedy social, economic and political development it is difficult to say with certainty that customary law is sufficient to regulate the present complex modern society. This is so because African Customary Law developed as the means for regulating the social relation of members of the same community (tribe) leading the same kind of traditional life.

It is for this reason that enactment of new law (statutory law) has become necessary in a number of fields.

One example where statutory law has been necessary is in the field of commerce. In this branch of the law there was no indigenous basis at all to regulate commercial friction, since customary law anticipated only a limited number of contracts, those known to rural life.

Another area is the field of labour law. According to the traditional notions, work was so much of earning a living. The idea of contract in which one undertook to work for a stranger for a wage was unthinkable in the African traditional set up. A new labour law had therefore to be established once there was a salaried work force. Labour conflicts, were unknown in the African <sup>Traditional</sup> set up and there was no indigenous law as far as this field was concerned. Laws therefore had to be passed to resolve master-servant conflicts.

The paper concentrates entirely on the future of African customary law in Kenya.



International trade, development of modern administrative systems financial institutions, police, health and educational services and public works have all been newly created since traditional structures provided no foundation for them, enactment of new law has/was been necessary to regulate them. From the above observations, it can be concluded that custom is not currently a living source of law in Kenya.

It is usually a subordinate one. In the sense that the legislative may by statute deprive a customary rule of legal status and in many systems, the test which courts apply in determining whether a custom is ~~fit~~ for legal recognition incorporate such fluid notions as repugnant to justice and morality which provide at least some foundation for the view that in accepting or rejecting a custom courts are exercising a virtually uncontrolled discretion.

It is unfortunate that the meteoric development of Kenya on to a modern nation has necessitated the gradual but syre replacement of African customary law by British~~type~~, imported legal systems. Hence it can be concluded that Kenya law today remains an imported legal system, unfamiliar to the citizens. Even in the statutory area nearly all Kenya statutes are substantially the same as the equivalent English statutes.

Inspite of all aforesaid this paper aims at showing that application of African customary law exists as a legal fact, fully recognised by the law and also gives a critigue to the methology that custom is a living source of law in Kenya as provided for by the Acts of parliament. The paper traces the systematic, decimation of African customary law from the time when British colonial rule was first imposed on unwilling populace up to the present day, noting in the course of the tracing the measures taken to aust African customary law in this country.

The paper falls in to three chapters. The first discusses Application of customary law in colonial Kenya as well as the administrative and legislative measures employed to aust it in this country. The second chapter examines its application in Ex-British Kenya and the legislative measures adopted to aust the same. In the last chapter the papers concentrates entirely on the future of African customary law in Kenya.



CHAPTER ONE

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CUSTOMARY LAW IN COLONIAL KENYA

This chapter takes the story of customary law from the year 1886, before which date African customary law reigned supreme in this country and traces the struggle for survival up to 1963.

Since African customary law can thrive best only under the right social conditions attached to its own values it could not have reigned supreme in colonial Kenya. All too often one finds that the majority of the whites in colonial Kenya entertained peculiar notions regarding African legal ideas and institutions, varying from the vague scepticism of those who thought that there were no such things as laws in Africa before the advent of Europeans to those who while admitting that there was such laws. Yet demand a whole-sale eradication of what exists and the substitution there for of imported European legal concepts. This narrow attitude stems from the approach which judges everything African in terms of European standards and values which dismisses out of hand everything that does not conform to such patterns.

As a matter of illustration of these various views of the colonialists the author will consider the views of the missionaries, administrative officers, social anthropologists and finally the judicial officers. The missionaries especially those of the older generation were accustomed to regard African customary law and custom as mere detestable aspects of paganism which it was their duty to wipe out in the name of christian civilization. They looked upon African culture as an undifferentiated mass of customs, rituals and inhuman practices and that there was little that could be said for its recognition as



part of the social order, consequently, to them (missionaries) customary law was bad and had to be abolished.

The administrative officers entertained a different view from that of the missionaries. These views were better expressed by two administrative officers namely SIR TMARRISON and LUGARD. Lugard's view is that the African is a child, his law is a child's law which has to be changed as he becomes an adult with development and becomes the adult's law.

SIR TMARRISON formerly a District Officer in Kenya once said:

"I soon myself struggling with graver questions of policy, the questions which go down to the root of tropical administrator. Should we override native customs some of which are in conflict with our western standards of ethics?.... The missionary of course has no difficulty in answering these questions. These he says are pagan customs, his duty is to destroy them and substitute a higher law.... The District Officer cannot follow this line of conduct. In theory the District Officer says that his policy is the sublimation of native custom so that it may approximate more nearly to what we believe to be a higher standard."<sup>1</sup>

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It can be observed that unlike the missionaries, the administrative officers did not advocate whole-sale abolition of African customary law. Instead they called for gradual replacement and modification of African customary law.

The European anthropologists were of the view that customary law though understandable differences between some of its provenances and those of other types of law was part of the law. EVANS PRITCHARD stated as follows:



"There can be no separate discipline which restricts itself to a study of primitive societies. It would be pointless to try to interpret the religions cults of primitive peoples except in terms of a general theory. A theory of the fundamental nature of law which must clearly cover the laws of both civilised and savage peoples."<sup>2</sup>

The views of the judicial officers were to the effect that African customary law should not be allowed continuity. Most authoritative judicial pronouncement on African customary law is found in the following extract from a case called RE SOUTHERN RHODESIA.<sup>3</sup> Their Lordships of the Privy Council in this case stated.

"Sometimes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law."<sup>4</sup>

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And this approach has found statutory form in the definition of law contained in the Southern Rhodesian constitution of 1961 which provides in part that law means

"S.72 (c) any unwritten law in force in Southern Rhodesia other than African customary law".<sup>5</sup>

The opposite view is now being established through legislation and an altered response by the judges to customary law. Thus, in Kenya the Evidence Act provides that the courts may



take judicial notice both of written laws and of all law, rules and principles, written or unwritten, having the force of law.<sup>6</sup>

Due to these varying views of the colonialists it can be stated that the arrival of the European colonial power had far-reaching impact upon African legal systems. In fact a dual system was established. This view point is backed by the following extract

"The arrival of European colonial powers wrought a fundamental revolution in African legal arrangement the results of which are with us today. The nature of the revolution varied some what with different colonial powers, but in general each power introduced its own legal systems or some variant of it as the fundamental and general law of its territories, and, second, permitted the regulated continuance of traditional African law and judicial institutions except where it ran counter to the demands of colonial administration or were thought repugnant to civilised ideas of justice and humanity."<sup>7</sup>

Thus with the establishment of a British presence in Kenya the English law was introduced mainly to govern the British subjects and those others who fell under Britain's protection. The indigenous population remained subject to its own law. African customary law was therefore recognised in colonial Kenya. In theory therefore the policy of the British colonial administration was to interfere little with the administration of customary law. This is evidenced by the fact that the colonial legislator permitted the continuance of customary law save where it ran counter to the demands of the colonial administration or was thought to be repugnant to European ideas of justice humanity and morality.



In 1897 the British government in London passed the East African Order in Council which became the judicial basis of the British presence in administrative capacity in Kenya. Irrespective of how much disastified African customary law must have been to the British government, the colonial government recognised through the 1897 Order in Council the existence and the continued application of African customary law in the territory as part of the law of the land. The Order in Council empowered the commissioner to make rules which would give effect to African customary law. Pursuant to the power the commissioner enacted the native courts regulations of 1898. These regulations recognised the inherent jurisdiction of the existing Chiefs and Councils of Elders among the African communities to a policy African customary law in respect of all matters civil and criminal which were referred to them or brought to them for settlement.

While the 1897 order in Council implicitly provided for continued application of African customary law within the protectorate it in essence disallowed it by implication. It gave the commissioner of the British East African Protectorate power to make laws for the peace, order and good government. With these powers it is not difficult to visualise what the commissioner was capable of doing and could do at will. He could legislate any part of customary law out on the ground that it did not make for peace, order and good government.

Section 52(c) of the Order in Council impliedly disallowed application of African customary law. Under this section the commissioner was given power to disallow any native law and custom or part thereof which in his opinion was devoid of humanity and justice or change it in the interest of justice and humanity. With this power the



Commissioner could disallow any customary law on the ground that it was devoid of humanity and justice.

In 1902 the 1897 Order in Council was repealed by the East African Order in Council. The relevancy of the 1902 Order in Council to the application of African customary law is that it recognised it by stating clearly that African customary law is to apply in all civil and criminal cases. Section 20 of the 1902 Order in Council allowed to be guided by native law and custom where all the parties were natives. This section was not mandatory in that the courts were to be guided. Hence the courts could refuse to be guided.

Another land-mark legislation of the early colonial era which had something to do with the application of African customary law was the courts Ordinance of 1907 under which the governor was given power to make the native tribunal rules of 1908. Under rule 10(1) the governor was either required to grant recognition to the authority of chiefs and councils of elders or village headmen over their communities if the authority and jurisdiction were exercised under African customary law or could grant such orders where they did not exist to chiefs, councils of elders or village headmen, provided that the jurisdiction was to be exercised in accordance with the rules made by virtue of the second sub-section.<sup>8</sup>

The native tribunal ordinance of 1930 is another colonial legislation which had something to do with the application of African customary law. Under this ordinance a native tribunal was authorised to administer the native law and custom prevailing in the area of its jurisdiction so far as it is not repugnant to national law, justice or morality or



inconsistent with the provisions of any order of the King in Council or with any other law in force in the colony.

The above colonial pieces of legislations indicate to us that African customary law in colonial Kenya existed as a legal fact, fully recognised by statute law. However its application was to some extent denied by the imposition of certain limitations.

Section 48 of the 1898 native courts regulation imposed stringent limitation on the application of African customary law. Under the section the sub-commissioner and the collector in each respective province and district could exercise administrative powers over the procedure and punishment used by the African tribunal within their localities. This was actually a great limitation on the work of the tribunals in the application of customary law. By such a limitation the colonial legislator gave by one hand and took away with the other. Hence African customary had a limited application.

Section 13 of the native tribunal order of 1908 provides another legislative limitation on the application of customary law. Under this section subordinate courts were given supervising powers over the African tribunals which in effect had statutory jurisdiction over African customary law matters. The effect of this section was to negate the application of customary law as allowed by the 1898 and 1902 orders in council.

Another and most important statutory limitation on the application of customary law in colonial Kenya was the repugnancy doctrine. This doctrine was embodied in the East African Order in Council of 1902. This Order in Council provides



"In all cases civil or criminal to which natives are parties, every court.... shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in council or ordinance or any regulation or rule made under any order in council or ordinance."<sup>9</sup>

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Of all the limitations upon the application of customary laws during the colonial period this test of repugnancy to justice and morality was potentially the most sweeping, for customary law could hardly be repugnant to the traditional sense of justice or morality of the community which still accepted them, and it is therefore clear that the justice and morality of the colonial power was to provide the standard to be applied. Thus a question arises as to whether the judge and the administrator could follow principles of justice and morality in Britain or justice and morality among the communities they were serving. In the view of the fact that most of them were British, it is expected that they were to follow those of the indigenous communities. This clause was in effect used by the colonial legislator to abolish indigenous principles of customary law. The colonial legislature took the view that indigenous law was a child's law and accordingly rejected it through the device of these legislature limitations.

In the Kenya appeal of <sup>10</sup>LOKITITE OLE NDIRONI V. NETWALA OLE NEBELE, which concerned a claim to blood-money in masai law EDWARD CJ wondered obiter about the repugnancy of blood-money; The court of appeal went on to hold that it was repugnant to allow a claim to be made 35 and 40 years after the homicide complained of.<sup>11</sup>



The doctrine of repugnancy also arose in the case of *GWAO BIN KILIMO V. KISUNDA BIN IFUTI*.<sup>12</sup> This was an application to the Tanganyika high court for revision of a subordinate court's decision. A decree-holder had caused the attachment of cattle not belonging to the judgement-debtor, but the debtor's father, one Gwao, on the ground that such attachment was justified by customary law. The lower court upheld this attachment; Gwao now applied to have these cattle restored to him.

The first question was whether the native law and custom of the appropriate tribe - the Turu tribe of Tanganyika - justified the attachment. In other words was it just according to the conception of natural justice and morality? The court held that the relevant customary law in question was unjust on the ground that it was repugnant to the English concepts of justice and morality.

WILSON J said as follows in this case

"To what standard then does the order in council refer - the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard."<sup>13</sup>

Thus in colonial Africa a British judge could advocate a British standard of morality. The author is worried in that he does not see how could the morality of the community which still accepted it be repugnant.

In the case of *Re GM*<sup>14</sup> the doctrine of repugnancy was also considered. In this case the Kenya supreme court opposed strict customary rules about custody to



what might seem fair and humane. The young Kikuyu child in question had lost her parents as a result of mau mau emergency and was in the custody of a well-to-do Nandi woman. It was agreed that this arrangement was for the benefit of the child. But the child's uncle claimed the child under kikuyu customary law as the child's lawful guardian. The learned judge MILES J held that English law should be applied rather than Kikuyu customary law. He therefore invoked and applied the English rule of law by which a parent has a legal right to custody of a child as against any stranger.

Another legislature, limitation on the application of African customary law was the inconsistency clause. This clause was embodied in the 1902 Order in Council.

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Article 20 of the order in council states

".... or inconsistent with any order in council or ordinance or any regulation or rule made under any order in council or ordinance."

It can therefore be concluded that this clause was used to negate the whole purpose of recognising customary laws.

Now, having seen how the colonial legislature rejected the efficiency of customary law in the colony through the legislative limitations. I now turn to consider the attitude of the colonial judiciary on African customary law. It is my submission that the judiciary was in no way different from the legislature in colonial Kenya.

Colonial rule recognised a dual legal system. There were those courts administering European law and those administering African customary law. To the English courts customary law was quite foreign and was therefore



a question of fact at first instance or one which the courts must accept upon its declaration by native courts. This principle that African customary law was a fact to be proved before the English courts was emphasized by the Privy Council in 1916 in the case of *ANGU V. ATTAN*.<sup>15</sup> Their Lordships in this case stated as follows:

"As is the case with all customary law it has to be proved by calling witnesses acquainted with the customs. Until the particular customs have by frequent proof in the courts become notorious that the courts will take judicial notice of them."

Consequently in determining which African customary law rule was applicable the colonial judge preferred the rule established by evidence. To him African customary law was not law.

The court in the case of *SAIDINI d/o ANGORI V. SAIBOKO MLEMBA*<sup>16</sup> expressed a similar view. The following passage from the judgement of the court illustrates what the colonial judge considered as better rule in finding the applicable rule of customary law.

"The courts below have found it a difficult case to decide mainly because they have been unable to satisfy themselves as to what exactly is the customary law on inheritance by daughter. When a person dies without male issue. In this present case and on equitable grounds there appears to be no valid grounds for precluding the inheritance by daughters. This court does not presume to make law or disregard customary law provided that it is not repugnant to natural justice or morality. But before this court would apply customary law which imposes a disability on women as in this case we must be satisfied as to the existence and general approbation of such customary law. Even if there is such a local customary law precluding inheritance by daughters which is by



no means certain, no doubt it will eventually disappear as it has already done in some parts of the territory."

In this case the court ruled in favour of the daughter on the ground that the rule had not been adequately established by evidence. Thus to the colonial judge African customary law was not law and had to be established by evidence.

In the Kenyan case of *AIMANI V. GIANGA*<sup>17</sup> a similar view was expressed. In this case the learned judge was of the view that the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case. In this case the judge gave judgement to the defendant since the plaintiff failed to call sufficient witnesses to prove his case. The relevant customary law in this case was not applicable on the ground that it was not established by evidence. This is a clear indication that the judge did not take judicial notice of the relevant African customary law as he did to statutory law.

In the case of *KGWAO BIN KILIMO V. KISUNDA BIN IFUTI*<sup>18</sup> the decision of the court was that the existence of a native law which would if applied justify the procedure was not satisfactorily proved.

Apart from the rule established by evidence in many systems the test which the courts applied in determining whether a custom was fit for legal recognition incorporated such fluid notions as that of repugnancy which provided at least some foundation for the view that in accepting or rejecting a custom courts exercised a virtually uncontrolled discretion.



In conclusion I am obliged to submit that although African customary law was recognised by the colonial government in Kenya its application was made impossible by the legislative limitations. Thus both the colonial law maker and judge hampered the first nails to the coffin of African customary law in the country. This was clearly done by the fluid notions of repugnancy and other statutory limitations imposed on its application which had the effect of rejecting it.



## CHAPTER TWO:

### CUSTOMARY IN EX-BRITISH KENYA

This chapter traces the history of African customary law since independence to the present day. In this chapter I will address myself to two important questions, namely; Is African customary law a legal fact, fully recognised by the law in Kenya? And is its application a myth or reality? As an answer to the first question it is without little doubt that customary law exists is fully recognised by the law.

The constitution Act of 1969 is one of the most important statutes which recognise the existence and application of African customary law. Section 84. (4) (c) of the constitution proceeds to recognise the efficiency of African customary law (only in areas of personal matters such divorce marriage, inheritance, status, custody of children) and such like personal matters. The magistrates courts Acts also do recognise the application and efficiency of African customary law in Kenya. This statute is to the effects that while the High Court has original and unlimited jurisdiction ~~in all matters, civil and criminal,~~ the magistrate courts only have jurisdiction to entertain any civil claim in matters which concern a claim under customary law according to section 10 (1) of the Act<sup>1</sup> what is meant by a claim under customary of the Act<sup>2</sup> include such matters as are contemplated by section 84 (4) (c) of the 1969 constitution Act<sup>3</sup>.

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Another post-independence statute which recognises the efficiency and application of customary law in Kenya is the <sup>Indicature</sup> ~~jurisdiction~~ Act. 4. Section 3 (2) of the Act provides for the application of customary law in civil matters.

Section 60 (1) of the Kenya Evidence Act 5 provides that the court should take judicial notice of all laws, rules and principles written or unwritten having the force of law. This provision seems to embrace customary law, by providing that, though unwritten it should be judicially noticed by the courts.

The above stated post-colonial statutes affirmatively answers the first question the author addresses himself to. As regards the second question the author of this paper maintains that Ex-British legislative dealt a death blow to the efficiency and application of African customary law.



The position of customary law as of the end of the colonial period characterised by the fact that it was unwritten and applied separately was considered unsatisfactory. It became generally accepted that all criminal laws should be written and uniformly applied. Thus in the conference on future of law in Africa held in London in 1960 it was recommended that the general criminal law should be written and not unwritten and should be uniformly applicable to persons of all communities. It was also held that this criminal law might be supplemented where local circumstances render, it is desirable, by particular local criminal laws applicable in defined localities provided these are not held to be discriminatory in their application to the particular communities.

The African conference on local courts and customary law held in Dar-es-salaam in 1963 state that;

"Every country accepted the principle that the penal law should be written and that the present position in some countries, whereby unwritten criminal offences existed side by side with a written penal code must be altered"<sup>6</sup>

The constitution of Kenya enshrine this principle. Section 7(8) provides that:

" No person shall be convicted of a criminal offence unless that offence is defined and the penalty there for is prescribed in a written law"

The post-independence statute has the effect of abolishing African customary law.

One can argue that its application is capable under section 60(1) of the Kenya evidence Act 7 in that the court should take judicial notice of its existence. This infact cannot be the case since section 3 of the 1969 constitution Act provides that;

"This constitution is the constitution of the Republic of Kenya and shall have the force of law through out Kenya and subject to section 47 if any other law is inconsistent with the constitution. This constitution shall prevail and the other law shall to the extent of the inconsistency, be, void"



Accordingly the constitution is the <sup>grund</sup> ground norm and all other legal norms must comply with it. Hence the Kenya evidence Act being an inferior norm must comply with the constitution for it to be applicable. Giving it an interpretation which would be contrary to the constitution would be illegal. Although the provision seems to embrace African customary law by using the word "unwritten" the court of appeal in *KIMANI V. GIKANGA*<sup>8</sup> held that when African customary law is neither notorious nor documented it must be established for the courts guidance by the party intending to rely on it. This is to the effect that African customary law is not among the laws which the courts should take judicial notice. It is therefore clear that there is at present no room for the application of the customary criminal law in Kenya in its traditional form. It has totally been abolished.

One civil law the ex-British legislature has equally contributed to its non-application in Kenya. The first post - independence legislation dealing with African customary civil law is the magistrates courts Act of 1967.<sup>9</sup> This Act abolished African courts and other courts to which appeal lay from African courts and creates a three tier hierarchy as follows:- District magistrates courts, Resident magistrate courts and the high courts. The possible assumption for the intergration of the courts and application of customary law would have been that most of the judges and magistrates are now natives who are often as familiar with native law and custom as the members of customary courts and also that they have the added advantage of legal training and experience while it is true that majority of our judges and magistrates are now Kenyans, the same cannot be said if the claim that they are as familiar with or knowledgeable in customary law. This is so because most of the members of the bench by then were trained outside Kenya and did not therefore receive any formal training in the various facts of customary law. A good number of these judges and magistrates had very little contact with the operation of African customary law in their native localities, but even if they had full contact, they are usually posted outside their home areas. Often members of the bench trained abroad find it easier to apply English concepts in circumstances where they are required to apply rules of customary law.



It may be argued that most of the members of the bench are now being trained either at the University of Nairobi or Kenya school of law. A counter argument would be that no African customary law is taught in these academic institutions so as to equip the judges and the magistrates with the required experience on customary law. Also these institutions do not have any direct contact to the African customary law. Once trained they are posted outside their respective localities. In these new areas most of them appear foreign to the customary law applicable there. They would as such refuse to apply it since they do not know it. There is therefore doubt that the products of these institutions have an edge over their counter parts trained abroad and may be in a much stronger position on being appointed to the bench to apply and interpret customary law.

Secondly, the magistrates courts Act gives the District courts jurisdiction only in civil matters and not in criminal matters. This district magistrates civil customary law jurisdiction is derived from section 10(1) of the Act which reads;

" 10(1) A District magistrate court shall have and exercise jurisdiction of power in proceeding of a civil nature where either

(a) The proceedings concern a claim under customary law". This has the effecting of disallowing African customary criminal law. Above all, not all civil customary law is given effect under this Act.

Unlike in Uganda and Tanzania customary law in Kenya is defined not in terms of its nature but in the contents of its subject matter. According to the magistrate courts Act a claim under customary law is defined in the interpretation section 11. The section reads:-

"In the Act except where the context otherwise requires a claim under customary law, means a claim concerning any of the following matters under African customary law.

- (a) Land held under customary tenure.
- (b) Marriage, divorce, maintenance dowry.
- (c) Seduction or pregnancy of an unmarried woman or girl.
- (d) Enticement of or adultery with a married woman.
- (e) Matters affecting status of woman widows and children including guardianship, custody adoption and legitimacy.
- (f) Succession both testate and intestate and administration of estates except as regards property disposed of by written law.



It can be observed here that the Act omits the enforcement of customary contracts and all save a very few torts. The major difficulty in this approach is whether the list is meant to be exhaustive. Can the District magistrates courts which, have jurisdiction in proceedings concerning a claim under customary law administer any matter not covered in the list? Eugene Contran answers affirmatively by stating that:

"Although it can legitimately be argued that the list is exhaustive in view of the use of "means" rather than "includes" it is submitted that it could not possibly have been the intention of the draftsman to exclude from the jurisdiction of the District magistrates courts matters not covered in the definition for the simple reason that this would lead to absurd results"<sup>12</sup> *(holds a note)*

He also submits that:-

"By necessary implication the courts of District magistrates section 3(2) of the jurisdiction Act 13 be guided by the customary law of contract and tort even though it is excluded from the list of subjects in section 2 of the magistrates courts Act"<sup>14</sup>

As a critique to Contran's view this paper considers firstly the intention of the legislature and secondly the judicial reaction towards the view. Both the rules of contract and judicial authority are heavily against a construction that the legislature could not have intended the abolition of the enforceability of those customary law contracts and torts it does not provide for.

In the case of *Saloman V. SALOMON* the court stated:-

"In a court of law and equity what the legislature intended to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable and necessary implication"<sup>15</sup>.

In the case of *RE POTTS EX PARTE TAYLOR* <sup>16</sup> it was pointed out that the use of the word means confines the expression concerned to the definition therein contained. Thus the use of the word means in the magistrates courts Act, meant that the magistrates courts could not apply any customary civil matter not covered in the list.

Russel states that;

The expression "means" is explanatory and prima facie restrictive. It means what the definition says it means"<sup>17</sup>



There is absolutely nothing in the magistrates courts Act to result or displace this presumption. The wording of section 2 of the magistrates court ACT is clear, and do not admit any other meaning by Implication as MR CONTRAN argues. Hence the legislature has enacted legislation which has restricted the District magistrates courts jurisdiction to specified subjects. Thus omitting customary contracts and torts. It can be concluded that there is no customary law in application as concerns contract and torts. These have been totally abolished. Having discussed the intention of the legislature I now turn to the second <sup>Contran's</sup> item of the critique to contracts view namely, that there is something in the judicature Act. is inclusive of all customary contracts and torts and that by necessary implication the courts of District magistrates must by virtue of this section be guided by customary law contracts and torts even though it is excluded from the list of the subjects in section 2 of the magistrates courts Act.<sup>18</sup>

It is absolutely difficult in the face of the provisions of the magistrates courts Act to draw from the judicature Act the implication sought by CONTRAN. NOWREJEE argues that

" If it were only a matter of conflict between two counteremporaneous provisions it would be the better founded submission that the specific provisions of the enabling magistrate courts Act would prevail over the general provisions of the procedural judicature Act for in respect of the subordinate courts the judicature Act is concerned with the mode of the exercise of their jurisdiction rather than providing the jurisdiction itself"<sup>19</sup>

The provision of section 3 (2) of the judicature Act is based on the old article 20 of the East African order in council 1902 reprocoded later in Kenya order in council and finally in the Kenya (Jurisdiction of courts and pending proceedings) regulation in 1963.<sup>20</sup>

" In all cases civil and criminal to which Africans are parties every court

- (a) Shall be guided by Africans customary law so far as it is applicable and is not repugnant to justice and morality or inconsistent with the order in council or any written law.



- 20-
- (b) Shall decide all such cases according to substantial justice and without undue regards to technicalities or procedure and without undue delay"<sup>21</sup>

The District magistrates courts themselves have refused to accept the view point of contran namely to found their jurisdiction under the judicature Act to fill the gap or to override the limitation imposed by section 2 of the magistrates courts Act.

In the case of DOMINIC N NJENGA V. THOTHO JUMA<sup>22</sup> the plaintiff sued in person for Shs. 564 as liquidated damages for defamation. The plaintiff alleged that the defendant abused him-calling him a dog and monkey in the presence of thirty people. It was accepted that the words complained of were capable of constituting defamation both in law, counsel for the defendant raised the preliminary objection that section 2 of the magistrates courts Act was insufficient to give the court jurisdiction to hear the claim under its customary law jurisdiction provided under section 10(1) (a) of the magistrates courts Act. Under section 2 of the magistrates courts Act a claim for defamation was not included therein. The court accepted this argument and founded its jurisdiction under section 10(1) (b) of the magistrates courts Act. No attempts were made by the court to invoke the provision of the judicature Act.

From this decision it is clear that the District magistrates courts themselves have not accepted contran's view point nor have they sought to use the way out suggested by him namely, to found their jurisdiction under the judicature Act.

The high courts has gone as far as to hold against his basic premise in this argument namely that section 3 (2) of the judicature Act is inclusive of all customary contracts and torts in the case of JOSEPH MWANGI WAINAINA V. GATHONI WAINAINA<sup>22</sup> the court held:-

"The judicature Act and the magistrates courts Act were enacted on the same day, and in my opinion in relation to the exercise under the former Act of the jurisdiction conferred upon magistrates by the latter, there is no warrant for

one advocated by contran for it likely that the courts will adopt it in future.



according a meaning to the expression "African customary law" as used in the judicature Act different from the expressed by the definition in magistrates courts Act".

In the above case the respondent claimed the return of four herds of cattle taken away by the appellant without the formers consent. The District magistrates court trying the case in the first instance had permitted the respondent/plaintiff to call fresh witnesses after both she and the appellant/defendant had finished giving their evidence. This was despite objection from the defendant's counsel. The defendant appealed to the high court against an unfavourable final judgement. As appellant he raised several grounds of appeal but the court did not find it necessary to hear more than the first one that the plaintiff should have been permitted to call for the evidence after the defendant had finished giving his evidence. Counsel for the respondent argued that the case involved a matter of African customary law and that by reason of section 3 (2) of the judicature Act the magistrate was empowered to depart from the procedure laid down by the civil procedure rules. The high court disposed of the argument as follows:

- (a) That the judicature Act does not define customary law but the magistrates court does.
- (b) That the District magistrate defived his jurisdiction from the magistrates courts Act.
- (c) It was clear that the present claim did not fall within any of the categories laid down by section 2 of the magistrates courts Act.
- (d) Therefore this was not a matter under customary law under the magistrates courts Act.

The court accordingly held that the District magistrate was not justified by reason of the judicature Act in departing from the rules of court. One point is very clear from this decision namely that the court had no hesitation at all in finding that the tort complained was not one included in the statutory list<sup>24</sup> and that it found the language of Act completely clear and unambiguous and did not feel the need to call upon further to discover the intention of the legislature. It therefore did not accept that section 3(2) of the judicature Act was enlarging the scope of section 2 of the magistrates courts Act nor did it feel the need to consider doing so. Hence it may be concluded with no little doubt that the view point of the court so far has not been the one advocated by contran nor is it likely that the courts will adopt it in future.



In the case of KAMANZA CHIWAYA V. MANZA TSUMA<sup>25</sup> contra's view on the meaning of section 2 of the magistrates courts Act was considered. The high court explicitly reflected it.

The foregoing argument suggest that the magistrates courts Act of 1967 had/has the effect of abolishing customary contracts and torts in Kenya. Another land-mark post-independence legislation having any dealing with customary law is the judicature Act of 1967. Section 3(2) of the Act reads:-

"The high court and all subordinate courts shall be guided by African customary law in civil cases in which one is more of the parties is subject to it or affected by it so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay"

The Act in question provides for the application of customary law but limits that application inter alia by the old colonial determinants "so far as it is applicable and so far as it is not repugnant to justice and morality". As discussed in chapter one that the repugnancy clause was used by colonial master rejecting African customary law, its inclusion in a post-independence legislation can be said without doubt that it is also being used to reject African customary law.

Secondly, the provisions of section 3 (2) of the judicature Act are not mandatory. This even if all the qualifying factors are present and none of the disqualifying factors operate the courts need not for those reasons alone apply African customary law to the dispute. The word "Shall" in the section only comes into play once. Customary law applies and does not itself determine the applicability of customary law in the first instance. This view is confirmed by the language chosen for the re-enacting of section 3(2) of the Act. It uses the word "guided". This is indicative that the section is permissive rather than mandatory. This is contrary to the Tanzanian Act reads:-



" Customary law shall be applicable in any other case which by reason of correction of any relevant issue with any customary right or obligation, it is applicable that the defendant be treated as a member of the community in which such right or obligation, obtains and it is fitting and just that the matter be dealt with in advance with customary instead of the law that would otherwise be applicable.<sup>27</sup>

In this Tanzanian ordinance the word "Shall" is used but the word "guided" is not used. This one can be said to be mandatory and not discretionary. ALLOT once submitted that the use of the word "guided" confers a discretion that discretion being conferred on the court.<sup>29</sup>

It is my humble submission that the provisions that the courts are to be guided by customary law "is ambiguous and that there could be several possible interpretations of "guided". It could mean that the courts have unfettered discretion on whether to apply customary law or not and how to apply it if they so choose, or that the courts only have a discretion in the manner in which the law is to be applied and not in whether it should be or that there is no discretion in either matter.

Ghai and McAUSLAN in their book are more certain that the result is the conferment of a discretion and contrast the present terminology with the one it replaced.<sup>30</sup> In this book these two writers state that:-

" Under the old system the African courts were required to administer and enforce the African customary law. Under the new system all courts are required to be guided in civil in which one or more of the parties is subject it or affected by it. The provision that the courts shall be guided by rather than apply or administer customary law, confers the same discretion on all court to depart from the rules of customary law as was formerly conferred only on courts in the British colonial system!<sup>31</sup>

According to these two writers section 3(2) of the judicature Act is not mandatory. The courts may or may not apply customary law in determining disputes before them.



The judicature Act does not give the courts customary law jurisdiction but provides them with procedure. The jurisdiction is provided by the magistrates courts Act.<sup>32</sup>

Hence the former has nothing to do with the application of customary law since the courts have a discretion as to its application.

There has been since independence gradual replacement of African customary law with statute law. This gradual replacement is driving customary law out of the legal stage in Kenya. For instance in the field of land law all customary land law, has been replaced by the various land statutes in operation in this country.<sup>33</sup> In the field of criminal law, African customary criminal law has been replaced by the penal Law.<sup>34</sup>

The 1972 law of succession Act has the effect of replacing customary law on succession. This Act is based on recommendations made by the commission on the law succession which the late President of the Republic of Kenya appointed in 1967. From its recommendations it can be concluded that the commission understood only English way of life and English type of laws as well. This is the way of life the law of succession Act of 1972 gives affect. The Act makes an assumption that all people have one concept of good life.

Since African customary is allowed to apply in Kenya there is no logic in this gradual replacement. The Western thought about African customary law (the African is a child his law is a child law which has to be changed) seems to have influenced the post-independence legislator. It is therefore not surprising that, not only do we have English speaking Kenya but most of the law we have is based on western thought of good life. Those advocating for the gradual replacement say that it is necessary on the mistaken view that African customary law is static and do not keep pace with the rate of development taking place in this country. I am totally opposed to this argument on the ground that African customary law is capable of changing to accommodate the changes but the change need not be in line with the western way of life which the legislators, magistrates and judges manning the appropriate governmental organs have given effect since independence.



Having seen the attitude of the legislature the author now turns to the altitude of judiciary. In the case of MAANGI<sup>35</sup> the high courts of the Republic of Kenya held that the African law of administration of estates was not law.

A similar view was held in the RE KIBIEGO Case<sup>36</sup>. In this case the court refused to apply the customary law governing the administration of estates on the ground that it was mediaval or primitive and instead applied the probate and administration Act of 1881 to Africans. The judge as the legislator is not willing to apply African customary law.

In conclusion the post-independence legislature and the judiciary have in effect abolished customary law. Its application is a myth and not a reality. Accordingly customary law has no place in Ex-British Kenya.

Another reason is that African customary law is being replaced, legislatively by the post-colonial government. The continuity of this tendency will soon wipe out customary law. It therefore has no future in this country. Thirdly the pressures being applied in nearly all aspects of life throughout the future. These are geared at bringing tremendous changes in all walks of life. With these changes customary law is becoming inefficient and inadequate to govern the changed modern society.

Fourthly nearly all the parliamentarians and those leading participants in the work of reform are firmly anchored in the western sense. These will therefore not be have failed to challenge the English church of god life and reject the African church of god life expressed in his law.

Finally, the native groups which form the substantial majority of the population are chiefly illiterate and ill-equipped to handle the complexities of all walks of life. This class has been disoriented by the African concept of god life which is not a religion but a way of life. If this disorientation of the native groups in Kenya continues it will mean that the very concept of customary law will be lost.



## CHAPTER THREE

### FUTURE OF AFRICAN CUSTOMARY LAW:

Having established that Kenya law today remains an imported legal system unfamiliar to the vast majority of the citizen, the author in this chapter concentrates on the question as to whether African customary law has any future in this country. In spite of its troubled history I regret to conclude that it has no future.

One of the reasons for my view is based on the teaching of the law. The recruitment and the training of the magistrates and judges shows that there is no possibility of abandoning western way of life which has influenced law making in Kenya. The succession Act of 1972 is illustrative of this point. The recommendations of the commission was based purely on western thought of good life. There has been no reactionary movement since Kenya attained her independence up to now. The legislators magistrates and the judges have shown their intention to carry the evolution which took place since the beginning of the colonial period through to completion.

Another reason is that African customary law is being bettered, legislatively by the post-colonial government. The continuity of this tendency will soon wipe out customary law. It therefore has no future in this country. Thirdly the pressures being applied in nearly all aspects of life threatens its future. These are geared at bringing tremendous changes in all walks of life. With these changes customary law is becoming insufficient and inadequate to govern the changed modern society.

Fourthly nearly all the parliamentarians and those called to participate in the work of reform are formerly educated in the western sense. These will therefore tend or have tended to champion the English thought of good life and reject the African thought of good life expressed in his law.

Firstly, the elite group which forms the propertied class (the class that has modelled nearly all the legislations) has gone western in all walks of life. This class has disassociated itself with anything African. This has undermined and will continue to undermine the African concept of good life reflected in his law. If this brain wasting of the elite group in Kenya continues it will soon blot out any remaining customary law if any.



The sixth reason why I maintain that African customary law has no future in this country is that the government has continued to accept recommendations and enacted laws in accordance even to those areas where constitutionally everyone in Kenya is entitled to practice his personal law<sup>37</sup>. A good example of these recommendations are those of the commission on the law of marriage and divorce and also those on the law of successions. The reports of these commission found their way in to the national assembly respectively and matured to the marriage bill and law of succession Act 1972.

If these pressures continue to pile and if there does not seem to be any discernible change of policy and altitude towards African customary law it is a logical conclusion that African customary law is on the way out of this country.

A second reason was the desire to preserve tranquillity, leaving the inhabitants under their existing and familiar customary law seemed likelier to promote harmony and a ready acceptance of British overrule than would an attempt to force them to live under an alien law.

Although application of African customary law was allowed in colonial Kenya it was nevertheless restricted. Of all the restrictions upon the application of customary law during colonial period includes the test of conformity to justice and morality and the inconsistency with slaves.

In post-independent Kenya application of African customary law was allowed. This recognition has been reinforced by the provisions of the various post colonial legislations which specifically instruct the judiciary to have proper regard for native laws and customs where they are equitable and not repugnant to justice and morality.

In colonial days a British judge in Kenya could have been readily swayed of opinion in determining what African customary law rules would be applied in a given legal situation. What is the



## CONCLUSION:

Under colonial rule customary law in Kenya was isolated from the law imported from Europe and relegated to a secondary position. With the first tentative and limited established of a British presence, the English law was introduced mainly for the benefit of British subjects. The indigenous population remained subject to their own laws, with no more than some administrative intervention to prevent the grosser abuses and the so-called inhumanities.

Thus, where Britain claimed no more than a limited overlordship or protection, the continuance in force of the laws of such communities was allowed. The first reason why the Britain allowed the continuity of African customary law, to me appears to have been one of economy. The senior British staff available to carry out multivarious duties of administering a newly acquired territory were never sufficient to provide a judicial service capable of handling all the cases which the African population had been settling and continued so to do in accordance with their traditional modes or arbitration and adjudication.

A second reason was the desire to preserve tranquility. Leaving the inhabitants under their existing and familiar customary laws seemed likelier to promote harmony and a ready acceptance of British over rule than would an attempt to force them to live under an alien law.

Although application of African customary law was allowed in colonial Kenya it was nevertheless restricted. Of all the restrictions upon the application of customary law during colonial period include the test of repugnancy to justice and morality and the inconsistency clauses.

In post-independent Kenya application of African customary law was allowed. This recognition has been reinforced by the provisions of the various post colonial legislation which specifically instruct the judiciary to have proper regard for native laws and customs where they are applicable and not repugnant to justice and morality.

In colonial Kenya a British judge in Kenya could advocate a British standard of morality in determining what African customary law rule would be applied in a given legal situation. What is the higher



position today when so many of the higher judiciary and all or practically all of the lower judiciary are nationals of the country? The first point we must remember here is that the contemporary judge in Kenya is usually an African but he may not be of local origin. Hence are likely to bring cultural prejudices with them as were British judges before them. And even where there is not such a gross disparity of national origin between the judge and judged, it is often the case that a judge does not come from the particular locality whose law he is administering.

Although application of African customary law has been recognised in Kenya a number of statements and legal scholars entertain a deliberately negative approach to customary law. They have since independence advocated a policy that would remit customary law simply to disappear either gradually or more rapidly and would replace it with modern legal systems borrowing heavily from foreign systems, especially those of the west.

Legislation has dealt with customary law in various ways. Some statutes have abolished or amended particular rules of customary law while allowing the field of law of which they are a part to remain in force. For instance land law legislations have abolished African customary land law, the constitution Act has abolished the African customary criminal law etc. These statutes have the effect of abolishing the application of customary law in the fields which they cover.

It is in my view that some areas of traditional law are more subject to change, restriction or abolition. For example, law pertaining to economic activities is bound to change more profoundly than law in other fields. Thus, customary law is being transformed or is disappearing entirely in the domain of commerce, contracts and torts relating to business relations, labour, credit practices etc. This process is a response to the felt need to abolish the legal rules which hinder the development of industry and commerce. The process is facilitated by the fact that customary law was never well developed in these areas. Furthermore the local population is not as deeply attached to these parts of their traditional law as they are to the legal rules pertaining to status, family and land tenure. This is so because personal law




and land law embody most of the cultural values of the society. Whereas it is my view that in some areas traditional law should be changed restricted or abolished it is my feeling that customary law should be retained in a number of fields because it is the body of law best suited to the African society. Law must be expressive of the value system of the society it seeks to serve. Hence customary law which was generated by the African society and which developed within it reflects the cultural and social patterns of the population to which it applies. Consequently customary law must be retained to regulate matters concerning personal status, marriages, filiation, inheritance and land relations. These laws should remain in existence partly because they do not hinder economic development and partly because it would be politically and practically difficult to change them.

8. 70 (2) Native Land Act 1968
9. Article 30 BA, Order in Council 1962.
10. (1952) 10 SACA 1
11. See also *WAINMAN v. ANTON* (1927) 11 S.L.R. 47
12. (1938) 1 F.L.R. (R) 402
13. *CHAO v. KISTUDA* (1938) 1 F.L.R. (R) 403.
14. (1957) 22 914
15. 1916
16. 1960 BA
17. 1965 BA 725
18. (1958) 1 F.L.R. (R) 402.



CHAPTER ONE

FOOTNOTES

1. An article entitled The Wachaga of Kilimanjaro in Journal Roy.
2. At pg. 12 of his social anthropology
3. 1919 AC. 221.
4. Pg. 233-234
5. 572(e)
6. S.60 (1) K.E.A. cap 80 Laws of Kenya.
7. ALLOT. The future of African law Op. cit P.220.
8. 10 (2) Native tribunal rules 1908
9. Article 20 EA. Order in Council 1902.
10. (1952) 19 EACA 1
11. See also WAIHARO V. KAMUETE (1927) 11 K.L.R. 67
12. (1938) 1 T.L.R. (R) 403
13. GWAO V. KISUNDA (1938) 1 T.L.R. (R) 403.
14. (1957) EA 714
15. 1916
16. 1960 EA 
17. 1965 EA 735 -
18. (1938) 1 T.L.R. (R) 403.

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2. S2(1) of the M.C.A. No. 17 of 1967
3. SUPRA
4. Tap 8 of 1967. Laws of Kenya
5. Cap 80 laws of Kenya
6. African conference on local courts and customary law held in Dar-es-salaam in 1963.
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9. No. 17 of 1967
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14. SUPRA
15. (1897) A.C.22. per lordwaston at page 38.
16. (1893) 10B 648 per Lord Ester Mr. at page 658
17. 4th ed. pp. 39-40
18. 4 E.A.L.J. at page 18
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20. Legal notice No. 319 of 1963
21. Kenya (Jurisdiction of courts and pending proceedings) Regulation 1963.
22. Nairobi D.M.C.C. No. 234 of 1968
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25. (MSA) H.C.CRI APP. No. 6 of 1970
26. No. 16 of 1967
27. Tanganika judicative and application of laws of ordinance 5.9. (1) (c)
28. Essay in African law by AN. ALOTT at pg. 194
29. S.18(a) African courts Act.
30. Public and political change in Kenya at pg. 375
31. S.10(1) (a)(b) M.C.A. 1967
32. Registered land Act cap 300, I.T.P. A. etc.
33. Penal code cap 63 laws of Kenya
34. (1968) AE A 637
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36. S.82 (4) (c) KENYA Constitution Act  
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