

MORALITY IN STATUTORY AND CUSTOMARY LAW
WITH EMPHASIS ON KIKUYU CUSTOMARY
LAW.

A dissertation submitted in partial fulfillment of
the requirements for the LL.B Degree, University of
Nairobi.

B Y

UNIVERSITY OF NAIROBI

W.W. GICHUKI

University of Nairobi,
June, 1975.

INTRODUCTION.

'Morality' is a very controversial term which does not lend itself to easy definition. Generally, morality is concerned with what is right and what is wrong. Monnin, J. in KING V. BROOKS (1960) 129 Can C.C. 239, at p. 248 ~~thought~~ that acts of moral turpitude were 'acts of baseness in the duties which a man owes to his fellow men contrary to the accepted rule of right and duty between man and his fellow men' Monnin, J.'s definition is a useful general guideline, but it should be pointed out that "morality" can be used to define narrower classes of propriety. The term "morality" is very wide, as Jenkins, L.J. said: Moral improvement would, I think, undoubtedly include religious improvement, but it is a wider term, and would also extend to the inculcation of a desirable code of secular ethics; for example, the secular ^{though} (th~~rough~~ also Christian) virtues of honesty, fair play, unselfishness and so on "(Baddeley v. Inland Revenue Commissioner, (1953) 1 Ch. 504, 525).

The purpose of this paper is to discuss the so called "offences against morality". The type of morality discussed in this paper will be the morality envisaged by chapter XV of the penal code cap. 63 of the laws of Kenya. These are the offences which one is said to commit when one offends against the criminal rules of sexual propriety, but they do not include such offences as selfishness, dishonesty and unfair play, as envisaged by Jenkins, L.J. A basic question which will be sought to be answered in this paper is whether customary law has played any part, and if so, what part, in the formulation of the Kenya Law of morality. To do this a survey of laws of morality both under customary law and under the written law will be made. This paper will be concerned with the types of offences which were punished under customary law and those ~~which~~ which are punished under the written law as morality offences. The sanctions generally available to prevent

Or minimise the commission of these offences under customary law will be looked into. Little or nothing will be said of the formal sanctions of written law since these mainly consist of punishment, fines and corporal punishment and are outside the scope of this paper anyway.

An important part of this paper will deal with the enforcement of morals in both customary law and the statute law. There are many aspects of the enforcement machinery which may be looked into, but this paper will be more concerned with the reasons for the failure of the machinery. An attempt will be made to indicate what the writer feels is the proper role of the criminal law in the field of morality. In this connection, the major question is whether the criminal law is properly applied to enforce morals.

Finally, where there are defects in the law, these will be exposed and a suggestion made for improvement where possible. The customary law discussed in this paper is mainly Kikuyu customary law, but reference will be made to other customary laws where possible.

UNIVERSITY OF NAIROBI
LIBRARY

THE NATURE OF AFRICAN CUSTOMARY LAW.

A lot of ink has been spilled in an attempt to answer the question whether African customary law makes a distinction between crimes and delicts. This question is one which has given writers on this subject a lot of problems and will continue to do so until one very important point is kept in mind in any attempt to answer the question. It should always be remembered that the dichotomy of the law of modern societies is essentially based on folk distinctions. Such a ^{dichotomy} ~~distinction~~ arises within a certain social ~~com~~ context and according to the culture prevailing in that society. In other words, people will make or not make the distinctions depending on the culture in which they were reared. The two categories of the law, namely criminal and civil, are not absolute categories and will therefore sometimes tend to overlap.

English law is, in a manner of speaking, clearly divided into criminal law and civil law. Criminal law may be defined, albeit incomprehensively, as that branch of the law which deals with those wrongs which injure the entire community, and civil law as that branch of the law which deals with wrongs which injure individuals. The definition is incomprehensive because not all wrongs which injure the entire community are crimes, ^{not} ~~now~~, conversely, are crimes only those wrongs which injure the entire community. Similarly, not all wrongs which injure individuals are legal wrongs. A person who fails to show his motor vehicle's insurance certificate when stopped by a traffic policeman can hardly be said to have committed a wrong which injures the whole community. Yet he is technically a criminal! A rapist may be said to have injured only the victim, but he is considered in the eyes of the law as having committed a crime. The victim of the rape may, however, sue for assault and battery in a civil trial. A thief causes damage to the victim of his theft, not to ^{the} whole community, and he is liable to imprisonment for a period fixed by the magistrate or judge.

trying him; in addition he may be sued for conversion in a civil court by the answer of the property he has stolen. The same set of facts may therefore give rise either to a criminal prosecution or a civil suit.

It will be gathered from the above paragraph that criminal law and civil law, even in the English legal system and other legal systems based on it, do not exist in mutually exclusive airtight compartments. A crime is a crime **only** because the legislature has deemed it to be so and the proceedings related there to are commenced in a court with criminal ^{jurisdiction} jurisdiction. An act is a crime because it has been given that status by the law, not because it has any objective feature which requires it to be a crime. This is very well brought out by S.4 of the Kenya Penal code, cap.63, which defines "offence" as "an act' attempt or omission punishable by the law", We have seen that an assault will be the subject of criminal proceedings as well as of civil proceedings; and theft in criminal law becomes conversion in the law of tort. It must be pointed out, However that not all crimes will be the subject of civil suits. The facts giving rise to murder will not normally be adjudicated upon by a court with civil jurisdiction. The same might be said of witchcraft and some traffic offences as well as many offences under the Liquour Licensing Act.² These offences, or the set of facts designated ^{as} this, are only dealt with in criminal process and have no relevance in civil law.

It is therefore safe to say that court proceedings are only one of the factors which determine whether a particular set of facts are crime or delict. This is certainly true of such terms as theft, rape, arson and criminal defamation. The major factor however is the law itself and, by extension, the law-making body. The law will determine what is a crime and what is a delict. This law is made by the legislature and the responsibility is on this legislative body to say what is a crime and what is not a crime. It is a distinction made by the people at a particular

historical moment and under particular socio-economic conditions. In this connection, Bohannan in his JUSTICE AND JUDGEMENT AMONG THE TIV has written that the "distinction which Europeans draw is a folk distinction. The distinction which I have drawn between 'Kwaghbo' ~~or~~ 'Kwaghdang' and 'ifey' is a folk distinction"³. And Driberg said of this distinction "Our varied laws and procedure and our distinction between civil and criminal law have grown up with European culture and are part and parcel of it; but they have nothing in common with African cultures; they are alien in growth and sentiment, and cannot be used to explain the bases of primitive legal theory"⁴.

CUSTOMARY LAW AND THE DISTINCTION.

Would it be strictly correct to talk of customary criminal law? Put in another way, does customary law make the distinction between civil and criminal law? A lot of literature has been written to answer this question, but apparently no consensus has been reached on this point. The writer will attempt to answer this question at the end of this chapter after considering the available evidence.

Driberg wrote in 1934: "We speak of criminal and civil law, a distinction which is meaningless to the African and fruitful of misunderstanding, when he is pursued in our courts on a criminal charge for what he would consider a civil offence, involving a totally different penalty"⁵. He believed that the Africans made absolutely no distinction between civil and criminal law. Instead, so Driberg says, if they made the distinction - and some distinction is implicit in their legal practice - they would speak of private and public law.⁶ Bohannan also said that "TIV do not make the distinctions that Europeans make between wrongs which injure the entire community and those which injure individuals"⁶. It is fairly obvious, therefore, that

some writers do not think that traditional African societies made the distinction between criminal law and civil law. But others seem to think that such a distinction, in whatever form, existed. Schapera, writing of the Tswana, says: "In practice, though not in theory, Tswana law is divided by the people into two main classes. These may quite conveniently be termed 'civil' law and criminal law' respectively although their categories are by no means identical with those of European systems of law"⁷. Driberg called the two categories 'private' and public' law.

Learned articles have therefore been written in an attempt to answer the question whether there was such a thing as customary criminal law, a question which does not lend itself to any easy answer. The writer will examine the nature of African customary law before attempting an answer to the question. Only then can one understand the so called African customary criminal law.

The Origins of Customary Law.

It would be fascinating to find out who legislated in customary societies since there was no clearly defined legislative bodies in these societies—^xcept perhaps in the highly centralised chiefly societies such as the Baganda. In such societies it would be a fair assumption that the powerful chiefs made at least some of the laws which were observed by their subjects. Who made the other law? Who made the laws in the other societies which were not so centralised, such as the Kikuyu, the Embu and the Meru tribes?

The most popular theory, and certainly the most credible, is that the laws had their origins in customs.⁸ A custom observed over a great length of time acquires^d the force of laws.

If, therefore, it was not the custom to ^{utter} ~~their~~ ^{obscene} abuse in the presence of one's senior in age, and if this was observed for two or three generations, it would acquire³ the status of a social norm which eventually had its sanctions. This theory is ³ ~~lead~~ ³ credible because how else would customary law have been born in the absence of a clearly defined and distinct legislative

authority? The main function of the Kikuyu Chiefs in this field was to enforce rather than to create law. The Chief of course had other functions besides the enforcement of law, but these fall outside the scope of this paper.

This ^{vagueness}vaqueness as to the origins of the African customary law is not the preserve of writers and academicians. The writer had occasion to interview Kikuyu men of ages ranging from 40 years to about 73 years? None of them had any clear idea as to how the customary law he was observing came into existence. The most common answer was that he could not think of an answer was that he could not think of an answer to such a question because he and his father found the law in existence, and that the law was probably made by the people themselves through applying pressure on their elders to promulgate such laws.¹⁰ Three of the oldest members of the group interviewed said that the law has always been in existence, ~~that the law has always been in existence,~~ that it evolves from the customs of the people, and that no particular person or persons can be said to be responsible for formulation of the law; that the only modification made by the ruling ^{"yika"}(age-group) was in respect of the punishment of the offenders. This brings us back to the theory that customary law, as the term implies, is no more than custom which has evolved into law.

The Aims of Customary Law

The main purpose of law in all societies is to maintain peace and order so that the normal activities of the people in that system may go on unhampered. This statement does not exclude dictatorships where the main aim might be thought to be the maintenance of ^{the}despot in power. The despot cannot maintain himself very long in power over a people who are not peaceful and orderly, for they will sooner or later seek to destroy him and his rule. Peace among the masses cannot be maintained if their economic, social and cultural life is seriously

interfered with. Rulers will therefore make laws to ensure that such activities are not interfered with, or ~~are~~ ^{are} interfered with only to the barest necessary minimum, so that they in turn may rule the people who have thereby been pacified.

The aims of customary law have been ably expounded by many able and learned writers. There are two theories which have been advanced by the writers so far and although these explanatory theories are not mutually exclusive, it is nevertheless necessary ^{to} examine them separately in order to gain a better insight into them and thereby to be able to determine their validity. The two theories are that firstly, the major aim of customary law is to maintain the equilibrium in society and secondly, to resolve disputes in a conciliatory manner. ¹¹

(a) The Equilibrium Theory.

The theory that customary law's main function is to maintain the equilibrium in society finds its main supporters among the majority of the proponents of the claim that customary law is a law of delict which does not differentiate between criminal and civil offences. These writers maintain that every offence, of whatever nature, is viewed by society from the point of view of the effect it has or may have on the social relations within the society. It is said that in a peaceful society, where no offence has been committed, there is a certain balance in the forces, social and economic, at play in the society. This is said to be particularly true of those societies which do not have a chiefly system, like for example the Kikuyu, ¹² and which at the same time are greatly influenced or claim to be influenced, by supernatural forces and phenomena like gods and ancestral spirits. When the gods, the ancestral spirits and their agents the tribal elders, are not angered, then there is said to be an equilibrium in the society. No calamities will befall the tribe and no ~~feuds~~ ^u feuds will occur.

Suppose now that a murder is committed by a member of the tribe, particularly when the deceased is also a member of the same tribe. It is claimed that the ancestral spirits of the murdered man's clan will be annoyed; this in addition to the anger of the deceased's living relatives and clansmen. The whole world of the spirits is upset and the harmony which is supposed to reign in that world disappears. The displeasure of the ancestors is felt by the elders, for they are supposed to be in constant communion with the ancestors. The clan of the deceased is ^{unhappy} and vengeful because one of their number has been killed. The clan of the murdered is afraid that the aggrieved clan will try to avenge the murder of their kinsman. This vengeance may be exacted by means of a blood feud or by the employment of more dangerous weapons like witchcraft or ~~incev~~ invocation of the powers of their ancestors to avenge their deceased kinsman. There is then an uneasy atmosphere in the society, a mixture of anger, fear and foreboding. The harmony in the society is broken and something then must be done to restore the basic equilibrium. In the case of murder, therefore, compensation is paid to the aggrieved clan or family and a goat is slaughtered so that the two clans can sit together and resume their old friendship. Occasionally the offending clan will offer the other ^{clan} ~~clan~~ a young girl who will in future take the place which would have been taken by the deceased's future wife. ~~have~~ A cleansing ^{ceremony} ceremony may also have to be undergone by the murderer. In all these ways, the harmony of the society is restored. This harmony is said by the various writers to emanate from the equilibrium in the social and economic forces mentioned earlier. If nothing is done about the potentially explosive atmosphere, then feuds will occur between the two clans, the aggrieved ancestors will exact their vengeance by visiting calamities on the offending clan, and the gods will be so annoyed that they might cause famines or epidemics, thus upsetting the equilibrium even further.

The same explanation obtains for other offences like rape, theft, witchcraft and others like failure to pay dowry, adultery¹³ as well as other

offences which are taboo¹⁴ in the society. Thus a man who refuses to pay dowry on his wife runs the risk of a curse from his ageing father-in-law. The curse is a very potent deterrent among the Kikuyu and since it may be extended to ^{posterity} posterity, it is particularly well fitted for mention as an example of the upsetting of the equilibrium in the society; the harmony in the society has been broken by the use of the curse. Similarly a man who rapes a woman, particularly but not exclusively an unmarried woman, or a woman who commits adultery, has broken one of the moral rules in society. He or she is considered unclean. The name used by the Kikuyu for this type of uncleanness is "thahu", a term which is more pregnant with meaning than any English equivalent. (The closest one can get to the meaning of "thahu" is "ceremonial uncleanness"¹⁵, but even this would not suffice). He is incapable, after acquiring "thahu", of communicating with the ancestors or performing any public function. The concept of "thahu" goes to the root of the social life of the Kikuyu. The offender is therefore in an extremely unenviable position. The elders of the clan, including his own, the gods and the ancestral spirits are angered by his action and calamity^m might befall his whole household,¹⁶ or indeed on the whole clan, sometimes the whole community. The offender must therefore be cleansed by a tribal medicineman before he can be considered whole again. This purification ceremony is a feature of the treatment^{of offences} which may be termed offences against morality. The purification ceremony is supposed to remove the uncleanness, the "Unwholeness" from the offenders, averting the possibility of a calamity brought about by the ^{ancestral} ~~spir~~ spirits and gods, thereby restoring the equilibrium in the society.

The main weakness of the equilibrium theory as explained above is that it rests largely on the basis of the hypothetical forces in society which are regarded as at a hypothetical equilibrium at one point in time and at a hypothetical disequilibrium at another point in time. Superstition may be part of an African society, but theories have never been t

but theories have never been their strong point. Africans will readily believe that the spirits of their ancestors have wrought the havoc or mischief in their midst, that the curse will make them impotent and that their gods can be mollified by the sacrifice to them of a spotless ram; but they will not as readily take to the notion of the reasonable man, the economic man and the MacNaghten Rules of insanity. The family or the relatives or the clan of an insane offender will be liable for the acts of their insane kinsman. And they will be liable to the same extent that the offender would have been liable were he sane.¹⁷ There will be no defence of insanity either to escape liability or to mitigate the damages. If the insane man kills another man, blood-money is payable to the full amount. If in his insanity he commits rape, the goat used for the purification of the victim is payable by his relatives: the fact that he will not be corporally punished by his age-mates is not a point judicially decided by the elders, but rather a decision taken or not taken by his age-mates who in any case do not sit in any judicial capacity¹⁸ to decide on the point. Since the equilibrium theory states that the traditional societies made their laws in order to maintain this hypothetical equilibrium, it follows that the societies must have had some notion of these forces. African societies, it is submitted, never thought in terms of forces being in equilibrium or in disequilibrium. They only knew that when the ancestral spirits or gods were angered they would punish the whole community unless the community itself took the initiative and either appeased them or punished the offenders.

Apart from the theory's undue reliance on the assumption that the people thought in terms of forces being in equilibrium, the theory is sound and provides a very good explanation of the supernatural forces at work in an African society. Perhaps instead of talking about the equilibrium of the forces, the proponents of the equilibrium theory should lay more stress on the real supernatural agencies like the gods and the ancestral spirits.

(b) The Conciliation Theory:

We now come to the second theory about the aims of customary customary law. This is the conciliation theory, The theory is that customary law sought to settle disputes in an amicable and conciliatory manner. The essence of this theory is therefore similar to the equilibrium theory in that it also emphasizes harmony within the society. It is said that in a case where one party was wronged by the party, the elders would be called in to arbitrate and to make the parties friendly once more. The mechanism of customary dispute settlement is a clear indication that this was one of the very major aims of the African customary legal systems before the advent of colonialism. The law did not seek to confer absolute rights to an individual as the English law of tort or contract does. Each case was decided according to its particular circumstances. There was nothing much resembling the rigid English doctrine of stare decisis. The fact that one offender paid two beasts by way of compensation to the plaintiff, did not mean that another person had to pay the same number of beasts if he committed a similar offence. Indeed the same offender might be asked to pay different amounts of compensation on two different occasions even when the offence is the same. For that reason it would not be entirely correct to say that under customary law the punishment of a particular offence was always so many beasts payable way of compensation.¹⁹ The punishment or the liability of an offender was bound to change on occasion because the main aim was reconciliation of the parties to avoid ill-feeling which might disrupt the community life of the society. This reconciliation was very often achieved by making one party, so to speak, meet the other halfway: release him from paying some of the damages which might have been payable on a thorough assessment of the loss or damage occasioned.

The aim of customary law can almost be described as the maintenance of peaceful and harmonious relations within the community.

This was done by the employment of conciliatory procedures in cases of dispute and by the appeasement of the gods and the ancestral Spirits. The aim was not to punish the offender as such offenders were punished not merely because they had behaved in a certain manner technically described as an offence, but because their behaviour had the effect of destroying the life of the community. Thus theft was heavily punished in most societies while the mere fact that one had gone into another's garden and eaten fruits or sugar-cane was not normally considered as an offence unless it was repeated many times. African customary law, particularly Kikuyu customary law, may therefore be said to have recognised the defence of necessity as a valid defence to certain charges. English law, by comparison, punishes behaviour as such and courts concoct such ridiculous terms as technical trespass,²⁰ technical assault and statutory offences to describe behaviour which they do not think is criminal in itself but is criminal because the law says it is.

It can therefore be seen that customary law developed from the local culture as a living law, referable to and compatible with the life of the community. Particularly in Kenya there was no impartial body like the police which went about arresting offenders. Nearly all the cases which were decided by the elders were initiated by one of the parties to the dispute, and even in the case of witchcraft there was always the complainant who was normally the person whose child or close relative had been bewitched. Similarly in theft cases the one whose property had been stolen was the complainant. Because of this aspect of the proceedings some writers have said that the whole of African customary law was a law of delict rather than crime. Others say that customary law is all criminal. There might be some argument in favour of the assertion that all African law is civil, but to say that it is all criminal is to completely miss the point. T.O Elias has this to say:

"What is not ^{so} easy to excuse is the tendency to give the impression that African law is all criminal and that because certain criminal offences are recognised and punished by English law in ways often different from those of African law, the two systems are necessarily ^{poles} apart in all other respects"²¹.

To return to the main question, did African customary law distinguish between crimes and civil wrongs.? We have seen that customary law developed as part of the local culture to deal with the problems of the local community. We have also seen that in most of the societies which existed in Kenya there was no centralised system of administration. English law is divided into criminal and civil law according to whether it deals with those acts which injure the entire community or those acts which injure individuals. We have seen that according to African law, virtually all the acts had the tendency to injure the whole community. It would therefore be fatuous to answer the question either in the affirmative or in the negative. African customary law, it is submitted, made absolutely no distinction between criminal and civil law. The distinction itself is in any case highly conceptual. The two categories ^{overlap} overlap. Neither in terms of procedure nor in terms of consequences can the distinction be maintained as a sensible and satisfying distinction because "no absolutely satisfactory definition of a crime has yet been put forward by any jurist ----- so intractably subtle is the distinction between civil and criminal offences even in developed systems."²² The distinction is a folk distinction and customary law, being a product of a certain type of culture, could not be expected to make it. Nkambo Mugerwa puts it very precisely when he says that "African customary law made no or little distinction between civil and criminal liability."²³

Which Customary Law ?.UNIVERSITY OF NAIROBI
LIBRARY

The term "customary law" is a term which is capable of causing a lot of misunderstanding. Which customary law do writers talk about? Customs have existed for time immemorial, and so has customary law. Does customary law change or is it static? Arguments both ways have been advanced, all with equal cogency. It is important to answer this question because only by answering it can one know of what sort of customary law one is talking about. Talk of applying customary law in all civil or criminal cases has been in the air for a long time. The Judicature Act of Kenya ²⁴ enjoins the courts to be guided by customary law in all civil cases to which one or more Africans are parties. It would be necessary therefore to decide whether customary law has changed in its substance or not, and if it has, whether it is the new or the old customary law which should be applied. Normally of course it is only the new customary law which should be applied, but the question arises whether what may be regarded as a change is in fact a change in the substantive law or merely a change in social practice. To illustrate, under customary law a young man of the warrior group, and everyone else who, had not attained the elder grade had no power to decide a case (unless it was one of the matters which specifically and exclusively concerned the age-grade as a group). Jurisdiction only lay in the elders of the clan. These days, however, a young man who is regarded as knowledgeable may be called upon by the elders to help them decide a particular case. It cannot consequently be said, because of that rare occasion, that customary rules as to the disqualification of young people to hear and arbitrate in disputes have changed.

In 1965 the then African Courts Officer wrote a circular to the Registrar of African Courts, Meru, which contained, inter alia, the following extract:

"Law panels cannot presume to revise, to amend, to restate customary law and thereby to expect the courts to enforce

the customary law so amended, revised or stated
 law panels have no authority whatsoever to
 change no customary law nor for that matter have the
 county councils. If customary law has to be changed,
 this must be done by the Legislature of the Republic
 of Kenya". 25

From the above extract, it is clear that no law panel was authorised to
 change Meru customary law in any manner whatsoever. Since this was a circular
 it is presumed that it went out to all registrars of African courts and
 that the comments contained therein applied to all law panels throughout
 the Republic,²⁶ If that is the case then no law panel throughout the
 Republic was authorised " to revise, to amend, to restate customary law
 and thereby to expect the courts to enforce the customary law so revised,
 amended or restated." The African courts officer also stated that if the custo-
 mary law had to be altered, this was to be done only by the legislature.
 The obvious conclusion is therefore that African customary law in Kenya has
 not changed since 1965, except where the legislature has intervened, in
 which case the law thus enacted would cease to be customary law and
 would become written law.

What about the period before 1965.? There is no neat and convenient
 quotation to answer this question in one word. One has to look into the
 available evidence before one can attempt to answer such a question. In
 the first place it is true that there was no immediately discernible body
 which could be said to function as the legislative body as we know it
 today. That would not mean that customary law did not adapt itself to
 new changes in the social life of the community. Every legal system must
 be flexible enough to accomodate such changes. The only reason that African
 law did not change after 1965 is because it was expressly prohibited to
 amend or revise it; what happened before it was prohibited certainly suggests
 that customary law did change as times changed. The writer was able to
 record that certain types of conduct were not punishable in Kikuyu
 society until they were made so by the ruling age-grade which was in power

power about one hundred and twenty years ago.

These included pregnancy (which previously only required the cleansing of the woman), the wounding of one's maternal cousin and extra-marital sexual intercourse. They were made unlawful by the "riika" which came to power around the year 1860 Or 1865. From that statement it would appear that some kind of legislation took place among the Kikuyu and that some changes did occur in the customary law. Lambert has said of the Embu people:

"In Embu, for instance, there was a very definite period for legislation though it was not readily discernible because it functioned, as a rule, only at rare intervals, viz, at the handing over from generation to generation, though it was capable of use at other times in the event of emergency or important of policy.²⁷

Lambert's statement applies with equal truth to the Kikuyu²⁸. Presumably it should be applicable to many others, And Gluckman has this to say:

" The view that customary law was ancient and immutable, retaining its principles through long periods of time, its origins lost in the mists of antiquity, has been discarded. Not only are customary laws changing today but they also were subject to constant change in the pre-colonial past".²⁹

CHAPTER TWO

MORALS IN CUSTOMARY LAW

In this chapter an attempt will be made at describing (not defining) what is morality in the African context in general, and in the Kikuyu context in particular ¹ Perhaps the best way to embark on a study of morals in this context is to investigate what is morality or, failing that, to say what is moral and what is not moral. s

The Problem of Definition

The first difficulty which confronts anyone making a study of subjects such as the laws of morality is the meaning of such value terms as "moral" and "immoral". This is so because what may be immoral in one society will not necessarily be considered immoral in another. The difference arises due to the varied nature of norms which exist among the different communities in the world, and the difference is not confined to two different countries, but also extends to different communities within a given country. Sellin quotes Maunier thus: "Thus, among the Khabyles of Algeria, the killing of adulterous wives is ritual murder committed by the father or brother of the wife and not by the husband, as elsewhere." ² Among the Akamba, extra-marital sexual intercourse per se is not immoral, while among the Kikuyu it is considered a grave moral offence.

Nowhere is this discrepancy as evident as in the law of marriage as enforced in Kenya. The Judicature Act ³ provides that the courts shall be guided by African customary law in civil cases "So far as it is applicable and is not repugnant to justice and morality....." The morality in this case was the morality of the Englishmen ⁴ as understood by the judiciary which was manned by personnel of origins other than African. This must be so "for customary laws 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 or morality of the colonial power was to provide the standard to be applied." ⁵ The legislature has therefore come to the conclusion that widow inheritance as practised by many Africans is "repugnant to morality." ⁶ The offence of bigamy is severely punished by the Penal Code. Yet the fact of bigamy and the fact of polygamy differ only in procedure since to be guilty of the former one has to have undergone a "civilised" marriage before contracting another one; while in the latter,

one has two or more wives with none of whom he has undergone the "civilised" ceremony of marriage.

The conflict of cultures is not only evident in the law itself, but also in the everyday activities. The novice European tourist will gape at African girls dancing naked to the waist and comment on the indecency of such a dance; yet this was the ^{or}normal thing in an African society. The English gentleman would gladly prosecute such a girl for the offence of indecent exposure. The typical African, on the other hand, will be shocked at a European couple holding hands or kissing in public; to him the very suggestive act of holding hands in public amounts to gross indecency. The fact that the "new Africans" have started copying these habits of the Europeans does not detract from the rule; it is the exception that proves the rule. Even they will not hold hands in the company of their parents, unless their parents also belong to the same breed of "new Africans". And the mini-skirt "war" which raged in the press a short time back was really an issue of what was moral and what was immoral.

The study of morality in customary law is not made any easier by the fact that one is trying to cram African concepts into essentially English categories which may or may not exactly correspond with African concepts. English words may not be properly translatable into an African language, and vice versa. The writer was confronted by this particular problem in the course of his enquiry into the treatment of offences against morality among the old men and women of Murang'a District. Morality, as we know it in the English context, is not amenable to translation into the Kikuyu language; what the writer therefore thought was easier to translate was the negative form of that word, namely immorality. Even this word, however, would not seem to correspond exactly with the Kikuyu equivalents. Thus when the writer asked old people to tell him what offences against morality were, they immediately recited along list of offences ranging from theft, witchcraft, disrespect to elders arson and assault to the graver offences of murder and rape. They grouped them under the one word "waganu", which has a connotation of bad behaviour, malicious behaviour as well as generally disregarding the accepted norms of behaviour. So the writer would turn to the other word "umaramari", with basically the same results. They were, however, able to distinguish the two foregoing

^d works from "uturika", lumping under the latter head the lesser offences like uttering obscene words, dis~~re~~spect to elders, disobedience to one's parents and bullying.

It is very clear, therefore, that any study of customary law can never be accurate as long as one is using English terminology and trying to translate ~~the various~~ the various words into the relevant African language. Writing of the Tiv, Bohannan said, "The distinction which I have drawn between 'kwaghbo', 'kwaghbang' and 'ifer' is a folk distinction".⁷ Although Bohannan was talking about the distinction between criminal and civil law, the words might as well have applied to, say, offences against property and offences against morality. We have seen how theft, rape, murder and witchcraft were lumped together as offences of "waganu" and "umaramari", words which might be thought to mean immorality. Indeed, one might think that the three words "waganu", "umaramari" and "uturika" are synonyms, but it is clear from the foregoing that they are not as the latter is less grave than the other two.

We are therefore left with only one alternative: to use the English classification of crimes and try to see them in an African perspective. This we shall do despite the warning by Bohannan that "it is just as wrong and just as uncomprehending to cram Tiv cases into the categories of the European folk distinctions as it would be to cram European cases into Tiv folk distinctions".⁵ It is therefore necessary at this juncture to point out the fact that in the succeeding discussion, the offences termed "offences against morality" are those offences which the Penal Code classifies as such offences, and related offences.

Offences Against Morality

As has been pointed out these are mainly the offences enumerated in Chapter XV of the Kenya Penal Code. They do not necessarily coincide with those offences which under customary law would be called offences against morality. Indeed, as we shall see later, the class of offences of this type found in the Penal Code is much narrower than a similar class of offences in customary law even when the criteria used in the Penal Code were to be applied in classifying the offences against morality in the African conception of morality.

General Features of Morality Offences

Before looking at the treatment of offenders against the laws of morality, we should first try to distinguish offences against morality from other types of offences. This can best be done by picking out the salient features of these offences which are common to all or most of them. This will not, however, mean that any conduct which bears these features is necessarily an offence against the criminal law of Kenya since, as we shall see later, there are very many "quasi-criminal" offences which do not have the sanction of the law, as for instance, adultery and fornication. We shall therefore consider the offences first under the Penal Code and then under customary law.

Under the Penal Code.

A look at the elements of the so-called offences against morality will show that they almost invariably all have sexual overtones. They almost all have to do with carnal knowledge. Thus rape is having carnal knowledge of a female person without her consent⁸; defilement is having carnal knowledge of a female person under the age of fourteen years with or without her consent.⁹ Even offences like keeping a brothel¹⁰, bigamy¹¹ and soliciting in public for immoral purposes¹² all have sexual overtones.

The primary aim of Chapter XV of the Penal Code is to protect the chastity and sexual integrity of women. Adult males can presumably take care of their own chastity and sexual integrity without the help of the criminal process. The presumption in turn gives rise to such absurd presumptions as that a man cannot be violated by a woman or by women. There is therefore no rape of a man by women. More will be said about this later. The Penal Code also protects very young boys from sexual assaults by both men and women,¹³ but this is the exception that proves the rule that Chapter XV is basically for the protection of women.

Generally, offences against morality carry very heavy punishment for the offender. Very few of these offences are categorised as misdemeanors. All the others are felonies carrying stiff sentences. Thus under S.140 of the Penal Code, a person guilty of rape may, in the discretion of the

court, be punished "with imprisonment with hard labour for life, with or without corporal punishment", Other offences carry punishments of five years imprisonment seven years and three years. Even for those offences described as misdemeanors a magistrate may sentence the offender to two years imprisonment or to a fine which is only limited by the jurisdiction of the court trying the case ¹⁴.

The classification of offences into offences against morality in the Penal Code under Chapter XV is a rather superficial classification. It does not follow any hard and fast rules and is in fact a rather irrational one. Probably the only feature which can be said to be peculiar to morality offences is that they deal with sexual matters. Yet even this does not apply exclusively to Chapter XV for bigamy falls under Chapter XVI; it is submitted that bigamy is also a morality offence. As for the other features, it is obvious that heavy punishment is not peculiar to morality offences. Property offences as well carry stiff sentences, and aggravated robbery is punishable by death ¹⁵, We can therefore safely say that the fact that the morality offences deal with sexual matters and are mainly created for the protection of women are probably the only two features which can be said to be truly the characteristics of morality offences.

Under Customary Law:

As has been stated above, the "offences against morality" under customary law do not exactly coincide with the offences defined in Chapter XV of the Penal Code. Those found under customary law form a category which is much wider and much more varied than their counterparts in the Penal Code. An attempt will be made in this section to give the general features of the so-called offences against morality under customary law: features which appear to be common to these offences. A caveat has to be entered at this point: firstly, the features enumerated below are of a general nature and may not be an integral part of ALL the offences though they may well apply to most of them: secondly, these features will be largely restricted to the offences defined in the Penal Code, reference being occasionally made to other offences under customary law; and, finally the features dealt with below mainly deal with the treatment of the ~~offenders~~ offenders under customary law, for, as we have seen, there was nothing like a category of morality offences under customary law and all offences tended to be termed morality offences.

Perhaps the most salient feature of customary law offences against morality, and which may be peculiar to that class of offences, is the

mode of treatment of the offender. It will be noted that almost all the offenders are subjected to particularly heavy punishment. Thus sexual intercourse with an unmarried girl was punishable in Kiambu District by the payment of five rams and one ewe, in Muranga two rams and one ewe, in Nyeri four rams and one ewe, and in Embu five goats and one ewe. Adultery was punishable in Kiambu by the payment of six rams and one ewe, in Murang'a four rams and one ewe, in Nyeri four rams and one ewe, and in Embu five rams and one ewe.¹⁶ Cotran's Report of the various penalties is, however, not universally true of all the various clans in Kikuyuland and there are many variations. Thus the writer found out that in his home location the customary punishment for abducting a girl without the intention of marrying her was for the man to pay one ram and one ewe, the ram to be consumed by the council of elders of the clan or clans concerned. Similarly, in the case of rape and defilement, the latter of which was extremely rare, the man paid one ewe and one ram. These relatively light penalties also applied to adultery and sexual intercourse outside of marriage. Such local variations existed only in relation to the number of rams, but apparently not the payment of the one ewe. More will be said about this mandatory ewe later. In most cases, the writer found, incest, defilement, rape, and, to some extent, adultery were punishable by basically the same penalty of one ram and the ubiquitous⁴ ewe.

This does not mean that offences other than "offences against morality" were not heavily punished. On the contrary, offences like theft and witchcraft were even more heavily punished, than, for example, adultery¹⁷ or defilement. Thus the writer was able to record that in certain parts of Murang'a District, the customary fine for theft was seven goats payable to the clan (presumably to be transmitted to the victim himself) regardless of how much property the thief had taken; that on repetition of the offence the thief was to pay seven goats and, ⁱⁿ addition, he had to be punished by his own clan by being ordered to pay three rams to be consumed by them; the culprit was tied up and guarded by his age-mates until he was able to pay his fine. Anthropologists have recorded, and the writer has verified, that among the Kikuyu habitual thieves were burnt alive or strangled. In the same area of research, the writer recorded that wizards and people who practised harmful witchcraft were normally put to death,¹⁸ presumably because such people were regarded as a very dangerous element in society whose iniquitous⁴ practices would bring calamities and disaster to the whole community.

Both the mode of punishment and the definition of offences in customary law vary with different ethnic groups, Cotran records¹⁶ that "(m)ere sexual intercourse with an unmarried girl is not actionable" under Luhya customary law. "However, any person who has sexual intercourse with an unmarried girl, as a result of which she loses her virginity, is liable to pay to the girl's father a fixed sum by way of compensation, notwithstanding that the girl consented to the intercourse. The compensation is one heifer". The compensation was paid for the loss of virginity of the girl, which would presumably diminish her marriageable value, and not for the sexual intercourse per se. Among the Meru people, compensation for adultery was one bull and one ewe. Among the Kisii, Kuria and Nandi, when a wife commits adultery, her father is liable to pay compensation, fixed at one cow and one heifer among the Kuria and Nandi, and one cow and one goat among the Kisii. Cotran also records that the payments or fines among the Kikuyu, Meru and Embu were made to the girls father by way of compensation.¹⁹ That may well have been true of the areas he covered. There were, however, bound to be differences both between the areas covered and between the various historical periods of customary law.²⁰ In his Restatement of African Law, Cotran says: "The customary law recorded in ^{to} ~~the~~ restatement is that obtaining at the present time, i.e. the law as it is practised by the people and enforced by the courts".²¹ Cotran was writing in 1968, when Kenya had already felt the cataclysmic impact of colonialism and was an independent state. The British Colonial authorities had set up Native Courts charged with the enforcement of customary law in their ⁱ ~~the~~ respective jurisdictions. These "native" courts had little or nothing in common with the traditional councils of elders which enforced customary law prior to the coming of the Europeans. The former were ~~named~~ ^{named} by more or less permanent magistrates assisted by more or permanent assessors. The assessors in the native courts, designated "elders" nearly always never came from the same place as the parties to the proceedings. They were set up as an impartial body of advisers to the magistrate ~~to~~ ~~the magistrate~~ to advise him on certain aspects of customary law. The courts heard customary law cases in the context of an essentially English legal system, and so-called offences were dealt with as offences against customary law carrying sanctions which corresponded with English jurisprudential ideas. Thus adultery cases in the native courts were always "adultery contrary to native law and custom" punishable not by payment of a certain number of goats or sheep or cows, but payment of a fine, mostly of fifty shillings among the Kikuyu of Murang'a District.²² The payment of a money fine can be traced as far back as 1934, probably earlier. Yet Cotran in 1968 could record that adultery with a married woman in

Murang'a District was punishable by the payment of four rams and one ewe by way of compensation to the lawful husband - this, according to him, being "the law as it is practised by the people and enforced by the courts".

Even assuming that the compensation recorded by Cotran and the fine imposed by the courts differed only in form, fundamental differences are nonetheless apparent. The native courts imposed fines which never found their way into the pockets of the injured husbands. Neither was an additional amount paid by way of compensation to the injured husband in the case of adultery. The revenue from the fines was the revenue of the erstwhile colonial government and not compensation to the injured husband. This is more in accordance with English jurisprudence than with African ideas of the nature of justice. Furthermore, the computation of the compensation differs from the amount of fine imposed by the native courts. Among the Kikuyu where pregnancy compensation is still payable to the father of the girl, computation on a money basis is expressed in the number of beasts which were payable under customary law. The plaint as late as 1972²³ expressed the claim in the form of beasts, with the corresponding standardised value per beast written in for convenience. The father of the impregnated girl claims twenty goats and six rams ("ngoima"), these corresponding with seven hundred shillings. One goat was deemed to cost twenty shillings and one "ngoima" was deemed to cost fifty shillings, making a total of four hundred shillings in respect of the goats ^{and three hundred shillings in respect of the} "ngoima" - seven hundred shillings in all. On that premise, it can be seen that the fine imposed on an adulterer in the Murang'a native courts corresponded with only one "ngoima" (ram), while Cotran records that the customary compensation to the injured husband was four rams and one ewe. The fine, following Cotran's report, should have therefore been two hundred shillings in respect of the rams and twenty shillings in **respect** of the ewe, and all this should have been payable to the husband.

It might be argued that Cotran was only recording customary compensation, to which the answer is that he was recording customary law, which includes the sanctions. We have seen that the native courts of Murang'a District imposed a fine on an adulterer, not in addition to compensation to the husband, but to the exclusion of it. The courts thus treated adultery as a criminal offence in respect of which the proper party to be compensated was the government. This practice of imposing fines went ~~on~~ up to the early sixties and the injured parties rarely, if ever, received any compensation. The fine itself did not reflect Cotran's

Why does Cotran's Report show a discrepancy with the law as enforced in the native courts? It is suggested that he mixed up the customary law as enforced in the African courts until 1967²⁴ and the law as it used to be before the native courts were set up; indeed he mixed up the law as enforced in the courts and the law which was applied when the disputes were settled out of court in the traditional way. Even when the disputes were settled out of court, the punishment or compensation varied widely, that for adultery varying between one ram and one ewe, ^{and four rams and one ewe, sometimes going up to five rams and the ubiquitous ewe.} Cotran's scale of compensation, it is suggested, was not the scale as enforced by the courts but may well have been the scale as practised by the people.

Cotran makes another statement which cannot be supported in view of the known Kikuyu way of life. He records that in all adultery and unlawful sexual intercourse cases, one ewe was payable in addition to the four, five or six rams by way of compensation to the injured husband or father. In fact the ewe was not meant to be compensation to anyone; it was used to defray the costs of the compulsory purification or cleansing ceremony which the woman or girl had to undergo after such unlawful sexual intercourse. The ewe ("mwati") was always paid to the medicine-man, though the offender is not the one who took it to him. It was therefore never paid by way of compensation to the injured husband or father.

UNIVERSITY OF NAIROBI
LIBRARY

This leads us to the other important feature of offences against morality. Whenever the offence was committed, it was mandatory for the parties, mostly the woman or girl, to be cleansed ("gutahikio") at the hands of a medicineman. This mainly applied to the Kikuyu, Meru and Embu. Most of the other tribes did not order the purification ceremony; for them the payment of cows or bulls or heifers was enough. The purification ceremony among the forementioned tribes was always performed on the woman or girl who had been a party to adultery or incest, or a victim of rape. The ceremony was supposed to remove the ceremonial uncleanness ("thahu") which attached to her at the time of the commission of the offence. This aspect of the treatment of an offender (or more particularly, of the victim of an offence) can be used as a rough and ready test of what was and what was not an offence against morality among the Kikuyu, Embu and Meru peoples. The proscribed behaviour was described as "mugiro",²⁵ meaning it was taboo, was prohibited and had a kind of uncleanness attached to it. This uncleanness was supposed to go to the very essence of human life and the existence of the cohesive tribal structure of the people. It also had religious overtones in that any person who committed ^{what} was "mugiro" and was not purified or cleansed in the traditional manner would be punished by the ancestral spirits, which punishment took the form of

madness, skin disease, barrenness or any other of the important calamities recognised by the community. In addition, nobody would like to mix with anyone who had "thahu" in him.

It is important to note at this point that the concept of "thahu" among the Kikuyu, Embu and Meru people was very important to ensure the observance of customary law. Next to the curse, this ceremonial uncleanness was probably the most feared by the people. Thus anyone who incurred "thahu" made sure he was cleansed as soon as possible, for otherwise the wrath of the ^{gods} ~~goods~~ and the forces of the whole spiritual world might befall him, with of course the attendant calamities already referred to. Kenyatta records that a ceremonial sheep cannot be offered by anyone who has committed, among other offences, rape.²⁶ Such a man is considered as having committed a moral or religious offence which might interfere with communion with the gods. This uncleanness was serious enough to warrant the payment of one ewe to the medicine-man to have it removed.

A less obvious but by no means unimportant feature of morality offences was the prospect of ostracism. Social ostracism could be meted out to any offender, whether he had committed an offence against morality or an offence against property. This form of punishment was perhaps one of the rarest in traditional Kikuyu society, probably because it was a very grave punishment. The essence of ostracism was that the ostracised person could not take part in the communal life of the society: he had to build his own house without aid from the rest of the community, he could not buy anything in the market, he would tend his shamba alone, etc. In other words, the offender was completely cut off from all communal activities. The seriousness of ostracism can be gauged from the following statement: "The stigma attached to the ostracism was far greater and very much worse than that attached to the European form of imprisonment. Many Gikuyu would prefer to go to jail rather than to be ostracised. The fear of this was one of the chief factors which prevented the people from committing crimes".²⁷ A man (or woman) could be ostracised for almost any offence which had repercussions on the communal life of the tribe, such as rape, offences against the spirits (such as eating the gods' meat), wizardry, and any other of the very serious offences. This punishment, however, was so grave that it was meted out only for really grave offences.

An important sanction that attached to morality offences was ridicule. It was of course not restricted to these offences. A person who committed rape, incest, theft or partook of the beer or meat traditionally reserved for a group to which he did not belong, was liable to be

riduculed by the whole community. Ridicule took many forms, including the composing of songs specifically relating to the person to be ridiculed, the making of jokes against him, and stories composed for that purpose. This was a common social sanction of customary law and was, like ostracism, applicable to almost any infraction of social norms, but which unlike ostracism, was not reserved for the grave offences. It applied even to offences which the Penal Code does not recognise as offences. For instance, among the Kikuyu masturbation was "given up after the initiation ceremony, and anyone seen doing it after that would be looked upon as clinging to a babyish habit, and be laughed at"²⁸ Similarly, a person who did not respect his parents and was always insulting them or beating them would be immortalised in stories and songs.

An attempt has been made to indicate some of the general features of offences against morality under customary law. These features are not peculiar to such offences. Indeed even if an offence answers to the above descriptions, it will not necessarily fall within the group of offences defined in Chapter XV of the Penal Code. The reason for this inadequacy of definition is rooted in the very basic and fundamental structure of African traditional society which radically differs from a European Society in many essential aspects. Furthermore it is virtually impossible to enumerate characteristics of offences against morality since customary law did not in the first place make any conceptual distinction between morality offences and others. If they made any distinction at all, it was between the serious offences and the minor offences. Perhaps an account of the types of punishments which attached to these offences is the best guide to what was a morality offence. We have also seen that morality in the customary law sense covered much wider ground than morality under the Penal Code. It will be recalled that the writer had great difficulty in eliciting a definition of a morality offence from the elders; offences which the written law would classify as property offences or offences against religion were grouped together as offences of "waganu" or "umaramari" or "uturika". In other words, all offences against customary law were nearly all offences against customary morality. All offences against tribal law were offences which would be seen to affect the very essence of the clan or tribe in the sense that they would cause a disruption in the normal communal life of the people. They were offences which went to the root of society. Perhaps an analogy (which may not even be justified) can be drawn between the infractions of customary law and such Penal Code offences as murder, theft, rape and arson, this group as distinct from such statutory offences as driving a motor vehicle without a valid policy of insurance, parking a car in the wrong place, etc.

that is, offences against customary law were nearly always offences mala in se as opposed to offences mala prohibita. The laws were part of the living being which was African Society. This proposition was put very strongly by Driberg as follows:

" The conflict with our own ideas is fairly obvious: on the one hand a system which is a living, sentient organism, part of the general ^{cultural} complex, based on a collectivist ^{society depending on sanctions} of its own which are not penal; on the other hand a penal code, which is not intrinsically one with the rest of the culture but can be arbitrarily imposed and which is naturally individualistic".²⁹

The norms under customary law try to maintain the social harmony and cohesion, the social equilibrium mentioned in an earlier part of this paper. Such norms, to the extent that they were recognised as laws, were therefore part of living culture, one organ among the many organs that went to make the existence, the nature and the life of the entire social organism - in a word, the vitality of an African society. They were not concerned with ^{the} individual victim as such, but were more commonly concerned about what would injure the entire community. English law is based on very different conceptions. Rape is punished in England because it is a sin.³⁰ So is theft and many other offences. ~~The~~ ^{Treason} treason was an offence because originally it was committed against the king who, the Englishmen believed, had a divine right to rule them; hence anyone who tried to kill or overthrow him was going against God's command, which was presumably a sin. Offences are not punished because they entail anything like "thahu" or "chira" (in Luo), but because they were either sins or they interfered with an individual in the English society. In African societies, they were punished because they carried the stigma of uncleanness or because they had the effect of destroying the social cohesiveness. To illustrate, an Englishman would commit murder if he killed a stranger, ie. a man from a foreign country, or if he killed first-born twins. Among the Kikuyu, killing a stranger was not punishable, and first-born twins were invariably strangled because it was believed that it was "thahu" for a woman to give birth to first-born twins.³¹ It is clear therefore that while the Europeans look at the act in isolation, Africans in the traditional society looked at the act in relation to the whole community. Perhaps that is why Lambert wrote that the judicial system of the European culture involves judgment by decree and the granting of exclusive rights to an "individual; the African system involves justice by agreement and the maintenance of social equilibrium."³² The norms and sanctions of the two systems are therefore bound to be different. That also is the reason

for the various difficulties encountered when one tries to write about one culture in the language of another culture and to cram folk distinctions of one into the folk distinctions of the other.

For the above reasons it is hard to talk of characteristics of morality offences. In fact it is doubtful whether there is, under customary law, such a category as "offences against morality". The various features outlined above do not indeed distinguish the offences from any other customary law offences. They are neither characteristic of, nor peculiar to, these offences. All offences against social norms were classified into serious and less serious offences. Any other classification along the lines of European categories would do violence to the fundamental nature of a traditional African society.

CHAPTER THREE

THE NATURE OF STATUTORY MORALITY

Kenya is a multiracial society comprising mainly the majority Africans, the Asians and the Europeans. The standard of morality and the norms governing these different races are obviously different. The criminal law, however, has to be ^{of} general application if only for administrative convenience. This uniformity can only be achieved by leaving some norms outside the ambit of the criminal law and enforcing those which are acceptable to the largest portion of society. This chapter will attempt to show the ~~initial~~ ^{crucial} inconsistencies that lie between the major systems of norms, namely the African and the European normative systems. In this chapter nothing will be said about the Asians community since it is a rather dormant one in the controversies which have been raging in Kenya over the development of the Law of Kenya. Writers on African Law have also tended to ignore the Asians community, probably because their laws do not have much ~~bearing~~ ^{bearing} on which direction the law in Africa should take in its evolution. Moreover, the Asians themselves tend to be a reclusé community which does not normally interact with other communities. Their influence on Kenya Law is therefore likely to be ~~indivisible~~ ^{minimal}. That leaves the African and the European normative systems.

One may likely object that none of these two groups has a complete uniformity of moral values and standards, particularly the African community. To this, the writer answers that even within a small community such complete uniformity does not exist. ¹ The morals of an Irishman, a Welsh and an Englishman do not always coincide; so with the African Community. It has been pointed out that even within one Location the punishment for the same offence never was the same among the various sub-locations within the location. But it is true that the African communities had legal systems which more closely resembled each other than they did the European systems. It will therefore not serve ~~any~~ ^{any} purpose to divide the Kenya society into.

numerous minute groups which have more or less identical values. Our aim is to find out what group was so influential or so powerful as to formulate the law of morality which would bind the whole country. To do this the writer thought it was convenient to divide the Kenyan society into two major groups, namely what other writers have preferred to call "native" and "foreigners". The best approach is to look briefly at the general law of Kenya and then to look at some of the offences in Chapter XV of the Penal Code.

Before the beginning of European colonisation^u of Africa, the various ethnic groups in Kenya were obviously governed by their respective systems of social control. All this was shattered towards the end of the nineteenth century with the advent of British imperialism². By a series of orders-in-council English law was imposed on Kenya. This was obviously in accordance with the so called "Pax Britannica" ~~whereby~~ whereby an Englishman was deemed to carry English law wherever he went. The law thus transported was the statutes of general application in England at the material time, the doctrines of equity and the substance of the common law.

In the early stages of this process, the law was restricted to the European community and was by and large not applicable to the indigenous people. The application of English law was formally extended to the rest of the inhabitants by the 1897 Order-in-Council which officially received into Kenya the statutes of general application in force in England as at that date, the doctrines of equity and the substance of the common law so far as the local circumstances permitted and with such modifications as were necessary to suit local conditions. At the time of the 1897 Order, the Asians had already come to Kenya, but they did not attempt to influence the type of law that would be in force in Kenya while they were living in Kenya. The main reason was obviously that the same principles of law had earlier been received into India with only minor modifications, and they did not therefore find the English law entirely new to them. This reception of English law was endorsed by the Kenya Parliament after independence in 1967 with the enactment of the Judicature Act⁴. So much for the general law of Kenya.

The criminal law ~~of~~ of Kenya developed in much the same way^{way}, beginning with the reception of English general law and ending with a Penal Code which was by and large a mere codification of English criminal law. In the early part of the twentieth century the Kenya courts were enjoined to apply the Indian Penal Code rather than the common law and English statute law relating to crime. The Indian Penal Code was also largely a codification of English criminal law with minor alterations to suit Indian conditions. This was rejected in 1930 with the introduction into Kenya of the Queensland Model Penal Code which was to be widely applied in East and Central Africa⁵. Though the Indian Penal Code ~~was~~ ^{and the Colonial Office Model Code may be said to be} different, yet they were different only in form and not in substance or in principle. It has been said of the Indian Penal code that "Its basis is the law of England stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise...." In the event, this Code was discarded in Kenya in 1930 and the Queensland Model Code (i.e. the Colonial Office Model)

introduced. Obviously therefore our criminal law is English law in character. This can readily be seen from section 3 of the Kenya Penal Code which reads as follows:

"This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal Law and shall be ~~continued~~^{constituted} in accordance therewith".

Since Chapter XV of the Penal Code contains our offences against morality, it follows that even our standards and rules of morality are supposed to be English, at least if s.3 has to have any meaning.

It remains to be seen what type of law was received and retained long after the country had become independent. Is this law ^lwholly suitable to the circumstances of Kenya? Or is there a chance for improving it further so as to accord with the social, cultural and other aspects of Kenyan Society?

Sir Kenneth Roberts-Wray wrote "There are parts of English Law which, though they suit England, are not suitable for Africa and Africans; indeed there are parts of it which are not even suitable for England!"⁶ ~~This~~^{This} is true of nearly every branch of the law of Kenya, but it is much more easily perceived with regard to the principles underlying the morality offences. English society is based on what has been called the nuclear family (as opposed to the African extended family system), consisting of the man, his wife and their children⁷. The nuclear family is thus very small and is very far from being the basis of African society with its extended family consisting of grandparents, parents, brothers and sisters, as well as cousins and uncles. Not only the principles underlying the offences but also the considerations taken into account in meting out punishment vary between the African system and the European system. We shall first look at the African system of justice in comparison with the European system before we look into

the offences themselves.

The first important principle in the African system of justice is reconciliation. So much has been written by anthropologists about this aspect of traditional African systems that the writer is only going to touch on it briefly. Whenever two parties quarrelled, the ~~the~~ adjudicating elders sought to reconcile them rather than to judge the issue. Even when damages were payable, ^{they were paid} not so much as punishment ~~a~~ but as a form of atonement as well as to appease the injured party so that the two parties could thereafter live together harmoniously. Bohannan writes of the Tiv that the "essence and purpose of Tiv courts' action and arbitration is to determine what is right in a particular case, not to determine which law is applicable, or what is always and absolutely right" ⁸. Similarly, T.O. Elias writes "In the African societies with a rudimentary political organisation, rules rather than rulers, functions rather than institutions, characterise the judicial organisation of these societies." ⁹ On the other hand, the English system of justice involves judgement by decree and the granting of exclusive rights to an individual. The English law is "Penal and individualistic in character, not ~~intrinsicly~~ ^{intrinsically} one with the rest of culture, but can be arbitrarily imposed..." ¹⁰. Such a system for the administration of justice is suitable for a society based on the nuclear family. The individual feels he is not under any obligation to please his neighbour. His first duty is to himself and his family. There is no call for reconciliation since the parties need not meet after the decision of the court has been announced. Indeed they may not meet again for the rest of their lives as the mobility of people in such societies is very high. An African family is on the other hand, an extensive one. Mobility in the traditional African society was severely limited and therefore the same people would be interacting all the time throughout their lives. In those circumstances it was only natural that the people should endeavour to live harmoniously together. Hence the attempts by the elders to reconcile the warring parties to a dispute.

The second major principle in the African administration of justice ~~is~~

L. B. ...

was compensation. It was the practice that when an offence was committed, either the whole community or the victim, or both, had suffered damage or loss. The usual procedure was therefore to compensate the victim by making the offender pay to him a certain number of animals. The father of a girl who had been impregnated or defiled before marriage was awarded a number of beasts because he had suffered in both his prestige and in the marriageability, that is the dowry-fetching capacity, of his daughter. A thief had to pay his victim seven-fold. ~~Where~~ Where the clan suffered by the act of an offender, as for instance where they had to pay the compensation ^{due} to the offenders ~~impecuniosity~~ impecuniosity, a ram or a bull as the case may be was payable to them to be slaughtered and eaten by the clan. Among the Kikuyu, a man who impregnated an unmarried girl, in addition to the compensation payable to the father of the girl, gave the "muhiriga" (clan) a bull because he had offended them by his wayward behaviour." ~~is~~. This compensation aspect of the African system of justice has attracted writings from many anthropologists. It has been said, for example, that "what was generally sought in legal proceedings for injuries was not so much the punishment of the offender as the compensation of the victim." ¹². It has led some anthropologists to assert that the whole of traditional African Law was civil rather than criminal. In making the assertion, such anthropologists had looked in vain for anything which approximated the English criminal Law either in form or in its operation. The controversy over whether the distinction existed between criminal and civil law arose only because the anthropologists were studying African law from the rather inappropriate viewpoint that any respectable legal system must at least bear some resemblance to the English legal system.

It might be thought that the two principles of compensation and reconciliation are contradictory and mutually exclusive. This is not the case. The compensation which was payable was, as we have seen, not an absolute figure fixed for all time and for all cases, but was varied according to the circumstances of the particular case. This was particularly true

where the offender was judged by the elders from his own clan when the other party was also from the same clan; in such cases the penalty imposed might vary with the nature of the offence committed and the financial ability of the offender. Even when the compensation was fixed, as for instance in the case of an unlawful pregnancy, the supplementary payment to the elders of the clan or to the council of elders (which was normally an ad hoc adjudicating body) took the form of a bull or a ram according as the offender was able to pay. Most of the other penalties for non-capital offences were also not absolutely fixed. Neither were they excessive, except perhaps in theft cases. They normally ranged from a single beast to twenty or thirty goats, which figure cannot be considered excessive ~~xxining inxxin~~^{bearing} in mind the size of the flocks and herds an African normally had in the old days and the fact that where the offender was unable to meet the demand his clan came to his aid in the well known doctrine of collective responsibility. What therefore happened was that ^{the} two principles were applied together in the same case to achieve a somewhat balanced justice which created no feelings of resentment on the part of either party.

As has already been pointed out, the statutory law which is applied in Kenya today has nothing akin to the balanced justice mentioned above. Reconciliation is rarely, if ever, the aim of the court or other adjudicating body. The court is not concerned whether the unsuccessful defendant will go away feeling that the decision is unjust, or whether an unsuccessful plaintiff is suspicious or resentful of the whole system of justice. The law applied and the sanctions available are impersonal and have no patience with individual cases where the law is ~~xxxx~~ clear. In other words the courts apply an impartial and objective system of norms completely devoid of any consideration of personal feelings attendant on the judgement of the court. Though the courts award compensation, they do not do so on the same principles that African elders used. The compensation is awarded as of right as long as the ^{cause} ~~cause~~ of action is clear, and such award is not balanced by such considerations as reconciliation. The law is based on the adversary system whereby the two

opposing parties argue out their case before an impartial judge who presumably has no previous knowledge of the case and the parties, who then decides which party wins on the strength of the evidence tendered and the ability of the party to argue his points out. The administration of justice is not "part of a living organism" within the social and cultural complex.

From the above discussion it follows that even the type of offences defined as offences against morality by the statute law will not necessarily coincide with a "similar" category of offences under customary law. This follows from the fact that the basic organisation of English society is vastly different from the basic organisation of the African society with its extended family concept. Even more important, English criminal law seems to have derived its validity from Christianity (as understood by Englishmen); certain behaviour was prescribed by the criminal law because it was regarded by the Church as sinful. Devlin wrote ¹³:

~~27~~

"The law, both criminal and civil, claims to be able to speak about morality and immorality generally where does it get its authority to do this and law does it settle the moral principles which it enforces? Undoubtedly, as a matter of history, it derives both from Christians teaching."

This raises the question whether a law which finds its roots in christianity and derives its validity from the Bible should be imposed on a society which did not originally know of the Bible and which already had its own body of laws formulated for the same ends, namely the peace, order and good government of the society. Must such a law be accepted wholesale without any modification to suit local conditions? Must all criminal law derive its validity from, and referable to the Bible? These and other questions will be answered in the course of this paper.

To come back to the main subject, we have said that our law is basically English law with negligible alterations. The definition of offences in our

statute law, though not vastly different from African concepts of what is "criminal" or an offence, nonetheless shows radical differences which cannot be ignored. This will become obvious when some of the morality offences are considered.

A person is said to commit the offence of abduction if he "with intent to marry or ^{carnally} carnally know a woman of any age, or to cause her to be married or ^{carnally} carnally known by any other person, takes her away, or detains her, against her will" ¹⁴. The emphasis is on the lack of consent of the woman ~~x~~ to the taking away for the purpose of marriage or ^{carnal} carnal knowledge. Presumably, therefore, the victim of the offence is the woman herself. Nothing is said about her parents or immediate relatives. It has already been pointed out that if such a case occurred in the traditional African society, the real sufferer would be her father or other immediate relative because then the dowry payable might be reduced; in such a case the father of the girl would receive compensation from the abductor. Traditionally also, the abductor would be given a choice between marrying the woman according to customary ^{riles} ~~rights~~ or to pay compensation to the father; the marriage to take place of course if the father and the two clans approved. An important point to note in this connection is that abduction would normally only take place when the abductor intended to marry the woman and when he was reasonably certain that consent to the marriage would be given. At any rate the offence of abduction as defined in the Penal Code clearly shows the individualistic nature of English criminal law: ~~th~~e woman is the one who suffers, not her parents, and nothing is said of any consent being required from her father, at least if she is over the age of sixteen. If the girl abducted is under sixteen years of age, the operative consent is that of the parents. In that case it is immaterial that the man wanted to marry the girl who had consented if her parents or guardian did not consent. The normal procedure in most of the African marriages used to be that the young men from the bridegroom's clan waylaid the bride and forcibly carried her to the home of the bridegroom. It would be interesting to find out how a court these days would decide the question of consent in such a case

Does consent have to be expressly given by the bride or is the mere fact that she belongs to a community where such is the general practice amount to tacit consent to be abducted? The parents themselves did not give express consent to the abduction of their daughter, but they knew that ^{that} ~~it~~ was the general practice and accepted it. It is submitted that in such cases there would technically be no consent and that the offence would be committed within the meaning of s.142 of the Penal Code. If that were not so, then ^{a woman who lived in a sub-culture where} the general practice was to rape women would be taken as having given her consent in advance to any alleged rape. Consent cannot be given in such a dubious manner in order to exempt a person ~~from~~ ^{from} liability. The fallacy of the definition of abduction can be seen from the fact that up to around the year 1942 ¹⁵, many Kikuyu young men would be considered as having committed the offence of abduction even though that was their accepted way of procuring a bride.

Perhaps the most controversial offence in the whole of chapter XV of the Penal Code in terms of definition is incest. Incest is defined in s.166 (i) and s.167. Section 166 (i) reads as follows:

"Any male person who has ^{carnal} carnal knowledge of ~~his~~ a female person who is to his knowledge his granddaughter, daughter, sister or mother is guilty of a felony and is liable to imprisonment for five years".

Consent is immaterial under s.166 (2) for the purposes of this offence.

Section 167 reads: "Any female person of or above the age of sixteen years who with her consent permits her grandfather, father, brother or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother or son, as the case may be) is guilty of a felony and is liable to imprisonment for five years".

These sections are complemented by s.168 which provides as follows:

In sections 166 and 167 of this Code, "brother" and "sister" respectively include half-brother and half-sister, and the provisions of said sections shall apply ^{to} ~~wh~~ ^e whether the relationship between the person charged

and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock".

The offence of incest existed in definitionⁱⁿ traditional Kikuyu society and if committed would be regarded with extreme disgust and consternation. It was perhaps one of the very few offences whose "thahu" was regarded with extreme fear. In practice, however, it never happened. Parents and their children, or even close relatives, were not allowed any type of sexual familiarity^Y between them, i.e. they could not do or say anything that smirked of vulgarity or sexuality in each other's presence, particularly when they were of opposite sexes. A young man learnt to keep away from his mother's house and his sister's adventure path¹⁶. While ostracism, ridicule and curses were rarely invoked contemporaneously in punishment of the same offence, incest was a grave enough offence to warrant all three. Though none of the people interviewed by the writer could ~~remember~~ remember hearing of any incest case, they were nevertheless all agreed that an offender would almost certainly be ostracised by the whole ~~community~~ community and in addition might be put to death by his clan, though the latter only indicates the extreme revulsion with which an incestuous affair would be regarded. Since the offence apparently was never committed, ~~however~~, however, application of these sanctions was only a matter of conjecture and cannot be taken as an established rule.

The principle behind proscribing incestuous behaviour is common to all communities in the world, namely to ~~minimise~~ minimise the danger of the children inheriting certain congenial^t weakness or diseases from their parents, and in addition to prevent the birth of unhealthy children. In other words the basis of the offence is essentially biological^c in nature. It is therefore all the more surprising when the test of relationship is seen to differ^{among the various communities}. Among the Englishmen the test is ridiculously narrow while among most African Communities the test is extremely wide. The Penal Code adopts the English test of relationship (s.168) and is therefore very restricted. Thus there is apparently nothing wrong with a man having carnal knowledge of his grandmother, or a woman permitting her grandson to have carnal knowledge of her. Improbable as it.....

may seem, it is not a physical impossibility for a young man of sixteen to have a grandmother of fifty. It is an offence for a man to ^{have} carnal knowledge _^ of his granddaughter, but it is no offence for him to have carnal knowledge of his grandmother. There can be no justification for such a gap in the criminal law unless it is said to be that conception in the former case is probable while in the latter it is not likely. Yet there is that slight possibility of its occurring even in the latter case; and if the aim is to prevent genetic complications in the children, one wonders why sexual intercourse between a woman and her grandson is not proscribed by the criminal law.

The test of relationship for purposes of incest in the African context is very wide. Unlike in English law, incestuous intercourse is defined to include any intercourse between relatives of all grades. A man cannot, unlike in English law, marry his cousin however remote the relationship is. English law permits, or at least does not punish intercourse between a man and his aunt or niece, or between a woman ~~and~~ and her uncle or nephew. African customary law forbids not only these categories of connection, but also any type of connection when a slight blood relationship can be traced between the parties. Indeed, in many African societies, a man could not marry within his own clan. Even these days when tribal ~~life~~ life is breaking down, it would be most ~~un~~ unusual if a man married a distant relative. If the Penal Code is meant to serve and promote the interests of the majority, why is an English ~~is~~ peculiarity allowed to remain in the statute so long after the legislative power has vested in the indigenous Africans? It is submitted that this is one area of the law which needs to be looked into. The law cannot be expected to be valid only because the minority's (in this case the European's) view is the one put down as the law. As it is now, the traditional law of incest is adhered to only ~~because~~ because the Africans have the good sense to choose to do so.

In addition to the discrepancies between customary morality and statutory

morality, there are other absurd aspects of the Penal Code which cannot go undetected. It will be remembered that one of the main features of morality offences under the Code is their emphasis on the protection of women or, more correctly, the protection of the sanctity of ~~sex~~ sexual intercourse. In fact all the morality offences revolve around this central issue of "carnal knowledge". ~~It~~ It so happens that the main beneficiaries under Chapter XV of the Code are the females. Thus rape is unlawful carnal knowledge of a woman or girl against her consent. This consent can be vitiated if it is obtained by force or by means of threats or by fear of bodily harm, or misrepresentations as to the nature of the act or by personating her husband. While it ^{is} unlikely that a man can be forcibly know carnally, it is not a too far-fetched idea to say that he can be forced to carnally know a woman by means of threats, or fear of bodily harm. Such forced carnal knowledge is however not an offence under chapter XV of the Code unless the man or boy is under the age of fourteen years. The reason for such an omission, ^{which} must ~~be~~ have been intentional, is hard to come by. Perhaps the English woman of the Victorian era (in which English law of morality has its roots) could not bring themselves to "rape" a man. It is submitted that such behaviour is by no means impossible in this age. As matters stand now, the only offence which can be regarded as the counterpart of rape is indecent assault of boys under fourteen years of age under s.164. Yet the fallacy of this section is apparent since it limits its application to assaults of boys under fourteen years of age. One can hardly be expected to see why a boy of fifteen years cannot be indecently assaulted as much as can a boy ^{of} under fourteen years of age or, for that matter, a man of any age. What is so magical about the age of fourteen years?

The ridiculousness of limiting age at a certain figure pervades the whole of chapter XV of the Code. A householder or occupier who permits the defilement of girls under thirteen years of age is guilty of a felony ¹⁷ while if the girl is more than thirteen years but under sixteen years of age, the offence ^c is a misdemeanor ¹⁸.

One might wonder why, if carnal knowledge of a girl under the age of fourteen years is a felony, permission by a householder for such a felony to be committed on his premisses should not be equally felonious. Why the difference in punishment since the same ~~girl~~ offence is being committed whether the girl is under thirteen or ~~four~~ between thirteen and fourteen years of age? Moreover, it is an accepted principle of law that where a technical term is used, such term will be given its strict technical meaning; a term bearing a technical legal meaning is to be given its technical legal meaning. If that be so, the term "defilement" must be seen to be anomalous in s.150. Defilement must presumably be given the meaning attaching to it in s.145 since it is a word bearing a technical legal meaning. It is used in the margin in s. 150, and it is a principle of law that marginal notes must be used to construe sections adjacent to them¹⁹. Defilement is only committed on a girl under the age of fourteen years according to s. 145. If that premise is accepted, the necessity of s. 150 comes into question. A householder can be said to permit the defilement of a girl under the age of fourteen, but not over that age. Section 150 therefore becomes almost entirely superfluous except to the extent that it covers defilement of a girl under the age of fourteen years.

Offences related to prostitution present a ~~stri~~ situation which leaves much to be desired. Prostitution as such is not punished by the law, yet offences which can be traced directly to prostitution are punishable. A man or woman "who knowingly lives wholly or in part on the earning of prostitution" is guilty of a misdemeanor²⁰. Similarly any person who procures or attempts to procure any woman or girl to become a common prostitute, or to become an inmate of or frequent a brothel for the purpose of prostitution, is guilty of a misdemeanor²¹. And a male person who in any public place persistently solicits or importunes for immoral purposes is similarly guilty of a misdemeanor²². It is clear from the sections dealing with prostitution that prostitution itself is not punished, while acts tending to further it are punished. One would then wonder why prostitution itself, the root cause of

the other offences, is not itself punished. In the same way one would wonder why a man is guilty of the offence of soliciting in public for immoral purposes ~~which~~ ^{within} chapter XV while a common prostitute is not guilty of the same offence. (When the prostitute solocits, she is said to be idle and disorderly ... s.182 (f) , chapter XVI). The question attains even greater significance when one remembers that in urban areas throughout Kenya it is the prostitutes rather than the men who hang around the bars and night^sspots, sometimes accosting prospective customers, and offering their wares in the open market.

Bigamy is committed by any person^u who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of such husband or wife.^{"23} It is necessary to repeat at this point Lord Devlin's statement that the English law of morality derives its validity or authority from Christian teachings. According to the Christian interpretation of the Bible, a man is permitted to have only one wife, and a woman is of course only permitted to have one husband at a time, It has ~~never~~ been shown that that rule ever was part of African customary law. On~~e~~ the ~~xxxxx~~ contrary, polygamy in African societies was the accepted and established practice. Furthermore, especially among the Kikuyu, it never seemed to matter what type of marriage the first or subsequent ones were. A man could marry by performing all the rites of a traditional Kikuyu marriage, then inherit his second wife from his deceased elder brother, and perhaps capture a third wife as a prisoner-of-war during a raid on Masai territory. All the three marriages would be valid by the laws of Kikuyu society. When the ^AEropeans came on the scene, they found it impossible to introduce their own brand of marriage law which would work in harmony with the African law. The coloniolists could not ant^llaw all the marriages by "natives" which came after the first marriage so as to make the "native " liable to be prosecuted for bigamy. Instead , they introduced laws which were calculated to insulate their system of marriages from the "uncivilised native marriages". They introduced the African Christian Marriage and

Divorce Act ²⁴, the Mohammedan Marriage and Divorce Act ²⁵ (Which were of course at that time termed ordinances) Under their provisions a native who had contracted a marriage under the Mohammedan Marriage and Divorce Act or "native law and custom" could not undergo a second marriage under either the Marriage Act ²⁶ or under the African Christian Marriage and Divorce Act, except ~~perhaps~~ perhaps with the same party in order to convert the Marriage to a native Christian marriage. ²⁷ The important point to note is that any person who goes through a ceremony of marriage under either Act is incapable, during the subsistence of that marriage, of contracting a second valid marriage and if he attempts to do so he will be guilty of the felony of bigamy.

This law is still in force in a country where the basic belief used to be in polygamy ^{or} and where monogamy was, and still is, a choice rather than an obligation. The law of bigamy was developed in England by Englishmen in accordance with their understanding of the Bible. Must the criminal law be used to enforce the supposed teachings of the Bible? ²⁸

The deficiency of the Penal Code in a country like Kenya will also be apparent from the fact that there are many offences under customary law which it does not cover. Even when we limit ourselves to looking at Chapter XV, these deficiency will still be there. The uttering of obscene words is and was a serious offence under customary law, especially when directed to a person who was not of the same age as the offender. A person who uttered such obscene words (with the exception of very ~~very~~ old men who seem to have ^{been} ~~been~~ exempt from liability), ^{was liable so far as the writer could ascertain} to pay to the elders one ram; if the words were directed to an elder who was also the offender's father, grandfather, ^{uncle, or} or such other close relative, the offended elder was entitled to fix his own penalty, which normally did not exceed one ram. It would be wrong to say that the Penal Code exactly covers this offence, i.e. the customary offence of uttering obscene words ²⁹. The Penal Code covers the offence of publicly conducting oneself "in a manner ~~likely~~ likely to cause a breach of the peace" ³⁰. Cotran correctly records that under customary law the abuse need not have been in public ³¹. In any case it is not hard for one to imagine a situation where

abuse would not be likely to cause a breach of ^{the} peace. It is even more doubtful whether obscene abuse is covered by s.182 (e) as the doing of an indecent act. Uncommercialised extra-marital sexual intercourse is not punished under the written law (neither is commercialised sex unless it involves being idle and disorderly), but under customary law this was gross misconduct which attracted ^d the informal sanctions which will be more fully discussed in the next chapter. Mast^urbation, also unpunished by the written law, was of course frowⁿed upon when practised by an adult, more so when a woman or girl did it ³². One can go on multiplying the various offences which are not covered by the written law, including entering one's mother's bedroom ³³, holding an old woman improperly ³⁴, flirting with young women in the presence of old people, and many others. The list is virtually endless.

From the foregoing discussion it will have become clear that many of the Penal Code morality offences are not only ^{not} in accordance with customary morality, but are also full of gaps which do not accord with the conditions obtaining in the Kenya of the present. Indeed most of these offences trace their origin to christian teachings which are subject to different interpretations throughout the world. The interpretation that gives birth to the law that is enforced in Kenya is English and is more suitable to English culture and values. James Read has said that the "basic legal system of East African nations may fairly be described as a colonial inheritance. The foundation of the general law are to be found in the rules of English law received and developed here during the colonial period" ³⁵, and again, "In short, the criminal laws were evolved during the colonial period and are based upon the cultural patterns, moral codes and behavioral patterns of a distant European nation" ³⁶. It is hard to quarrel with such an accurate assessment of the law of Kenya, whether civil or criminal.

ENFORCEMENT

It is not enough for a society to have norms to regulate the behaviour of its members and their relations with each other if there is no machinery for the enforcement of such norms. In every society there are therefore agencies created or existing for the enforcement of its normative codes. This applies equally to complex and simple societies, to modern and traditional societies. The enforcement of morals and moral codes is a controversial topic and has attracted the attention of many jurists and philosophers. In this chapter it is proposed to examine the various ways in which the moral codes were enforced in traditional society and are enforced in the new and somewhat complex and urbanised communities of Kenya. Breaches of the law existed and continue to exist for various reasons. An understanding of the way observance of moral codes was ensured in traditional society is necessary to the extent that it might shed light on the increasing breaches of the law of morality occurring in Kenya today. The written law obviously does not include among its sanctions all the sanctions that existed in traditional society, some of which were indeed more effective than the threat of imprisonment. Traditional society is disintegrating fast along with its sanctions and this might explain the reason for the increased "immorality" in today's society. In this chapter, too, an attempt will be made to expose some of the factors which militate against both the continued adherence to traditional norms and the administration of justice in the field of morality. The order chosen is to deal with traditional society first, and the modern society second before attempting an explanation of the various factors which hinder the administration of justice.

Traditional African Society:

Most writers are agreed that norms existed in traditional African societies; what they are not agreed upon is what to call the norms. Early writers call it native custom or tribal custom, others call it native law and custom, and later writers call it customary law. Malinowski calls it savage custom¹ and Hartland calls it primitive law². For the purposes of this paper, the writer has chosen to call it African customary law, not because it signifies anything different from earlier expressions, but because it has become fashionable to call it so. There is also considerable agreement upon the existence of enforcement machinery in traditional society, but there is plenty of difference of opinion on what form the machinery took or how it worked, so that some writers stress one sanction as the major device for ensuring observance of the law. Hartland stresses supernatural phenomena, Lowie³ stresses the sanction popularly known as ostracism and Nkambo Mugerwa⁴ talks of self-help.

At any rate, there existed the machinery for the enforcement of moral and other codes, though this machinery was not always evident to the casual observer. The question is; what made Malinowski's "savage" and other writers' "native" obey his society's code of behaviour?

Apart from the specific sanctions available in that society, some writers have maintained, there is a mysterious propensity in the traditional African to obey the tribal norms. Driberg wrote in 1934 as follows; "Primarily the law is obeyed, just because it is accepted. Its acceptance and its position as an integral part of the social organisation are its own sanction. It is obeyed, because only by obedience to the law will society function, and it is in everybody's interest to subscribe to its regulations"⁵. Driberg's statement is by and large incontrovertible. Law is obviously obeyed either because it is accepted as sound or because of the fear of the sanctions which back the law. In the traditional African context, the law was obeyed primarily because it was accepted by the people and because it formed part of the living organism of society, and secondly, it was obeyed because disobedience would attract the full weight of the law and the sanctions attendant thereupon. Malinowski was ready to accept the second reason for obeying the law, but with regard to the first he said:⁶

"Accustomed as we are to look for a definite machinery of enactment, administration and enforcement of law, we cast round for something analogous in a savage community and, failing to find there any similar arrangements, we conclude that all law is obeyed by this mysterious propensity of the savage to obey it".

It cannot be contested that the "mysterious propensity" of the traditional African to obey the law played an important part. The law was an institution he accepted and the propensity was to obey rather than to disobey it. Yet it was not the only reasons why law was obeyed. In every society there are deviants; they disobey the law for many reasons. The Majority who obey the law do so either because they accept it or because they do not want "to get into trouble". The "trouble" in traditional society used to be very great indeed, including ostracism, "thahu", and supernatural sanction. It cannot therefore be said that the "propensity" school of thought and the sanctions school are irreconcilable; they only lay stress on different phenomena and are in fact two sides of the same coin.

And now to turn to more specific considerations, there were certain sanctions which worked to ensure that the law was observed, and here we are concerned with the law of morality rather than the general law even though the same sanctions were available for other branches of the law. In traditional society, mainly because of the type of the social organisation, morality offences were committed either against a woman or with the woman as an accomplice (e.g. adultery), but not against the man.

Where the victim woman was unmarried (in other words if she was still a young unmarried girl), the usual practice was for her to report the offence to her mother, as a girl would not normally be expected to talk to her father anything that smir~~k~~ed of sex. Her mother would then go to the head of the household (the father and report the incident; where the father was deceased his brother would step in his shoes and act. The father of the girl (or her paternal uncle, whoever was present) would consult the elders of his clan on what to do. The elders would take the affair up to the adjudication level if they thought the case was worth the bother (and it usually was). Very briefly, there was no standing council of elders which always decided the cases; the council was not a permanent tribunal like the English court set up for the sole purpose of deciding cases. It was an ~~ad~~^{ad} hoc tribunal composed of whichever elders decided to hear the case; and in this connection it should be noted that contrary to what European writers and some African writers maintain, any elder who happened to be present at the hearing of a case was entitled as a matter of right to speak and to help in coming to a decision in any case - with the qualification of course that the case was within the normal jurisdiction of the grade of elders to which he belonged and he was not otherwise disqualified by reason of insanity or being a witch. The elders would normally hear the case ~~for~~ for the complainant and the case for the "defendant" in open court and in the presence of anyone who chose to attend the hearing, including children and young men and women who were however not entitled to speak except as witnesses. The elders would then reach a decision, normally that the defendant was liable, and award whatever penalty was appropriate in the circumstances of the case. A certain amount of compensation was awarded in the form of goats or sheep (and rarely in the form of cows), with of course the mandatory ewe for the cleansing ceremony mentioned earlier in this paper. The elders would also normally demand one or two rams ("Ngoima") which they would slaughter and eat as a group.

As soon as was convenient the girl or woman would go to a medicine-man "(Mundu Mugo)" who, on receiving the ewe, would perform the ceremony for cleansing the woman of her uncleanness ("thahu"). The "fine" exacted on the offender was normally paid very soon after judgement. Where the offender was unable to pay, the members of his clan would join together in what has come to be called the spirit of collective responsibility and between themselves raise the amount needed. This does not however mean that the offender can repeat the offence with impunity. Normally if he committed a second offence whereby the members of his clan were called upon to contribute to another fine, his property would be sold to raise the fine: offenders' lands were sold in this way. In addition to the fines and compensation, the offender ran the risk of the other sanctions being invoked against him, including a possible beating-up by his own age-mates.

There were many other sanctions, some of which have already been discussed in connection with the features of morality offences under customary law. Perhaps the most common of these was ridicule. The offender would become the laughing-stock of practically everybody in the community. Songs would be composed and sang by the young people and words or short phrases would be recited, all with the result of extreme discomfiture of the offender. Lowie has written⁷:

"Generally speaking, the unwritten laws of customary usages are obeyed far more willingly than [English] written codes, or rather they are obeyed spontaneously. To become the laughing-stock of his daily associates for minor misdemeanors and to be completely ostracised for graver offences are terrible punishments for the native, and they have a deterrent force which the affliction of penalties in our sense is often quite devoid".

Ridicule was perhaps by far the commonest of the informal sanctions which were applicable to offenders. It was used by nearly everyone. The age-mates of the offender, his juniors in age and women would sing about him. Mother would tell their children to behave and not be like so-and-so.

Ridicule was perhaps even more feared than the prospect of being told to pay compensation.

Another sanction which has already been mentioned was ostracism. Ostracism was of two types, partial and complete ostracism.

An offender, be he a witch, rapist or thief, could be ostracised by the whole community. He was solemnly declared a social outcast and thenceforth he would not be allowed to mix with other people. He was barred from all public functions and could not take part in any of the community functions. It was not open to him to partake of any of the feasts organised in the community or to attend public prayers for rain, prosperity, peace or any of the other things which the community sought to pray for. The offender could not take part in communal work and had to till his land on his own, build his own house and generally perform his work entirely on his own or with his own family. He could not go to market since nobody would be willing to sell to him or buy from him. Neither his age-mates nor anybody else would talk or eat with him. In short he was a complete social outcast. Such an extreme sanction was reserved for really grave offences like malicious use of witchcraft, habitual theft (if the offender was not killed earlier), defilement of holy ground, incest and habitual rape⁸.

A more common type of ostracism was the one which may for the sake of convenience be termed partial ostracism. This was not a solemn casting out by the whole community. It was normally a decision taken by the offender's age-mates. If he was a young unmarried man, no girl would dance with him at the many dances organised by the young people, and nobody could fraternise with him. An elder who had been ostracised by his fellow-elders could not take part in their councils and he could not be invited to a feast by the other elders.

Nevertheless other people were free to talk to him and to work and eat with him if they so chose. The partial ostracism was however almost as effective as total ostracism. Once other people had heard that the offender had been ostracised by his age-mates, the tendency was to keep away from him. Though he was not a complete outcast, the offender was regarded by other people as a stranger person who was not acceptable to his own colleagues. How could he therefore be heard to say that there was nothing wrong with him? In short, partial ostracism worked in practice very much like total ostracism. Nonetheless, the later was more feared than the former because it carried a heavier social stigma. In this connection, Sidney Hartland has said that "the alienation of the sympathy of one's fellows generated an atmosphere of terror which is quite sufficient to prevent a breach of tribal customs".⁹

The threat of ~~retribution~~^{retaliation} was also responsible for the prevention of breaches of the law. A person who was minded to commit an offence had to take into account the risk of possible retaliation from the other party or from the injured clan. When a person was murdered by a person from a different locality, unless the elders intervened there was likely to be a feud, the deceased's fellows trying to kill a man from the murderer's household or clan to avenge their deceased friend. Similarly, young men were likely to avenge the rape of one of the girls of their clan or company, the revenge taking the form of a severe beating-up, if not actual killing, of the rapist. An adulterer, much like at present, ran the risk of sudden death at the hands of the injured husband. This is the process which many writers call self-help. It has been said that because "the settlement procedure is uncertain, absent or ignored, these societies resort to physical violence with the result that they are in a constant state of war with their neighbours and even between the sub-groups within the same main group".¹⁰ While the statement may be true of Ugandan societies, it is not wholly true of many of Kenyan pre-colonial societies, particularly the Kikuyu.

It is true that fe^uds existed, but to say that the societies were "in a constant state of war with their neighbours and even between the sub-groups....." because "the settlement procedure was uncertain, absent or ~~ignored~~",^{is} it is submitted, an exaggeration. Perhaps Gulliver had such writers in mind when he wrote:

"But in any case, not all peoples who have no adjudicators or arbitrators necessarily practise an institutionalised resort to force and fe^ud in the event of dispute; nor, no doubt, are all disputes treated by fe^uding even in those societies where that is practised, for such disruption can scarcely be allowed within fairly small face-to-face local groups."¹¹

Similarly, C.M.N. White wrote:

"In all these societies bodies of rules existed to define the appropriate reciprocal behaviour of individuals, and mechanics existed to maintain the social order. The [acephalous or stateless societies] might vary greatly between constituted authority and various forms of self-help, with religious and supernatural sanctions, and processes of reconciliation playing their parts. This the social order was maintained, and there is little need to reject the existence of law in such societies merely because the western Austinian or neo-Austinian criteria of Law fail to apply."¹²

In other words, there were other sanctions besides the use of force and, it is submitted, these were more effective in checking criminal tendencies than the use of naked force.

Retaliation was not restricted to the use of force. It also took the form of witchcraft. A good many Africans would think twice before assaulting a woman from a different clan for fear that they would be bewitched by members of the aggrieved clan. The importance of witchcraft in the prevention of offences against morality and against property cannot be over-emphasized.

Witchcraft was one of the very few most feared phenomena in any traditional African society. Indeed fear of witchcraft has not completely died down yet. It is well known that many African societies, particularly the Luo and coastal tribes, still live in mortal fear of being bewitched.

African religions, like nearly all religions on earth, are based on supernatural phenomena. Among the Kikuyu the clan consisted of both the living members and those members who were already dead, namely the ancestors. Prayers were offered to both the Almighty God of Africans (who was very much like the Christians' God, the father¹³) as well as to the ancestors and ancestral spirits. The belief was that any conduct, be it theft, murder, or any of the other proscribed offences, which worked to destroy the community and cohesion of the clan or tribe was frowned upon by both God and the ancestors. When either of these beings was annoyed, the Vengeance was phenomenal. God struck down offenders by the use of lightning and thunder. He could also visit upon an erring community untold misfortunes like famine and epidemics. Offended ancestors would cause such lesser misfortunes as a death in the family of the culprit or incurable sickness to the culprit himself. The wrath of the ancestors could cause skin and other diseases in a particular household, and it could also bring barrenness and impotence to the culprit's household. The wrath of the ancestors could be brought about by the uncleanness mentioned earlier in this paper and that was mainly the reason for the mandatory cleansing of anyone who had been involved in an unclean offence (an offence inviting "thahu") and the mandatory payment of one ewe by a sexual offender. Obviously very few people would contemplate committing offences which attracted the wrath of supernatural agencies.

Another potent deterrent to crime in customary society was the use or the threat to use a curse. The cursing was normally an affair within the kinship system. In the ordinary course of things, a curse was effective only when pronounced on a person by his close relatives, normally parents.

However, it would be almost equally effective if an outsider pronounced it in connection with his own property ¹⁴. Instances ^{also} ~~also~~ occur when certain individuals who are renowned ^w for the ^{potency} ~~potency~~ of their curse even when they are alive are invited to curse unknown offenders. There is a lot of mystery surrounding the curse and a lot of riddles still remain unsolved as to the operation of the curse, but very few Africans who have been ^r ~~in~~ [^] bought up in the rural areas doubt its efficacy. There are still many calamities which old men will readily point out as the result of a curse. Leprosy, insanity, impotence and various incurable diseases were all directly attributable to a curse. It works very much like the other supernatural agencies and is likely to cause the same calamities as would be caused by the offended ancestral spirits. The importance of the curse as a deterrent to the commission of crime in traditional African society cannot be exaggerated. A persistent rapist stood in danger of being cursed by both his relatives (who would of course be liable to pay the compensation if the offender defaulted) and his parents. The same case applies to the other serious breaches of customary law, be it disobedience to parents or elders, theft or illicit sexual intercourse. The only limitation of the efficacy of a curse is that normally (but not invariably) it was effective only when the curser was dead, otherwise its gravity was unabated. Jome Kenyatta had this to say of the curse:

"Among other things, natural or supernatural, the curse of a dying father or mother is the most dreadful thing that can befall a son or daughter..... This is the worst form of sin or uncleanness and is the only one from which deliverance cannot be gained by purification. It is even transmitted to a man's children".¹⁵

These then were the main sanctions which militated against the commission of crime, moral or otherwise, in traditional society. There is a lot of truth in the assertion that these were more effective as deterrents than the modern penal systems can ever hope to be.

Modern Society:

Enforcement of laws in modern African countries is not half as formal as it used to be in traditional societies. Though some of the informal sanctions are still applicable, they do not operate within the law itself and have not been enforced in any courts of law. In speaking of informal sanctions we have in mind those traditional sanctions which have been discussed in connection with enforcement of morals in traditional society. Here we are concerned with the enforcement of the laws of morality in courts of law.

As may have already been gathered from other parts of this paper, most offences against morality are committed against female persons, excluding of course, such offences as indecent assault of boys below the age of fourteen years¹⁶, incest and bigamy as well as unnatural offences. Normally therefore the victim, in this case the woman, makes ~~the~~^{her} report to the police who record her complaint. After doing their own investigations, the police decide whether or not they are going to arrest the alleged offender. If they decide to prosecute him, the police gather all the evidence they can lay their hands on and take the matter to a supposedly impartial and unbiased court of law. It is beyond the scope of this paper to go into any detail of the complicated procedural rules which have to be satisfied before the matter can be brought within the jurisdiction of the court, and the even more complicated rules surrounding the trial of the accused. It will be sufficient for the purposes of this paper to say that the alleged offender is arrested, charged with the alleged offence and cautioned¹⁷. As soon as possible¹⁸ he is brought before a court with criminal jurisdiction where the prosecution adduces all the evidence which it deems relevant to ensure the conviction of the accused. It should be pointed out that for some offences, as for instance incest by both males and females¹⁹, a person may not be prosecuted without the written consent of the Attorney-General. In theory at least, the consent of the Attorney-General is necessary because of the complexity of the legal problems surrounding the offence and to minimise the risk of embarrassment both on the part of the accused and on

the part of the prosecution if it is decided that no offence has been committed. Furthermore, one can easily conceive a situation where the political climate of the country is not conducive to prosecution of such offences, especially when there is the risk of making the accused look like a political martyr, if he is a vehement opponent of the government. The trial of the accused is, as a general rule, held in open court and his guilt or innocence is established by the court on the available evidence. If guilty, the accused is convicted and awarded punishment according to the discretion of the court and the provisions of the law creating the offence. The punishment which the convicted person may undergo for a morality offence vary both in their nature and in their severity and to the jurisdiction of the court. A term of imprisonment is commonly awarded to the accused, which term may vary in different cases from a nominal term of imprisonment for one day or one week to imprisonment for seven years, the maximum being cynically fixed by implication at life imprisonment. For the graver offences like rape, defilement and having carnal knowledge of an idiot or an imbecile, the imprisonment will be coupled with hard labour; and for many of the offences corporal punishment will also be thrown in.

Not all reported offences are prosecuted. Neither are all the offences committed reported. Some cases are dropped at the time of investigation by the police, others at the time of trial. It cannot be doubted that the police force is terribly overworked, having to deal with thieves and robbers, traffic offenders, vagrants and vagabonds and drunkards. They may find themselves without enough time to do anything like a full investigation of the alleged offence, so they take up the more promising cases and shelve the rest. The police are also notorious for their manifest disinterest in offences reported to them, particularly when the victim of the offence does not look influential. The police are bored with their work and the less they handle the better they feel. They will, as the writer has on numerous occasions witnessed, advise the victim that the case will not stand up in court and to go and settle the whole affair at home with the elders²⁰, who of course have no criminal jurisdiction. Such cases are rape and defilement, though, the police dare not ignore for they might get into trouble with their superiors when the matter reaches the appropriate level. Even worse than their disinterest, the police are notorious for their anxiety about

appearing in a court of law as witnesses. As any casual observer may notice, a police constable lives in mortal fear of being cross-examined by an advocate for then they are likely to confuse their evidence, or even to make contradictory statements. The inability to win a case will of course reflect on a policeman's competence in the eyes of his superiors and he may not get the promotion he thinks he so well deserves for his enthusiasm. A policeman will therefore wish to ignore a reported offence if he thinks that there is a real possibility of the evidence not being sufficient or competent in court. For all these reasons an offence which has been committed may not reach a court of law even though it has been reported to the police. It is only fair, however, to add that some of the investigations are dropped because no genuine offence has been committed, as the annual police reports will show.

Unreported Offences:

Many offences are of course not even reported to the police²¹. In this connection the writer had occasion to interview thirty-one men of the ages of eighteen to twenty-nine years who had committed either rape or defilement, or both²², and twenty-three women who had been either raped or defiled or both. Of the men only nine of them were prosecuted, six of whom were convicted and imprisoned, the cases against the other three being dismissed. Of the remaining twenty-two offenders, only four had been reported to the police, who on their own decided to drop the investigations, the other eighteen totally escaping justice. Of the twenty-three women, eleven women had both been raped and defiled the other twelve had only been raped. Out of these offences only two were reported, both of which were rape cases; defilement was not reported. Of those two rape cases, only one was successfully prosecuted, the offender, because he was a young schoolboy, being released and put on probation for eighteen months. It is obvious, therefore, that a very large proportion of morality offences are not reported, and of those reported only some are prosecuted, with an even smaller number being successfully prosecuted. Prosecutions fail because the police have not done their homework, but what about the unreported offences? Why are such offences not reported?

There are various reasons for women not reporting offences committed against them.

It is of interest to note that many of the reasons given below were at one time or another mentioned by the victims of morality offences, and even by offenders, in the course of the interview carried out by the writer. While there may have been other more personal reasons, the following may be said to be the major reasons applicable to nearly all of the unreported offences. An attempt will be made as far as possible to arrange them in order of the importance attached to them by the various people whom the writer interviewed.

By far the most important reason and one which was mentioned by practically everybody was the natural anxiety of women to avoid a scandal on their names and reputations. It may be stated in passing that the victims interviewed by the writer were women who could read and write in the vernacular but could not speak fluently any other language apart from a much corrupted type of Kiswahili. If such cases were brought to court, the complainants, as chief prosecution witness, would have to speak in their mother tongue in the presence of all manner of people, including old men and women, reciting all the sordid details connected with the offence. However much the customary norms can be said to have broken down, they have not done so to the extent that a woman can easily and without discomfort utter what would be regarded as obscene words in open court in the presence of people who are old enough to be her parents. The prospect of having to undergo that ordeal is enough to deter most women from reporting morality offences of which they were the victims, unless very serious bodily harm has been occasioned thereby. It is even more of an ordeal to the woman when the trial is over, the result of the proceedings notwithstanding. The fact that a woman in the rural areas has been raped, for example, does not enhance her reputation or virtue. Sympathy will rarely be felt for her. To the young people it is a matter for much amusement and laughter, to the older people it is the occasion for much cynical comment. They will want to know what the woman was doing outside her parents' house at the time the offence was committed. Needless to say, all this causes shame and much discomfort to the victim of a rape, the prospect of which is enough to discourage her reporting the offence.

The second commonest reason which was mentioned by twenty one victims and practically all the offenders is fear. People who commit rape are regarded as people of ruthless character who can do anything short of murdering a person. A girl who has been raped or forcibly defiled will most often be warned by the culprit not to do or say anything about it under pain of the possible reprisals that might accompany a disregard of the warning. The threatened reprisals will be in connection with grievous bodily harm inflicted on the girl either by the rapist or at the instigation of the rapist. The girl therefore lives in mortal fear of the consequences of reporting the offence and will consequently not be too anxious to draw the attention of the police to the fact that an offence has been committed. Indeed some of the women interviewed claimed to have been lightly beaten up to make the warning sink deeper.

Indifference is another factor. This was mostly mentioned by the women and is applicable to nearly all the offences against morality. In addition to the foregoing two considerations, many of the victims manifested an attitude that they really did not care, for after all no serious harm was inflicted. This is particularly true of rape when the degree of physical violence involved was minor. The same case applies to defilement and indecent assault of females as defined in S.144(3) of the Penal Code. Defilement is normally committed with the consent of both parties and it would be very hard indeed to find a girl who has been defiled with her consent going to the police to report the offence. Such reports are made by the parents of the girl, but only if they know that their daughter has been defiled. The unlikelihood of the parents knowing of such an offence is obvious, since in most cases the information can only be obtained from the parties, one of whom does not want to incriminate himself, and the other does not have any reason to disclose the information. Indecent assault also falls within the general reasoning of this paragraph. Few women will bother about obscene words or gestures even when they are directed at them; some may be outraged, some may not, but they find no reason why they should bother to travel up to ten miles to the nearest police station to report such a frivolous offence.

Homosexuality is in many ways similar to defilement in that it is committed between consenting males and none of them is anxious to report the committed offence. A ^{caveat} caveat may be entered at this juncture: homosexuality was not an offence known to many traditional African communities. It existed in some societies, notably along the coast due to the Arab influence. Homosexuality was hardly ever committed in many societies, particularly Kikuyu and Embu. These days the incidence of this offence has increased in the urban areas as a result of the corruption of the local culture and customs.²³ In fact many of the morality offences are not reported for the simple reason that people will just not report them; the police will do their own investigations. Thus abortion comes to the notice of the police only when it fails and/or causes serious complications which have to be treated by a qualified doctor. A person who has committed defilement, or any of the unnatural offences defined in s 162 of the Penal Code will not report the offence on his own initiative. Just as the victims or other parties to the offences will not report the offences, so also other people will not bother, for after all the only harm that has been occasioned has fallen on the victim who has not bothered or is apparently indifferent. Why should a stranger to the offence care to report and risk being asked awkward questions both at the police station and in the law court?

The conditions obtaining in most areas of the country, and particularly in the rural areas, are not conducive to the efficient administration of justice. The communication systems are often very poor indeed, with poor roads and few vehicles, and virtually no ^e telephones for many miles. Many police posts, ^e leave alone police stations, serve a radius of sometimes ten miles. The reporting of an offence might involve travel on foot for seven or ten miles, sometimes at odd times of the day. If the offence is not serious, therefore, the people will choose to ignore it. Even where the offence is more serious than ordinary assault, for example rape of an adult woman or indecent assault, or even the defilement of a relatively big girl of say thirteen to fourteen years who looks fu

the parents of the girl or the woman may choose to have the matter settled out of court by the elders and the sub-chief; compensation is paid and the offender is sternly warned not to repeat the offence. This process is helped along by the fact that ever since the days of the colonial police, the police have never cut a fine figure in the eyes of the ordinary people: they are still looked on as the agents of the government and the agents of terror and oppression. People will avoid them as much as they can without breaking the law. They are always in fear of what the police will do to them if their testimony is declared unreliable in court. Finally, some people do not even know that certain types of behaviour are unlawful, as for instance uttering obscene words in the presence of a woman or defilement of a reasonably big girl, or even, for that matter, abortion or bigamy.²⁴

CHAPTER FIVE
THE LAW OF MORALITY AND SOCIETY

The conditions which governed the type of law that existed in traditional societies have obviously changed. In this chapter it is proposed to make an assessment of the law governing morality in relation to the social environment existing in Kenya. An attempt will also be made to assess the general moral climate in the country in order to be able to make a sound assessment of the law. Some of the defects of the statutory law of morality will be exposed and a remedy suggested where possible. In the course of this chapter also some of the inadequacies of customary law will be discussed and a comparative assessment made of the traditional and modern systems of enforcing morality.

It is convenient at this stage to remember that customary law was restricted in its scope by the type of society that existed in the old days. This is particularly true of offences against morality. Some offences were simply not committed, and there was therefore no opportunity for proscribing them. Such offences as bigamy, abortion and soliciting in public for immoral purposes were virtually non-existent; so were buggery and bestiality (at least in most societies), managing or keeping a brothel and homosexuality, the last being committed only in a minority of the traditional societies. There is however no doubt that in time these offences would have come to be prohibited by customary law. Apart from this important limitation, it is fairly correct to say that the customary law of morality was much wider in scope than its statutory counterpart. With this point in mind we can ^{now} go on to an assessment of the moral climate obtaining in the country at the present time.

With the interaction of so many cultures in Kenya, there can be no doubt that the moral standards of society have dropped very low. This disintegration of standards is most apparent in urban areas where the anonymity available and the apparent indifference of one's neighbours give the individual the courage and freedom to act very much as he likes without fear of sanctions other than the criminal process; the informal sanctions ^{which} might be employed in the city are less ^{than} a shadow of the sanctions ^{which} existed in traditional societies. A young man ^{will} make obscene utterances in the presence of an old man or woman, or even direct such utterances to the old man or woman. In this process of moral disintegration the rural areas are lagging only a slight distance behind the urban areas.

Extra-marital sexual relations are the order of the day, and prostitution in the modern sense has hit practically every corner of the country. Adultery is very common in both rural and urban areas; in this connection it should be noted that on the strength of Cotran's Report on customary criminal offences in Kenya, the commission on the Law of Marriage and Divorce, 1967 recommended that adultery be made a criminal offence in Kenya.¹ Rape has also become very common in Kenya as in the rest of Africa.² It is fairly obvious that morality offences in the customary sense are multiplying daily, as a cursory glance at a criminal court's diary will easily reveal. While there may be many and varied causes of the increase in these offences, the breakdown of customary society and its legal and moral codes and systems contributes no small part to these crimes. This is one important fact which should be kept in mind whenever law reform is contemplated. It would simply not do to recommend the wholesale re-introduction of traditional norms and sanctions unless they can be enforced. The people might in any case hold the customary law in contempt, or they would simply find its definition of offences and the punishments provided by it absurd, which is of course a reflection of the low moral standards prevailing in the community. The writer recorded that out of fifty-eight men and women (that is, forty men and eighteen women), only sixteen (i.e. about 20%) could think of any sound reason for making prostitution a criminal offence; two women and twenty-seven men thought abortion should be a criminal offence; and none of the fifty-eight thought that promiscuity should be a matter of concern for the law. In general, therefore, people tend to think that the criminal law should not be used to interfere unduly with personal relationships between individuals. The obvious exceptions which were cited by the people were incest, bestiality, defilement and rape. All this obviously points to a lowering of moral standards in the community.

Presumably the law should reflect the moral standards of the society as far as possible. The question is, which moral standards should be considered? The eternal difference in outlook between the young and older generation complicates this question since a simple solution to that question is bound to antagonise one of the two groups. As a rule the old people have a moral code which is much stricter than the moral code of the young generation.

Prostitution is viewed with a lot of disfavour by the old people, while the younger people are more tolerant with it. The same case applies to abortion, adultery and indecent assault of females. On the other hand, the writer found that while the young people invariably condemned bigamy (in this connection used in its technical legal meaning), the old people invariably denounced the law creating the offence; indeed many old people did not seem to know of the existence of the offence of bigamy. Which then should be the standard of the law?

Arguments can be raised in support of either standard. It is true that moral standards are deteriorating, and that more morality offences are being committed these days than in former days. Moreover, the society tends to be indifferent to this increase in offences and in fact appears to tolerate them. Is this any reason for amending the law to legalise immorality? It may be argued that if the abortion law is repealed this will be tantamount to express recognition of a person's right to abortion. Similarly a repeal of S. 145 might cause an increase in defilement cases. Therefore, when one law of morality is disallowed or repealed, it might be interpreted to mean that the legislature no longer thinks that the act is an immoral act, much less an illegal act. It may however be pointed out that this may not be the correct interpretation of such a repeal since the fact that prostitution has not been made punishable as a criminal offence does not make prostitution any the less immoral. All that a repeal of the law would seem to mean is that the legislature does not find it any longer necessary or expedient to punish a person under that law.

The question at this point is: will the act which was considered immoral fifty years ago be considered immoral in a hundred years' time? There can be no simple answer to this question. Conversely, can an act which has never been considered immoral become immoral with the passage of time? Before any answer can be attempted to this question, it is necessary to distinguish between the criminal law and other norms. The criminal law is that branch of the law which, by the use of formally institutionalised machinery, punishes a

person because he has been found guilty of an offence which is prohibited by that law. The punishments which can be awarded are fairly definite, as we have already seen. Social norms, on the other hand, can be described as those rules which govern the relationships between the members of a society or a community; these rules are largely informal and have no formal legal backing. While the criminal law is enforced by the courts, social norms are not; the latter rely on informal social sanctions for their observance, the latter have legal sanction. The criminal law does not profess to cover the whole of the field covered by the norms which deal with morality. One will thus find that certain conduct is disapproved by society while the criminal law of that society does not prohibit it; Promiscuity is tolerated by society, but that does not mean that it is approved, much less encouraged by society. It was punished by traditional Kikuyu Law, and, in fact by many other traditional societies (e.g. the Luo), but it is not now an offence under the penal law. Even in these days when moral standards in society have been lowered, it cannot be said that promiscuity is approved. Informal sanctions are still available against a promiscuous woman, though these sanctions do not carry half as much weight as they carried in traditional societies. A promiscuous woman is still the laughing-stock of the people, a woman to be held in contempt, a woman who is to be ridiculed. Nicknames are coined to refer to such women and much merriment is derived from talking about them. Their names become the metaphors to describe moral dissipation. Much as they may not be formally punished, the society still considers them deviants of a kind and will in various ways express its disapproval of their immorality.

Prostitution also falls into this category of offences. It has been said by numerous writers that prostitution is one of the oldest professions in the world, dating back many thousands of years. People have learnt to live with it and very few countries indeed punish prostitution as an offence. In Kenya the legislature punishes other offences which are connected with prostitution, yet it has avoided outlawing prostitution itself. Soliciting in public for immoral purposes, keeping or managing a brothel, procuration for the purposes of prostitution and living on the immoral earnings of prostitution are all morality offences punishable by the criminal law, yet prostitution itself is outside the ambit of that law.

There may be various reasons for this: perhaps the administration of a law prohibiting prostitution would be difficult, or there may be "a realm of private morality and immorality which is in brief and crude terms, not the law's business!"³ Whatever the reasons are, prostitution is not punished, but not because the society does not consider it immoral. Society merely tolerates it. It may be even more correct to say that the law tolerates it since there must be a very significant section of society which does not tolerate it.

It may be argued that the moral judgment of society does not change. "Moral judgment" is here used in contradistinction with moral standards. More people than previously are willing to commit moral offences today without feeling terribly guilty about it, although they know and in fact feel that there is something basically wrong with committing such offences. This is what the writer means by saying that moral standards have dropped. The higher the moral standards in a community, the more reprehensible immorality will be. All immorality is reprehensible, but certain immoral acts are more reprehensible than others. Conversely a given morality offence may be less reprehensible today than it was fifty years ago. For example, extra-marital sexual intercourse was certainly more reprehensible in traditional Kikuyu society than it is now. The same case applies to pregnancy outside of marriage. This result is brought about by a drop in the moral standards. On the other hand, though people indulge in extra-marital sexual relations, they will not display such behaviour in public. They recognise that the behaviour is immoral according to the judgement of society. They still have that fundamental decency to know that by the moral judgment of society there is something grossly immoral in doing certain acts in public. This is what is meant by moral judgment of society. To the extent that people engage in conduct which they know, is immoral, and yet for which they do not feel unduly guilty, we can say their moral standards have dropped while their moral judgment has not. To illustrate at the expense of repetition, in many traditional societies when the moral standards were high, extra-marital sexual intercourse was an offence which was not tolerated; when the moral standards dropped, the behaviour was still frowned upon but it was ~~not~~ tolerated. It is this fact of being frowned upon which we refer to when we talk of moral judgment. The immoral act does not acquire legitimacy when it is tolerated;

it remains as immoral as it was, but nobody is going to bother about it. Lord Devlin was "willing to assume that the moral judgements made by a society always remain good for that society"⁴ The distinction between moral standards and moral judgments is a conceptual and subtle one, but it is important for the purpose of explaining why morality offences are committed while at the same time the offenders realise that what they are doing is immoral.

Lord Devlin goes on to state that "the extent to which society will tolerate - I mean tolerate, not approve - departures from moral standards varies from generation to generation. It may be that over-all tolerance is always increasing"⁴ As we have seen the moral standards of the older generation are higher than those of the younger one. Their moral judgments are based on those standards, and perhaps the general moral judgments of society are based on even older standards. These are the judgments which instil a sense of guilty in the person who commits a morality offence. The standards themselves do not instil this sense of guilty. It might therefore be more correct to say, on the strength of the above explanation of moral standards and judgments, that society will not tolerate departures from its moral judgments, though it may well tolerate departures from its moral standards. This is true because if mere tolerance has the effect of legitimising immorality, perhaps there would be not stigma attached to prostitution. It would appear, therefore, that no matter how low moral standards fall, the law relating to morality should not be altered since moral judgments do not shift. Since a repeal of any of the laws governing morality may be viewed as an outright approval of immorality, and since society's moral judgment does not shift (i.e. society would prefer to maintain high moral standards), it may be argued that the law of morality should at least remain as it is and if possible, should be made even more stringent.

But the argument to the contrary is equally convincing. If moral standards continue falling, in time the larger portion of society will be committing offences which they would not formerly have contemplated. These days African women become the inmates of brothels where fifty years ago no woman in her right mind would have contemplated going. Men who are fifty years of age consort with girls who are

young enough to be their daughters. A Kikuyu man will marry an uncircumcised girl. These days, something which never occurred in traditional society. In short morality offences will be committed by so many people that the law will become a dead letter. Those who are entrusted with the enforcement of the law will be in the foreground committing the prohibited offences. The general attitude to the law will relax and its enforcement will be neglected so much that few people will know that it exists. That is what has happened to the offence of indecent assault as defined in s. 144 (3) of the Penal Code. Few people know that it is a criminal offence to make obscene gestures at a woman, and this offence is perhaps one of the few offences which are committed by many people many times in a single day. Yet nobody bothers to enforce it under that subsection. As far as the people are concerned s. 144 (3) is a dead letter. Few would notice its repeal if it was repealed. There are many offences which in time might become as dead a letter as s. 144 (3). Such offences as procuring a woman for the purposes of carnal ~~knowledge~~^{knowledge} or for the purposes of making her a common prostitute, and the offence of living on the earnings of prostitution stand a risk of being obsolete since nobody enforces them with any amount of enthusiasm. One would wonder whether an offence that is not enforced should be allowed to remain in the statute book. When the law exists in the statute books but is not enforced, it tends to lose its respectability. Disrespect for one particular law might lead to disrespect for ~~other~~^{other} laws. When that happens the law loses the sanctity it should have and crimes are committed by the legislators, the law enforcement officers as well as the rest of society. Such a situation is clearly not desirable and the law is better off repealed.

The controversy is apparently insoluble. It should nevertheless be remembered that the law does not profess to cover the whole field of morality, and indeed it should not cover such a wide field. The law should aim to protect public decency and public morality so far as is possible, but it should not attempt to flog people to a higher morality. It should of course be able to condemn any act which is universally condemned by society, such as incest, but there are limits beyond which the law should not be permitted to interfere with the private life of the people. The Wolfenden Committee on Homosexual Practices and Prostitution⁶ of England made its remmendation

on the premise that there "must be a realm of private morality and immorality which is..... not the law's business". If it is accepted that the law's business in the realm of morality is restricted, as the writer thinks it should be, amendments to the law of morality can be taken with good grace. Some areas of morality are in fact best left to the good sense of individual members of society, though this must not be taken to mean that the whole of the criminal law of morality should be repealed. Rather certain offences which are universally condemned by society, such as incest, rape and defilement, should still be within the general sphere of the criminal law.

By leaving certain areas of morality to the individual, the writer does not advocate a wholesale return to customary law and its informal sanctions. The customary law relating to offences is almost entirely inadequate to enforce observance of social norms, for as we have seen, traditional social organisation has almost completely broken down. Sanctions like ridicule and ostracism, so powerful and effective in traditional society, cannot be expected to cope with modern condition. The increased geographical mobility and the economic organisation of a modern society can effectively subvert the efficacy of such sanctions. A person who has been ostracised by one community can migrate to another community where he will not be regarded as^a social outcast.

CONCLUSION

In formulating the law the legislature is in theory supposed to reflect the attitudes prevailing in the society as well as the needs of the society. We have seen that there may be conflicting interests in the society which must somehow be reconciled if the law is to have any meaning ~~of~~^{for} the majority of the people. The law should ~~be~~^{not} be confused with religion; neither should ~~the~~ functions of the law be taken to be the functions of social values as such. The law should restrict itself to the necessary task of maintaining a certain degree of public morality but should refrain from unduly interfering in the "the realm of private morality and immorality" as far as possible. It should, however, be allowed to interfere in such areas of private morality if it is reasonably necessary to protect the public good. These areas would include those offences which

may be termed "natural offences" like incest, rape and defilement. At any rate the law should be fairly based on existing conditions in society without making any absurd assumptions. Many of the absurdities of the criminal law of morality have already been pointed out.

We have seen that the counterpart of rape is inadequate in that it covers only the offence of indecent assault of boys under fourteen years of age. Rape is defined as unlawful carnal knowledge of a woman without her consent, or with her consent if the consent be obtained, inter alia, by means of threats or intimidation of any kind, or by fear of bodily harm, or by misrepresentation as to the nature of the act. This would seem to include situations where the consent is obtained by use of blackmail. Perhaps it is not too hard to imagine a woman employing threats or blackmail to induce a man to have unlawful carnal knowledge of her. The writer would recommend that rape should be defined to include that kind of situation so that a woman may also be guilty of rape.

The offence of soliciting in public for immoral purposes presents another striking absurdity. We have seen that the male offender may be charged under s. 153 (1) (b), in which case he may be sentenced to a term of imprisonment for up to two years.⁷ A female person, on the other hand, may only be charged for the same offence under s. 182 (f), when she would be liable to imprisonment for a term not exceeding one month in the case of a first offence, and to a maximum of one year for subsequent offences. Yet the same offence is committed by the man and the woman, a prostitute committing it many times in the course of one day. This situation should be corrected to make s. 153 (1) (b) catch the female offenders also and by repealing s. 182 (f). Also, because we have seen that s. 144 (3) is a dead letter, the offence of indecent assault should be abolished, at least in the form given to it by s. 144 (3).

Incest and bigamy are two other offences which need modification. We have already said that most African societies had the offence of incest corresponding to the Penal Code offence, but that the prohibited degrees of consanguinity were much wider. While it may not be desirable to prohibit fraternisation between very distant relatives, the law should

be modified^{ied} to include at least some of the close relatives. Sexual relations between a woman and her grandson, a woman and her nephew, and between first cousins should be prohibited. It is absurd, in a country where such relations were strictly prohibited, to continue to assume that they did not exist and to imitate the law of incest which was developed in^a foreign country within a totally different cultural context. In the same way, bigamy is an offence referable to the content of a foreign culture. We have already said that the fact of polygamy and the offence of bigamy (or more correctly, the fact of polygynyⁿ and the offence of bigamy) differ only in form and not in substance. It is submitted that the offence of bigamy is anomalous in Kenya where polygamy is still permitted and practiced; it should therefore be abolished as an offence.

Abortion is another controversial offence. We have seen that a majority of women and a very significant number of men feel that abortion should not be a criminal offence. It is of course not desirable to legalise abortion in all cases, but it is submitted that there are certain situations where abortion should be exempted from the criminal process. Where, for example, an abortion is carried out in order to save the life or health, both mental and physical, of the mother, it should not be a criminal offence. It would also seem undesirable to bring into the world a child whom one has no means of maintaining ~~at~~ at a reasonably decent standard of living. The writer recommends that abortion in such cases should be legalised, with the proviso that such abortion be carried out by a qualified medical practitioner.

The above proposals have been necessitated by the nature of the penal law and the social conditions prevailing in the country. The basic defect of the Penal Code is of course that it is a foreign law imported into Kenya with very little or no modification to suit local circumstances. Perhaps the penal law of Kenya will only be free from criticism when it is completely overhauled so as to adequately reflect the general feelings and needs of the community, in other words, when its foreign ~~content~~^{content} is excised and the law is regarded by the society as having roots in the indigenous cultural and social climate.

NOTESCHAPTER ONE

1. The Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 laws of Kenya (1962) s.9 (i).
2. Liquour Licensing Act Cap.121 Laws of Kenya.
3. Justice and Judgment Among the Tiv P.120
4. (1934) Vol.16 Journal of Comparative Legislation and International Law, P.231.
5. Vol.16 Journal of Comp. Legislat. and Internat. Law P.231.
6. Bohannan op.cit. P.120.
7. A Handbook of Tswana Law and Custom P.46
8. Nevertheless some legislation went on at important occasions, for instance among the Embu, as we shall see later.
9. The writer interviewed thirty-eight men in connection with this question. No women were available for interview.
10. For example, prohibiting the bibing of alcohol by young people.
11. Driberg in the Journal of comparative legislation and International Law, 1934 Vol.16 series III wrote at P.231: "Its whole object is to maintain an equilibrium, and the penalties of African Law are directed not against specific infractions, but to the restoration of this equilibrium."
12. The so called Kikuyu Chiefs were not Chiefs in the conventional sense. They were termed "athamaki", but this only mean that they were brave, wise and influential; it did not mean that they were ruling over anybody and no allegiance was owed to them as Chiefs.
13. Among the Kikuyu there was lawful adultery to the extent that an esteemed guest, provided that he and his guest were of the same age-grade, was permitted to sleep with one of his guests' wives. This hardly happened where the host had only one wife.
14. The word used by the Kikuyu is "mugiro" which seems to be much stronger than the English "taboo".
15. See generally Jomo Kenyatta: Facing Mount Kenya.
16. In fact the writer knows and was shown some people whose incurable skin diseases are alleged to be the result of "thahu".
17. This has always been the case with primitive legal systems and would appear to reject the English legal requirement of mens rea.
18. Among the Kikuyu the warriors had no judicial power.
19. A few offences, however, bore a more or less fixed amount of compensation within certain geographical limits, eg. impregnating an unmarried girl; the compensation varied according as the clan one had wronged was within a near or a distant geographical limit.

20. Njareketa V. Director of Medical Services (1950) 17 E.A.C.A.60
21. T.O. Elias: The Nature of African Customary Law, P.27
22. T.O. Elias op. cit. p.119.
23. Gluckman: Ideas and Procedures in African Customary Law, P.280.
24. Act No. 16 of 1967.
25. Circular from African Courts Officer (T.A. Watts to the Registrar of African Courts, Meru, dated November 8, 1965 entitled Amendment to customary law, Meru law Panel Minutes."
26. On further enquiry the writer was informed that most of these records were forwarded to Nairobi for destruction and that the file containing the circular from the African Courts Office was left behind by a mere oversight.
27. Morris and Read: Indirect Rule and the Search for Justice, P.171
28. See generally, Jomo Kenyatta: My People of the Kikuyu.
29. Op. cit. P.9.

CHAPTER TWO

1. The writer is more familiar with the Kikuyu tribe than with any other.
2. Social Explanations of Crime p.396
3. Act No.16 of 1967 s.3.
4. Wilson, J. in Gwao bin Kilimo, 1 Tanganyika law Rep. (R) 403, said at p.405: "I have no doubt whatever that the only standard of morality which a British Court in Africa can apply is its own British standard."
5. Morris and Read: Indirect Rule and the Search for Justice P.175
6. African Christian Marriage and Divorce Act., Cap.151 s.12 (i).
7. Justice and Judgment Among the Tiv p.120
8. Penal Code s.139.
9. Penal Code s.145.
10. Penal Code s.156 (a)
11. Penal Code s.171
12. Penal Code s.153 (i) (b)
13. Penal Code s.164
14. Section 36 of the Penal Code.
15. Penal Code (Amendment) Act, 1973, Act No.1 of 1973.
16. Eugene Cotran: Restatement of African Customary Law, Vol.1
17. Adultery is not a criminal offence under the written law of Kenya.
18. In the writer's home village one witch was executed at the beginning of the twentieth century.
19. As for the Akamba, see Penwill: Kamba Customary Law pp. 93 - 96
20. We have seen that customary law was not static and that it varied and continues to vary from one place to another. The principles, however, remain the same.
21. E. Cotran: Restatement of African Customary Law, Vol. 1 p. XIV
22. This information was gathered from the records at Kiharu and Kangema District Magistrates' Court, Nyeri District.
23. According to court records of Mukurwe-ini District Magistrates' Court, Nyeri District.
24. This is the year the African Courts Ordinance, No.65 of 1951 was repealed.
25. The Luo call it "chira"; see G. Wilson Luo Customary Law and Marriage Law Customs, p.92
26. Facing Mount Kenya p.244
27. Jomo Kenyatta: Facing Mount Kenya p.230
28. Jomo Kenyatta; op. cit. p.162.
29. (1934) Vol.16 Journal of Comparative Legislation and International Law p.243.

Lambert
LIBRARY

30. See Devlin: Enforcement of Morals p.7.
31. This was the Kikuyu traditional law according to the elders interviewed by the writer.
32. Lambert: Kikuyu Social and Political Institutions, see generally pp. 112 - 122.

CHAPTER THREE

1. As we have seen in the preceding chapters.
2. See generally Ghai and MaAuslan: Public Law and Political Change in Kenya, Nairobi, 1970.
3. Seidman "The Reception of English Law in Colonial Africa Revisited", 1969 2 East African Law Review 47
4. Act No. 16 of 1967, S.3.
5. Morris and Read, Indirect Rule and the Search for Justice PP. 109 - 130.
6. (1957) Journal of African Law 83
7. Bromley, Family Law, 2nd Edition P.1.
8. Bohannan, Justice and Judgment Among the Tiv P.19.
9. Nature of African Customary Law P.30
10. Whitfield, South African Native Law P.4
11. This is perhaps why some writers thought that African customary Law was all criminal in nature.
12. Milner, African Penal Systems P.103.
13. Devlin, Enforcement of Morals, P.7
14. Penal Code S.142
15. This is the year the writer has noted the last widespread use of abduction to effect a marriage. In some parts of Kikuyuland, notably Othaya, this still occasionally done.
16. See generally Jomo Kenyatta, Facing Mount Kenya, PP.160 - 162
17. Penal Code S.149.
18. Penal Code S.150 and the marginal note thereto.
19. Rudd, J. in MUGO V.R. 1966 E.A. 124 at P.128.
20. Penal/Code sections 153 and 154.
21. Section 147 sub-sections (b) and (d) of the Penal Code.
22. Section 153 (b) of the Penal Code.
23. Penal Code S.171.
24. Cap.151 Laws of Kenya.
25. Cap. 156 Laws of Kenya
26. Cap. 150 Laws of Kenya.
27. This is still doubtful in view of ~~S.50~~^{S.50} of the Marriage Act.
28. In this connection the writer sought the views of fifteen married women, fifteen unmarried women, fifteen married men and fifteen unmarried men. It is interesting to note that among the thirty men, only three (all of whom were ^{from} Christians) were against the abolition of the offence of bigamy; and five women (one a firm

(cont.)

- Christian) thought bigamy should be punished as a criminal offence.
29. The informal sanction of ridicule and disrepute is, however, available in many cases, particularly in the rural areas.
 30. Penal code section 182 (d).
 31. Report on Customary Criminal Offences in Kenya, Government Printer, Nairobi, 1963.
 32. Facing Mount Kenya pp. 160-162
 33. Meru customary law on this point has not changed and is still strictly observed, according to findings of the writer in June, 1974.
 34. According to Kikuyu custom a young man can only hold an old woman from behind by her upper arms, especially when dissuading her from punishing an erring child. Any other approach is taboo.
 35. (1966) East African Law Journal 39
 36. (1966) East African Law Journal 42

CHAPTER FOUR

UNIVERSITY OF TORONTO
LIBRARY

1. Malinowski, Crime and Custom in Savage Society
2. Hartland, Primitive Law
3. Lowie, Primitive Society
4. Gluckman, Ideas and Procedures in African Customary Law P.280
5. (1934) Vol. 16 Journal of Comparative Legislation and International Law P. 238
6. Malinowski, Op. cit. P.14.
7. Lowie, op. cit. P.384.
8. The writer witnessed this ceremony in 1964 when a man was ostracised for failing to pay a 'fine' imposed by elders, but the sanction broke down after only about two months.
9. S. Hartland, Primitive Law, P.214
10. Gluckman, op. cit. P.280.
11. Gulliver, Law in Culture and Society pp. 25 - 26
12. (1959) Journal of African Law 86
13. According to Jomo Kenyatta, Facing Mount Kenya pp. 231-238
14. In the writer's village there are still two families who cannot share meat among themselves because it is rumoured that a curse prohibiting such sharing was pronounced by their ancestors some three generations back.
15. Op. cit. p.114.
16. Penal Code s. 164.
17. See generally the Criminal Procedure Code, Cap.75 Laws of Kenya.
18. The Kenya Constitution S.72 (3).
19. Penal Code S.169.
20. The writer has witnessed in his home village numerous cases of defilement, rape and theft settled out of court by elders at a meeting presided over by the sub-chief.
21. See "The Dark Figure of Crime" as explained by Leon Radzinowicz in a lecture to the Royal Society of Arts in London; and mentioned by W. Clifford, Introduction to African Criminology p.6.
22. The difficulty in obtaining people who could admit having committed these offences was phenomenal. It was even harder to get women who could admit that they had been raped or defiled. It should also be noted that the people interviewed were those whom the writer was satisfied had in fact committed the offences or had been victims thereof.
23. W. Clifford, op. cit. pp. 127-129.
24. Some old people interviewed by the writer could not believe that there was an offence like bigamy.

CHAPTER FIVE

1. Recommendation No.75.
2. W. Clifford, Introduction to African Criminology pp. 127-135
3. Wolfenden Report, S.61, quoted by H.L.A. Hart in Law, Liberty and Morality at pp.14 - 15
4. Devlin, Enforcement of Morals P.18.
5. Jomo Kenyatta, Facing Mount Kenya P.132
6. Discussed by Hart as well as Devlin, op. cit.
7. The offence becomes a misdemeanour, punishment for which is provided in s.32 of the Penal Code.

UNIVERSITY OF NAIROBI
LIBRARY