

GUARDIANSHIP, CUSTODY AND MAINTENANCE OF CHILDREN  
UNDER THE GUARDIANSHIP OF INFANTS ACT, AND UNDER  
KENYAN CUSTOMARY LAW: A COMPARATIVE STUDY

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE LL.B DEGREE UNIVERSITY  
OF NAIROBI.

---

BY  
ELIZABETH W. GAKIYA

UNIVERSITY OF NAIROBI  
LIBRARY

NAIROBI

JULY 1980

# C O N T E N T S

	<u>PAGE</u>
<u>INTRODUCTION I:</u>	1
<u>CHAPTER 1:</u>	
1. Definition of Guardianship and custody	7
(i) What is Guardianship	10
(ii) What is custody	
2. Historical development of the relating to guardianship, custody and maintenance	11
3. The significance of guardianship, custody and maintenance	15
4. Guardianship of Infants Act.	17
<u>CHAPTER 2:</u>	
1. Definition and ascertainment of custody law	21
2. The legal and historical basis for the application of customary law of custody and maintenance	24
<u>CHAPTER 3:</u>	
1. The custody and maintenance of	30
(i) Legitimate children	32
(ii) Illegitimate children	
2. Legitimacy under customary law	35
<u>CHAPTER 4:</u>	
1. The law of custody today	42
2. Conclusion: Some suggested reforms and recommendations.	47

DEDICATION

THIS PAPER IS DEDICATED TO THOSE PEOPLE WHO MAY BE INTERESTED WITH ISSUES CONCERNING THE CUSTODY AND MAINTENANCE OF CHILDREN.

## ACKNOWLEDGEMENTS

I wish to express my gratitude to the following people my Supervisor, Professor Date-Bah for his most useful comments on the draft of this paper. I am especially grateful to my cousin, Peris Karugondo for typing this dissertation for me and all the other people who gave me assistance while I was doing research. Their assistance proved invaluable in the preparation of this paper.

The views and mistakes expressed in this paper are, however, mine, unless otherwise stated.

TABLE OF CASES

1. R. V. Amkeyo (1917) 7 E.A.L.R. 14
2. Cheni V. Cheni (1962) 2 All ER 873
3. Omwoyo Mairura V. Bosire Anginda (1958) 6 C.O.R.L.R 4
4. Mwangiru V. Mubi (1967) E.A. 639
5. Case V. Ruguru (1970) E.A. 55
6. Mathew V. Brise (1851) Beau 341
7. Sleeman V. Wilson (1871) L.R 13 Eq 361
8. Re Nevin (1891) 2 Ch.d 299
9. Re 7 (1970) 1 All ER. 344 (C.A)
10. Hewer V. Brynant (1970) 19B 357
11. R.V. Greenwill (1836) 4 ad 2F 624
12. J.V.C. (1970) A.C. 668 or (1969) 1 All ER 778
13. G.S. Krishan V. Krishan Kumari 28 K.L.R (1955) 32
14. R.V.De Manneville (1804) 5 cast 221
15. R.V. Gyngall (1893) 2 QB 232
16. Re A.C.B. 10 K.L.R 70
17. Willoughby V. Willoughby (1951) 164 (C.A)
18. Hopper V. Hopper Guy 20(1) K.L.R 19
19. Re (B) (S) An (infant (1964) E.A. 171
20. Mvwanga V. Jiwani (1964) C.A. 171
21. Lerionga Ole Ntutu V. Sindoi Ole Sindaria (1953) 1 C.O.R.L.R.8
22. Zipporah Wairimu V. Paul Muchemi (1953) 1 H.C.D. No. 1280  
(1970)
23. Mary Wanjiku V. Peter Hinga (1977) H.C.D. No.5
24. Taabu Kazungu V. Kalama H.C.D No. 12 (1977)
25. Bazmi V. Sultana (1960) E.A. 301 (C.A)
26. Abubakar Bin Omar V. Mtongweni Bin Mousa (1917 - 18) 7 K.L.R 43
27. Momanyi V. Omwonga (1953) C.O.R.L.R. No. 5
28. Hyde V. Hyde & Woodmonsee (1866) 1 p & D 130
29. Re G.M. (1957) E.A.L.R. 714
30. Ndorosi Saitemo V. Siteni Maba C.O.R.L.R. No. 6 of (1956)
31. Mbamati Ole Kamoiro 4 Sironga Ole Pardiyo application No.4 of 1961

32. Nyandiko V. Kerubo Matanya (1955) 3 C.O.R.L.R. 2
33. Nyaberi V. Nyaboga C.O.R.K.R. app No. 6 of 1961
34. Timina Olenya V. Elan Keya C.O.R.L.R. app No.10 of 1961
35. Re C.T (an infant (1957) Ch. d 48
36. Baidaut V. Bindail (1946) ch. 67
37. Obara V. Joel Obara No. 1173 of (1973)
38. Mary Wambui Evanson V. Evanson Wambaya K.H.C.D. No. 49/73 of 1973
39. Karuru V. Njeri (1968) E.A.L.R.
40. Wambui V. Okumu (1970) E.A.L.R. 578
41. AG - Reid
42. Karunu V. Karunu (1975) E.A.L.R. 18
43. J. Mule Nzoka V. Beatrice Mwikali K.H.C.D. No. 69/70 of 1970
44. Mohamed V. Yasmiri (1973) E.A. 533 (C.A.)
45. Mum & Another (1971) K.H.C.D. 77 case No. 88
46. Barbara Jean Sicken V. David Michael Sicken (1973)  
K.H.C.D Case No. 52. K.H.C.D Case No. 52.

## TABLES OF STATUES

1. The Guardianship of Infants Act Cap 144 Laws of Kenya.
2. The Legitimacy Act Cap 145 Laws of Kenya.
3. The Matrimonial Causes Act Cap 152 Laws of Kenya.
4. The Judicature Act Cap 8 Laws of Kenya.
5. The Magistrat's Courts Act Cap 10 Laws of Kenya.
6. The Evidence Act Cap 80 Laws of Kenya.
7. The African Christian Marriage & Divorce Act Cap 157 Laws of Kenya
8. The Constitution No. 5 of 1969
9. The Subordinate Courts separation & Maintenance Cap 153  
Laws of Kenya.
10. The Marriage Act Cap 150 Laws of Kenya.
11. The Affiliation Act of Kenya (now repeated)
12. The Kenya (Jurisdiction of courts and pending proceedings)  
Regulations of 1963.

INTRODUCTION

This dissertation is an attempt to examine guardianship, custody and maintenance of children. It will also deal with the problems which have plagued Courts when seized of such proceedings. The discussion will take the form of a comparison of the positions under the customary law and under the Guardianship of Infants Act.<sup>1</sup> The Act underlines the Western Philosophy of life which embodies Christian morals. Conversely customary law reflects the African Philosophy of life. These differing attitudes spring from the different cultural heritage of the two races.<sup>2</sup>

No doubt Western culture has left imprint on the mode of life of the urbanized Africans. But the so called urbanized or detribalised Africans do not fall neatly into either category. For instance, it is common practice for Africans when marrying to combine elements of customary law with the statutory procedure prescribed for marriage.

In this paper I will also discuss the institution of marriage. This is due to the fact that any discussion of guardianship, custody and maintenance of children must of necessity start with the institution of marriage. Marriage is the point from which problems of guardianship, custody and maintenance and access to children flow. Professor Read has stated the essential difference between statutory and African marriages as follows:

"But the most important distinction between customary and statutory marriage is of course the distinction between polygamy and monogamy."<sup>3</sup>

The question therefore as to what constitutes marriage is particularly relevant in locating the root of the disparities between statutory and customary marriages.

The statute which draws inspiration from the Anglo-Saxon ethics defines marriage as the voluntary union of one man and one woman for life to the exclusion of all others.<sup>4</sup> Thus the Western idea of marriage is that it is an affair between two individuals, the prospective groom and bride respectively. A parent or guardian is only involved in instances where one of the parties has not attained the age of <sup>Majority</sup> maturity in which case the consent of the parents or guardian becomes necessary.

By contrast the traditional African marriage is an alliance of the two families or the two clans of the prospective spouses.



The members of the two families or clans participate at its inception and its dissolution should efforts at reconciliation break down. This spirit of participation is validly described by Professor Mbiti.

"For African peoples, marriage is the focus of existence. It is the point where all members of a given Community meet. The departed, the living and those yet to be born. All the dimensions of time meet here, and the whole of history is repeated, renewed and revitalised. Marriage is a certain drama which everyone becomes an actor or actress and not just a requirement from the Corporate Society and a rhythm of life in which everyone must participate. Otherwise, he who does not participate in it is a curse to the Community. He is a rebel and a law breaker, he is not only abnormal but "under human." Failure to get married under normal circumstances, means that the person concerned has rejected society and society rejects him in return."<sup>5</sup>

Professor Mbiti conveys the profound respect coupled with religious learnings associated in the mind of the African peoples with marriage.

The dissertation also takes into account what the two cultures regard as the chief purpose of marriage. This question serves to explain the attitudes towards custody of children and how entitlement to custody of the child is decided.

The chief aim of marriage according to Western Philosophy is companionship.<sup>6</sup> For the African it is the procreation of children. For the African, therefore, children are some measure of guarantee that with the individual's death his name will not die out.<sup>7</sup>

Unlike the African situation the Western world does not centre around groups but around the individual. Marriage is an individual affair and the emphasis is on independence. Thus a child is under the care of the parents or guardian until he attains majority when he is considered independent.

In Kenyan societies the clan is considered to be more important than the individual. This may be explained by the mode of production of African societies based on agriculture. This is because an important function of the family in traditional practice was the allocation of land. An individual's right to parcels of land was enjoyed by right of family membership.

The Western notion of what constitutes a marriage has been taken up by courts deciding issues concerned with the African customary marriages. A case in point here is that of R.V. Ankeyo,<sup>8</sup> where it was wrongly decided that the principle of bride price connoted wife purchase. Here we should note that the division of marriage into monogamy or polygamy is superficial.

It was argued by Sir Joselyn P. Simon in the case of Cheni v. Cheni<sup>9</sup> that:

"After all there are no marriages which are not potentially polygamous in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses."

In the Kenyan case of Omwoyo Mairira v. Bosire Anginda<sup>10</sup> the parties contracted a marriage under statute law. The parties consequently separated but not in accordance with the procedures laid down by the statute. The husband then married other wives under customary law. The wife also married again under customary law rites.

The husband applied to the court after seventeen years of separation for the return of his wife and three children two of whom were fathered by the co-respondent. The court held that the matter would have to be decided in accordance with customary law.

In the light of these cases it may be argued that the basic differences between statutory and customary marriages are much wider than a mere glimpse would suggest. As a result these differences makes it necessary for different rules of custody to be applied in each case. In statutory law custody of the children may be awarded to either parent. Under customary law the right to custody in most cases is awarded to the father unless after separation he has demanded back his bride price in which case the custody is awarded to the mother.

It is also the view of the author that matters pertaining to custody and maintenance of children are consequences upon a variety of incidents which include inter alia. divorce, nullification of marriage, separation, death of one or both spouses in a marriage or consumeration of leviratic unions. It is in this broader conceptualisation of marriage breakdown that the custody and maintenance of children under Kenyan law are discussed.

The above conception of divorce did not apply most under the Kenyan customary law. This is because in most communities divorce was virtually non-existent. What took place might be described as separation. In Kenyan societies where divorce was permitted it was rare.

The only instance in which a man could divorce his wife was when the wife was discovered to possess or practice witchcraft. It constituted a valid ground for divorce. It was the only time infact when the woman was allowed to take her child with her." The Africans (Kenyans) believed that witchcraft was hereditary and that the children of a mother who practised it would also become practitioners, in that field. But there is no evidence as to the practice adopted where it was the father who practised witchcraft. Presumably the children in case of divorce would remain with their father.

The Guardianship of Infants Act which is the principal legislation on the subject of custody and maintenance anticipates the above broader perspective of incidences preceding custody and maintenance.

It states in Section 17:

"Where in any proceeding before any court the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant or the application of the income thereof, is in question, the court in deciding that question shall regard the welfare of that child as the first and paramount consideration whether from any point of view the claim of the father or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother or the claim of the mother is superior to that of the father."<sup>12</sup>

The position of African customary marriages warrants some further comment since there is no single legislation directly and solely concerned with same and also because such marriages have undergone considerable jurisprudential batterry during and after Colonial administration. There even exists express provisions in the other marriage legislations permitting "conversion" or upgrading of these supposedly legal African customary marriages to the status of either Islamic or monogamous Christian forms.<sup>13</sup>

It can be conceded that judicial opinion favourable to Kenyan customary law marriages have undergone some appreciable degree of recognition since the famous negative opinion expressed by late Chief Hamulton in the 1910s when he said he did ..... " ..... not think that it can be said that the native custom approximates in any way the legal ideas of marriage."<sup>14</sup>

I shall also identify the incidental statutory references and court decisions that have been recognized and given legal legitimacy to marriages contracted under African customary law. The Constitution which, in theory at least embodies the highest legal norms and standards in the state to which all laws must conform provides general recognition of customary laws.<sup>15</sup> The legality of African customary marriages is also recognized by the Judicature Act Section 3 (2), the Evidence Act of 1963 Section 130 (2) and the Marriage Act Section 37. However, this is made superfluous since section 35(1) and 11 (d) of the marriage Act permit conversion (presumably for the better system) of marriages contracted under customary law and Islamic law respectively to monogamous christian type.

It becomes apparent then that the marriage systems are hierarchically ordered and the potentially polygamous (Islamic and African customary law) types filling the subordinate positions. In the final count the African customary law marriages occupy the lowest degree of respect under the positive law.

Perhaps the area where African customary laws of marriage have found more clearer expression and recognition are in the courts in the case of Mwogiru V. Mumbi<sup>16</sup> where justice Miller stated.

"Marriage by kikuyu custom under the marriage Act can result in perfectly valid Marriage provided that there had been compliance with the rules which govern each form of Marriage."

In another case<sup>17</sup> in which the judge gave other contraversial observations justice Miller also observed that;

"It is settled law that marriages properly contracted under customary law are of legal effect and matters appertaining to promises and preparations for such marriages are in my view Cognisable by the courts depending upon the circumstances."

It is important at this juncture to underscore the fact that except for formal religious dogma, the level of social stratification resulting from the increasing spread and notionalisation of Capitalist forces aided by state intervention (the differences in family insitutions and structures anticipated by the different existing laws are becoming less real). Extended family structures and patrilocality are two areas where major changes are taking place as relations of production upon which social relations predicated change. The African family has been hit the hardest.

This paper in essence therefore is divided into four major sections. The first section provides a general overview of what will be contained in the following sections. The section also deals with the historical

development of the law relating to guardianship, custody and maintenance. It deals with definitions of guardianship and custody, the significance of custody and maintenance not forgetting to mention the juridical attitude towards both. It also discusses the problems as well as the various theories, concepts and laws governing guardianship custody and maintenance of children. Custody under the Guardianship of infants Act is also discussed. There is a brief synopsis of what these relations are given in order that the juridical bases for some of the contradictions and/or inconsistencies in custody laws and practice can be appreciated contextually.

Section 2 deals with the definition, ascertainment and application of customary law and the position of custody and maintenance under that law.

Section 3 provides a detailed analytical review of custody and maintenance in respect of legitimate and illegitimate children under statute law and under customary law. The last section 4 provides a brief review of the application of the law of custody today. There is also a brief conclusion and recommendations on the basis of the findings of this study.

DEFINITION OF CUSTODY AND GUARDIANSHIP

WHAT IS GUARDIANSHIP

Strictly speaking, the term "guardian" includes a parent, for the parents are regarded at common law as the natural guardians of their children and now by the statute after the death of one parent the survivor is the guardian of their minor children either alone or jointly with any testamentary guardian appointed by the other.<sup>1</sup> But in common parlance the concepts of parent are quite distinct, for the right and duties of the former arise automatically and naturally on the birth of the child, while the latter voluntarily places himself in "loco parentis" to his ward and his rights and duties flow immediately from this act.<sup>2</sup> It is in this latter sense—that of the person who places himself in loco-parentis to his ward, as distinct from the natural parent that the word will be used in this discussion.

Once a guardian is lawfully appointed most of the rights which a parent has with respect to his legitimate children vest in him. In view of the intervention of equity, it is hardly surprising to see a marked similarity between the office of a guardian and that of trustee. As regards the ward's property, the guardian is a trustee in every respect, with precisely the same powers and duties as the trustee has over any other trust property; and as a trustee he is bound to account to his beneficiary, the ward when his guardianship comes to an end. But whereas a trustee has no personal rights and duties with respect to his beneficiary, these are today the guardian's chief responsibility.

The nature of the office was thus described by Romilly M.R. in Mathew v. Brise<sup>3</sup> as follows:

"The relation of guardian and ward is strictly that of trustee and cestui que trust. I look on it as a peculiar relation of trusteeship ..... A guardian is not only trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant, with many duties to perform, such as to see to his education and maintenance ..... of all the property which he gets into possession in the character of guardian, he is trustee for the benefit of the ward."

At common law the feudal overlord automatically became the guardian of an infant by knight service or grand seryeanty, and since the guardian was entitled to the profits of the ward's estate, this right was extremely valuable to the crown and the mesne lords.<sup>4</sup>

Section 8 of the Tenures Abolition Act, 1660 empowered a father by deed or will to appoint a guardian or guardians of his legitimate children who were under the age of twenty one years and unmarried on the father's death, until they respectively reached their majority or for any less time. As the mother had no right as such to the custody of her children at common law it is hardly surprising that no power of appointing testamentary gurdians was given to her.

Section 3 of the Guardianship of infants Act of 1886 gave her a limited power to do so but her nominees could only act after the death of both parents (when they would act jointly with any other gurardian appointed by the father) or if the father survived her, jointly with him if the court considered that he was unfit to be the sole guardian. It was not until 1925 when the mother was given equal rights with the father in this respect. Now the father and mother may by deed or will appoint one or more guardians for their legitimate children.

The Act gave the father no power to appoint a testamentary guardian for his illegitimate children.<sup>6</sup> The Guardianship of Infants Act of 1925<sup>7</sup> had given such power to the mother which schedule provided that after the death of the motner of an illegitimate minor, the guardian appointed by her must consent to the child's marriage. A more limited power was given to the father by the legitimacy Act 1959, now he may appoint a testementary guardian provided that a custody order granted under the Guardianship of minors Act in his favour is still in force at the time of his death.<sup>8</sup>

It must be noted that the power to appoint a testamentary guardian is clearly one of the "rights and duties which by law the mother and father have in relation to a child".

If a deceased parent has appointed no testamentary guardian, or if the guardian or if the guardian or guardians so appointed refuse to act the court may if it thinks fit appoint one to act with the survivor.<sup>9</sup> A similar power exists if there is no parent, guardian or other person having parental rights with respect to the child.<sup>10</sup> In determining who to appoint as guardians "the court, according to its ordinary practice gives a preference to the nearest blood relations and does not appoint strangers when fit persons are to be found among other relations."<sup>11</sup>

Here it should be noted that both the parents and the nearest relatives wishes will be ignored if this is necessary in the interests of the child. A case in point here is that of Re<sup>12</sup> where the father of a girl only a few months old had strangled his wife, the girls mother, and had been convicted of manslaughter on the ground of diminished responsibility. He wanted the girl to be brought up by his brother and sister (who lived in the same neighbourhood) and obviously had some hope of making contact with her again in the future. The court refused and the child was made a ward of court.

A guardian has custody of his ward and therefore broadly speaking, has the same rights and duties with respect to his person as a parent has with respect to legitimate child. A duty to protect the ward at common law will clearly arise once the guardian assumes responsibility for doing so. The children and young persons Act 1933 specifically renders a guardian criminally liable for breach of the various duties imposed by the Act, to ensure the physical and moral protection of children.<sup>13</sup>



The guardian's duties will clearly cease if the ward dies, they automatically determine when he comes of age. Whether the guardian's powers cease if the ward marries before he or she reaches the age of majority is doubtful.

Like a trustee the guardian once having accepted the office cannot resign it at will but if he is unwilling to act, it would be in the ward's interest that he should be replaced.

### WHAT IS CUSTODY

When we talk of custody we find it is an ambiguous term. In its primary term it means the right to care for and control. It is therefore the correlative of the duty to protect. The wider meaning of custody has been given by Sachs L.J. as;

"In its wider meaning the word custody is used as if it were almost equivalent of guardianship in the fullest sense. Adapting the convenient phraseology of counsel such as guardianship embraces "a bundle of rights" or to be more exact "a bundle of powers which continues until a male attains the age of eighteen years or an infant female marries. These include the power to control, the choice of religion and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold the consent to marriage. They include also the personal power physically to control the infant until the years of discretion and the right to apply to courts to exercise the powers of the crown as *paren partriae*"

All the above stems from the parent's right to custody. At common law from which our law relating to custody is derived the right to custody of a legitimate child was vested on the father and was almost absolute. Its rights were superior to that of the mother and it was only in exceptional cases where there was the risk of serious physical harm or moral harm due to the father's cruelty or gross corruption of the child resulting from profligacy that the father's right could be forfeited.<sup>15</sup>

Since the middle of the 19th century the courts through a series of statutes have intervened considerably the effect of which was to whittle down the father's rights and pay more attention to the child's welfare<sup>16</sup> and to give the mother more positive rights to claim custody which even equity did not accord her.<sup>17</sup>

#### HISTORICAL DEVELOPMENT OF THE LAW RELATING TO GUARDIANSHIP, CUSTODY AND MAINTENANCE

The British interests in East Africa which began in the later half of the 19th Century were mainly Economic<sup>18</sup> and strategic<sup>19</sup> covered with the mask of humanitarianism: to replace slave trade with legitimate trade.<sup>20</sup> The introduction of the British rule in Kenya was the introduction of the English law.<sup>21</sup> The first ordinance introduced in the East African Protectorate was the East African Order in Council 1897, the intention of which was to make certain Indian Acts applicable to Kenya. But where these were inappropriate or inapplicable jurisdiction was to be exercised in accordance with the relevant English law. Article II of the order in Council stipulated

"Subject to the provisions of this order, so far as enactments, procedure and practice of India herein specified are inapplicable, Her majesty Queen Victoria's Criminal and Civil Jurisdiction in the protectorate shall be exercised in accordance with the common law and statute law of England in force at the Commencement of this order."

To understand the principles on which Kenyan law of guardianship and custody rests one must be familiar with the statute law of England in the 19th Century. This is important because the 1897 order in Council did not indicate clearly the applicable law of guardianship and custody for Europeans and other non-East Africans who were neither Africans nor Muslims.

The traditional theory at common law was that the father had had absolute rights of custody over his legitimate children. These rights extended to very young children.<sup>22</sup> This notion probably derived from the Aglo-saxon christian doctrine which regarded men-folk as bread winners of their families.<sup>23</sup> However in the 19th Century parliament altered the common law by passing a series of enactments, the effects of which were to deprive the father of his common law powers of custody over his children, if their welfare so demanded and progressively give the mother rights until she was at par with the father in matters concerning custody of the children.

The first of these series of liberalising acts passed by parliament was the TALFOURDS ACT of 1839.<sup>24</sup> Under it the mother could have custody of her children until they reached the age of seven and access until they attained the age of twenty one. The matrimonial causes act of 1857 gave the courts powers to make orders of custody to parents up to twenty one years. The two subsequent acts namely the custody of infants act of 1873 and the Guardianship of infants act of 1886 did no more than raise the age the mother could have custody of her children from seven years to sixteen years and then to twenty one years respectively. The next two acts the Guardianship of infants act 1886 and the custody of children act 1891 have been held not to be statutes of general application in Kenya.<sup>25</sup>

Developments in statute law of guardianship and custody in Kenya followed very closely changes in English law. This historical background is important because the law was one of the major tools used by the Colonial powers to establish their control over occupied territories.<sup>26</sup> But the problem which faced them was how to develop a legal system embracing the whole Country. As Ghai and McAuslan observed, "If one problem was as to what to apply, another was to whom should the law be applied."<sup>27</sup>

The 1897 East Africa order in council seemed therefore to be an attempt to indicate which laws applied to the different classes of people. If that was so, the 1897 order in Council was inadequate for there was no provision governing Matrimonial relief. Where the Indian Divorce Act, which applied by virtue of Article II(b)

of that order in council provided for procedure it failed to do so with respect to divorce and nullity. The personal laws applicable to African Muslims or those African's who were neither muslims nor christians were indicated by the native courts regulation 1897 established by the 1897 order in council<sup>28</sup> it became clear that statute law was to govern non-natives.<sup>29</sup> The muslims for the most part were to be governed by Mohamedan law, the rest of the Africans were to be governed by existing laws (Acts). Regard was also to be had to native laws which were not opposed to morality and humanity.<sup>30</sup> The British settlers were insistent that they were entitled as of right to the English legal system which they had brought with them from England and was part of their heritage from common law.<sup>31</sup> After 1399, Kenya was to be a whiteman's country as is evident in the words of Sir Elliot;

"It is mere hypocrisy not to admit that white interests must be paramount. And that the main object of our policy and legislation should be to found a white colony."<sup>32</sup>

In the areas of guardianship and custody the general approach adopted by the courts in England and evident in Kenyan courts decisions is vividly portrayed by the words of lord Esher M.R in the case of R.V. Gyngall<sup>33</sup> where his lordship said;

"The court is placed in a position by reason of the prerogative of the crown to act as Supreme parent of the child and must exercise that jurisdiction in the manners in which a wise, affectionate and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate and may be intending to act for the child's good, but may be unwise and may not be doing what a wise, affectionate and careful parent would do".

The courts thus view their role in deciding matters of custody as that of benoalent "grand parent". In Re A.C.B<sup>34</sup> a Kenya case the courts decided the point without reference to the local circumstances.<sup>35</sup>

In that case the mother of an illegitimate child applied to court seeking the removal of her child from the custody of the putative father. Custody had been given to the father as a result of the applicants mental disorder. From the judgement it is apparent that only English values were taken into account. An excerpt from the judgement of Barth, C.J. reads :-

"It is clear from the series of decisions in England that the mother of an illegitimate child has no legal right to its guardianship but that the court will, in the absence of any serious reason to the contrary give it to her in preference to a stranger, but that the putative father has also a direct interest in his offspring and as between him and the mother the question is would it be to the interest and benefit of the child to be taken away from his father. If it would not the court will not interfere."

The first piece of legislation specifically to govern custody in Kenya was the custody of infants ordinance 1926 . As should be expected, it was a piece of legislation derived entirely from the 1891 custody of children act in England. The 1926 custody of infants act was enacted to protect charitable organisations <sup>36</sup> from unscrupulous parents who were in the habit of claiming their children after these societies had incurred great expenses in rearing and educating them.

Naturally the Kenyan courts have followed other aspects of English family law. For instance at common law, the mother if guilty of adultery, was not given care and control of her child. The present rule as laid down in Willoughby V. Willoughby<sup>37</sup> is that, in absence of any evidence that the mother is promiscuous, a bad housekeeper or a bad mother she should not be denied custody. These considerations were relied on the Kenyan case of Hopper V. Hopper and Guy<sup>38</sup>. Custody of a child was granted to the father but care and control were vested in the respondent mother who had committed adultery and was then staying with the co-respondent.

The second piece of legislation was the Guardianship of infants ordinance 1959 and is the present Guardianship of infants act Cap 144. Debates in Parliament on the bill indicate that the adoption of entire English Acts and parallels drawn from English law was a deliberate policy. This is evident from the speech of

Mr. Webb a member of the legislative council in that debate:

"As my honourable friend knows this bill is drafted on the lines of English Acts, dealing with the same subject-matter; and in order to have advantage of English text books and English decisions we have followed the English Act fairly slavishly." <sup>39</sup>

The above process of making the English law to become more entrenched could have been averted or at least slowed down "had the courts construed the statute strictly, they might not have felt bound to apply every rule of English law but tried to create a corpus of law responsive to the emergent demands of the local circumstances." <sup>40</sup>

#### THE SIGNIFICANCE OF GUARDIANSHIP, CUSTODY AND MAINTENANCE

"The child is singled out by law as by custom for special attention". <sup>41</sup>

The position of a child in the family raises problems. A major public policy consideration with regard is to give every encouragement to the family to fulfil its role as the provider of the child for its sustenance and protection during its vulnerable years. This is due to the fact that adults are presumed to be capable of deciding what is in their best interests, while children on the other hand are regarded as "Incomplete" beings incapable of determining and safeguarding their interests. There must always be somebody to care for them.

In every society the law governing the custody of children reflects the structure of the family. In the Western Societies the family is made up of the spouses and their children. The spouses are under a legal obligation to bring up the children. Where they fail, the children are made wards of the court and are kept in a home where they grow as healthy members of the society. Since most of the spouses can bring up the children properly, the courts are often asked to decide which of the two spouses is to have the custody. The welfare of the child which embraces both material and non-material aspects of life is considered the most paramount consideration in such cases. <sup>42</sup>

In Kenya where the family is a bigger unit,<sup>43</sup> different rules governing the custody of the child exists. The rights of the child born outside marriage differs from one community to another. In some communities it is the woman's family which has the right to the custody whilst yet in others, the right is conditional on the father making a specified payment.

Under all customary laws the spouses who establish a family have the right to the custody where there is a marriage. Where a man and woman are cohabiting outside marriage and their customary law does not give the right of custody to the man. It is the women's family which has the right to the custody of all the children.<sup>44</sup> In Lerionga Ole Mtutu V. Sudoi Ole Sindaria<sup>45</sup> a man who had cohabited with a woman claimed custody of the children born during the period of cohabitation. Entering judgement for the woman, the Kenya Colonial Court of Review held that under the Masai customary law that applied to the parties, the child belonged to the woman's family as they were not married and the appellant was entitled to a refund of the maintenance for the child during the period of cohabitation.

In Zipporah Wairimu V. Paul Macheri,<sup>46</sup> the Plaintiff a woman prayed to be declared the sole guardian of four children, three of whom she had had with the defendant who had lived with her. She contended that no marriage existed between them and that under Kikuyu customary law, the children belonged to her family. The defendant who had paid part of the dowry payable after the commencement of cohabitation lived with the plaintiff as a married woman under Kikuyu customary law contended that they were married and he was entitled to the custody of the children who had been named like children born within wedlock. The court entered judgement for the defendant holding that there is a valid customary marriage where part of dowry is paid and the parties live like married people under customary law although some of the requirements of marriage remain unperformed.

This argument was also followed in the case of Mary Wanjiku V. Peter Hinga.<sup>47</sup> Here the Plaintiff claimed the custody of five children born when they were living as husband and wife. She contended that she was married to the defendant under the Kikuyu customary law. The court held that she was married to the defendant and that she was entitled to the custody of the children.

The significance of the law of guardianship and custody is that there is always somebody to care for the child, in the Western Countries where we have the notion of legitimate and illegitimate the right of a legitimate child is awarded to the father and that of an illegitimate child to the mother. Among most of the Kenyan Communities strictly speaking no child is considered illegitimate since birth in or out of wedlock is irrelevant to its status in the Community or in its legal rights and duties. Such matters are determined by the acceptance of a child as a member of a family and the only question that arises in customary law is in which family it adheres to, that of its father or its maternal grandfathers. Such questions are answered by the Courts in determining who of the two spouses is to have the custody of the child.

THE GUARDIANSHIP OF INFANTS ACT  
(CAP 144 OF THE LAWS OF KENYA)

Ever since Kenya became a protectorate and then a Colony until she acquired the present status of a Republic, there has been persistent inconsistencies in decisions of the Courts of record regarding the proper principles applicable in custody and Maintenance Cases. This has been due to several factors namely, the existence of separate Indicial system, that is African and Central within the legal system prior to 1967. The absence of a single substantive legislation prior to 1959 governing custody and maintenance of child also created problems. The apparent neglect of proper legal research by the bench before the ruling on cases, particularly where parties were not represented by advocates and the obviously confusing cultural norms involving conflicts between the received laws and the numerous indigenous customary laws and religious rules.



In 1967 the Government decided to intergrate the court system. The Judicature Act still retained the reception clause which had been contained in 1897 East Africa Order in Council.<sup>48</sup> Section 3(2) of the Judicature Act indicated the position accorded to customary law. Apart from rephrasing the reception clause and giving customary law a much inferior status than it had enjoyed in the Colonial days the Colonial rules remained intact.

The second attempt was to reform the existing systems of law which was launched in 1967. A commission on the law of Marriage and Divorce was appointed to look into existing laws and suggest ways in the form of recommendation for reform. This was a difficult task owing to the fact that Kenya is a multi-racial as well as multi-religious society.<sup>49</sup> As it turned out the Commission's recommendations were really the existing statute law, with a few reforms reflecting the changes in England. For instance the Commission recommended that noone should have an absolute right to the custody of the infant children of marriage if the parties to that marriage separate or are divorced, the paramount consideration should be the good of the children.<sup>50</sup> This view offers nothing new; infact it is paraphrasing of the existing statute law which is purely English law on custody of children. The Commission recommended that very young children should be in the custody of their mothers unless exceptional circumstances dictate otherwise, which also reflects English Law.<sup>51</sup>

In the 1970s there was beginning to appear some consistency in the application of the Guardianship of infants Act with three principles emerging as dominant. These being the two principles embodied in section 17 of the Act regarding the paramourcy of the interest of the child and the equality of rights as between fathers and mothers on claims to custody over children. The third principle is that a child of tender years is in the absence of exceptional circumstances to be in the custody of the mother.<sup>52</sup>

This third principle is in line with the 1967 Commission's second recommendation. In this principle the responsibility for provision of material factors required for the maintenance of the child may be shared by the mother and the father.

The Guardianship of infants Act is applied to all cases regardless of whether or not parties are governed by statute law.

The case of Bagmi v. Sultana<sup>53</sup> illustrates the wide application of the Guardianship of infants Act. The issues here were first whether Mohamedan law or the Guardianship of infants Act applied to questions of custody and maintenance of a child born to separated parents who professed Islamic religion and belonged to the Hanafi Sect and secondly, if the later, statute was applicable, whether the father was entitled to custody of a child whom he had been in custody for a fixed period of 3½ years. Expert evidence established that the child had stayed very happily with the father for 3½ years although it could be expected to recover from the definite disturbance it was going to suffer were the mother to be given custody. The Court of Appeal in affirming the decision of the High Court ruled that in all matters of custody the Guardianship of infants Act applies. In its language the Court stated:-

".....that ordinance (Act) applies in full force to Mohamedan, not less than to other infants, and under section 17, the welfare of the infant and not the right under the Mohamedan law of either parents is a paramount consideration in deciding questions of custody."<sup>54</sup>

Section 17 of the Act has been applied on many occasions to impose the English notions on what is best for the child. The relevant section reads in part:

"Where in any proceeding before any court the custody of upbringing of an infant or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question the court, in deciding the question, shall regard the welfare of the infant as the first and paramount consideration whether from any point of view the claim of the father or any right at common law possessed by the father in respect of such custody or upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

LIBRARY

As mentioned above section 17 stipulates for the equality of rights as between parents towards children, gives welfare and interests of children paramount consideration and rules out any other contending legal doctrine that may conflict with the ones in the Act.

Sections 6 and 7 of the Act provides that each spouse has equal rights in initiating the court proceedings in the interests of the welfare of the child. Again third parties (viz those who are not the parents of the children) may recover any reasonable costs of upbringing a child from its parents (Section 13).

The Act bars the mother of the child from obtaining any maintenance from the child's father unless she is separated from him (Section 7(4)). This latter section encourages physical separation of the parents and may be open to criticism as to whether this is necessarily in the interest of the marriage or the children. It makes reconciliation difficult.

S.13 (supra) appears to encourage strangers to take interest in the welfare of the children. It is interesting to note that prior to the enactment of this legislation, judicial opinion in one instance rejected this principle<sup>55</sup> whereas in another it was favourable.<sup>56</sup>

However, since the Guardianship of infants Act is the sole statute governing the custody of children it is applied to all cases even those falling under customary law despite the fact that it has been enacted on the principles of English law.

CHAPTER 2

DEFINITION AND ASCERTAINMENT OF AFRICAN CUSTOMARY LAW

There is no single definition of customary law agreed by lawyers, jurists, social anthropologists and others who may be concerned with it. This in itself is not surprising for both custom and law may be used in a number of differing senses depending upon the requirements of the writers approach. The fact that these terms may mean different things to different contexts is not in itself important. But the place of customary law in the developing legal systems of new African states is a matter of some considerable contemporary importance which calls for some precise definition in this immediate respect.

Some of the divergencies of view on the concept and definition of customary law may be lessened however if it is recognised that a diachronic approach may clarify part of the disputed field. Traditional African political systems presented a wide range of patterns. In all these societies, bodies of rules existed to define the appropriate reciprocal behaviour of individuals and mechanisms existed to maintain the social order. Thus the social order was maintained and there is little need to reject the existence of law in such societies merely because imported criteria of law are not applicable.

In many colonial countries in Africa the governing powers also recognized that side by side with the general law which they introduced there were also existing local rules which were regarded as enforceable where infringements of local norms of acceptable behaviour occurred. Local or customary courts were established to administer such law, though these courts generally were authorised to apply part of the statute law of the country in addition to customary law. As a result whilst customary law as a body of unwritten rules recognized by communities continued to exist there now also emerged law in the sense of the adjudications and decisions of recognized courts which in many societies had not hitherto existed. At this stage then the study of customary law was enabled to follow two alternative lines. It could become a study and analysis of the decisions of the courts, or it could proceed as the interpretation of a folk system of social control.

C.M.N White defines customary law as , "a diachronic process of development, rein - interpretation and change in mechanisms of social control ranging a long a spectrum from traditional systems of social control to the introduction of courts which have progressively differentiated

between legally enforceable rules and other social norms, and finally extinguished by its replacement by written law broadly comprising of those rules which can safely be distilled from the decisions of the courts with such cautious supplementation from other sources as may be practicable and with such statutory modifications as may be found essential for the needs of a changing society".<sup>1</sup>

On the other hand statutory definition of "Customary law" or "native law and custom" as it was often called in the earlier legislation of the then British Africa, have been few and far between. Customary law like elephants and more recently ownership was evidently considered to be one of those phenomenon which it was impossible to define but which could nevertheless be recognized when seen. In recent times the legislator ( or legal draftsman) has been getting bolder and several definitions some long, some brief have been incorporated in the new legislation integrating the courts, or modifying the juristic basis of the legal system. More and more of the customary law is replaced by legislation for instance in the field of landlaw. It is therefore very uncompromising to call the fragmented rules that remain customary law.

Restatement and other attempts at systematic investigation and recording of customary law expose another problem that of discrimination between habits and norms followed by a given community but to which recognition and force of law are not accorded and these normative rules of behaviour and institutions to which legal recognition is given. By such recognition is meant that they are not only followed as a matter of practice but must be followed as a matter of law. Law and customary law may have different meanings that is, may be viewed and handled differently by differnt categoeries of persons professionally concerned with it. To the anthropologist it is part of the mechanism of social control on a segment of what he may call "Jural phenomena". But the judge of the High Court, the legal plactitioner advising a client, the academic lawyer condcting a field investigation have different opinions as to what customary law is or what ought to be regarded as customary law.

The problem of "customary law" therefore in its general sense and the ascertainment and status of a rule of customary law in particular may be approached in varying ways.<sup>2</sup>

The difficulty of ascertaining customary law has also been contributed by diversity of the African communities with their different customary laws. Further there are subdivisions of clans and sub-clans

among the African societies the job of ascertaining what customary law is becomes almost insurmountable so what is said to be customary law in Kenya may be a generalization and the reader must be aware of this. Notwithstanding the fact that some rules may differ from one community to another, there still are features common to most if not all systems of customary law.

The changes that have occurred and are still occurring complicate the ascertainment of customary law, modern society with its ever increasing devices has continually affected and altered various aspects of customary rules. Perhaps the importation of English law has contributed a lot towards this change. The effect of this is to render customary law rules uncertain from time to time.<sup>3</sup>

The Judicature Act Section 3(2) has also contributed to the complexity of ascertaining customary law. It stipulates in part,

"The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it so far as it is applicable and is not repugnant to justice and morality of inconsistent with any written law ....."<sup>4</sup>

A case in point here is that of Momanyi V. Omwanga<sup>5</sup> where the wife constructively deserted her husband. The husband however refused to grant her a divorce. Meanwhile the wife went to live with a paramour for several years and she bore children to him.

According to a well established Kisii customary law rule, all those children the wife had brought forth belonged to the husband. The husband claimed custody of the children but the court ruled that this custom was repugnant to natural justice and morality.

The above case illustrates the blow the so called repugnancy abuse had bided on customary law. More interesting is the position in which a customary rule is left once it is declared by a superior court to be repugnant to justice and morality.

The definition of customary law in section 2 of the Magistrate's courts Act enumerates claims that are to be regarded as customary law claims instead of defining or ascertaining what customary law is. The Act therefore does not reduce the difficulty of ascertaining customary law because it has only listed the claims which are considered to be customary.<sup>6</sup>

The other factor that poses a difficulty in the ascertainment of customary law is the fact that it is unwritten customary law was passed

from one generation to another orally by elders who were well versed in the customs of a particular tribe. Now with the social changes taking place, it is very hard to find elders who are conversant and competent at their own customary law. The few elders that are accessible often give conflicting account of a rule under customary law.

From the foregoing it suffices to say that customary law rules have been tricky and difficult to ascertain. It is in the light of such observations that an analysis of customary law of custody and maintenance should be approached.

THE LEGAL AND HISTORICAL BASIS FOR THE APPLICATION OF CUSTOMARY LAW OF CUSTODY AND MAINTENANCE

The historical basis for the application of customary law in general and the customary law of custody and maintenance in particular can be traced from the extension of the Darwinian theory by the British Colonists to Kenya. The Africans had to be gradually civilized<sup>8</sup> and hence the declared policy that the enforcement of customary law was intended merely to tide over the transitional period.<sup>9</sup>

As regards the legal basis for the application of customary law this can be found in the 1897 order in council. Article 52 of that order stated that those customary laws "not devoid of humanity or morality" were applicable.

The Native courts regulation of 1897 specifically referred to the application of customary law. Article 3 of these regulations stipulated; "Native courts mentioned in Article 2 shall as far as practicable be guided by the Indian civil Criminal procedure codes ..... and throughout the protectorate be guided by and have regard to any native laws and custom". Attitudes of the legislature and Judiciary indicated that the African Institutions were devoid of morality and humanity. This was expressed by the 1902 order in council, which repeated the 1897 order in council. Article 20 of the order read as follows:

"In all cases civil and criminal to which natives are parties every court (9) shall be guided by native law and custom so far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in council or ordinance."

Early judicial attitudes toward African institutions were also biased. For instances marriages among Africans were commonly referred to as "Unions".<sup>10</sup> This view was expressed by Sir Robert Hamilton C. J. in the following words:-

"The use of the word "marriage" to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer ..... The elements of a so called marriage by native custom differ so materially from the accepted idea of what constitutes a civilised form of marriage that it is difficult to compare the two".

Therefore to that learned judge like so many other colonial officers an African marriage under tribal custom did not qualify as a form of marriage to wit monogamous Christian marriage.

The 1920 order in council showed that attitude had not changed.

Subsequent legislation showed that statute law was used to modify customary law and to assimilate the Africans into the western ideas of civilisation. For instance native Christian marriage and Divorce Ordinance 1931 enabled those Africans who professed Christian faith to change marriages contracted under customary law into statute marriages. This was a direct implication that statute marriages were of a higher status. The above ordinance also provided among other things that a woman deemed married under that ordinance was entitled to retain guardianship of minor children subject to the proviso that the right to bride price accruing from the marriage of a daughter should be determined according to native law and custom."

Again looking at the case law one finds that the aim of judges cannot be anything but to get rid of some customary laws.<sup>12</sup> The early attitude of the English courts of law towards customary law especially customary law marriages which were in essence polygamous manifested in a number of cases. It seems that English law in the 19th century took the position that marriage in all Christian countries was essentially the same thing and that recognition should be denied polygamous marriage on the ground that they were a different institution.<sup>13</sup>

Polygamous marriages were equated with non Christian marriages. This attitude formed the basis of the classic enunciation of the English law concerning polygamy by Sir James Wilde in Hyde V. Hyde<sup>14</sup> and Woodmonsee where he said;

'..... Now it is obvious that the matrimonial law of this



country is adapted to the christian marriage and is wholly inapplicable to polygamy."

The hitherto conservative judges were not prepared to hold that the polygamous marriage in like manner as the monogamous marriage confers the legal status of marriage, in other words that polygamy possessed the same "legal potential" as monogamy. This negative attitude of the judges made them reach the wrong conclusions in deciding customary law cases. For instance it was wrongly stated in the case of Momanyi Nyabari V. Omwonga Nyaboga<sup>15</sup> that childlessness was a common ground for divorce among the Africans<sup>16</sup>.

In another case<sup>17</sup> the courts had to determine the age at which no hardship can be caused if the children are separated from their natural mother. This is purely an English concept because among Africans there is always someone to care for the children.

In Re. G.M.<sup>18</sup> customary law was enforced and custody granted to the parent but only because it was consistent with English common law. The notion of importance of the welfare of the child was set aside because at common law it applies only in cases of parents inter-se or strangers inter-se and not as in this instant case where the dispute was between a parent and a stranger.

However, there were instances where customary law was applied or appears to have been understood. In unreported case<sup>19</sup> a husband petitioned for divorce on the grounds of wife's adultery. There was a child of the "union", aged two years. The Municipal Native affairs officer, a European, hearing the case concluded that the "union" had the essentials of a marriage by native law and custom and that bride price was paid in contemplation of procreation of children. The husband was given the relief sought.

In Ndorosi Saitemo V. Siteni Maiba<sup>20</sup> the customary law applicable was enforced. It was held that the applicant forfeited his rights because he failed to pay the initial bride price in full and was therefore not entitled to custody.

Under Masai customary law a husband may return his wife to her family if there are no children of the marriage and he is entitled to receive back any bride price he might have paid. This rule was enforced in the case of Mbarnoti Ole Kamoiro V. Sironga Ole Pardiyo<sup>21</sup> where the applicant brought action for custody of the children born by a wife he had returned to her family.

It was held that even if he had not received back some or all of his bride price he could not lay claim to the children.

In another Masai Case<sup>22</sup> the court ruled that although the masai law, which it applied dictated that a legal husband has rights of custody of children conceived and born to his deserting wife during an irregular marriage, the putative father of such children was entitled to recoup the maintenance monies spent on such children.

Two years later the court of Review had to decide a case<sup>23</sup> of custody in which a Gusii woman had deserted her legal husband and during that period had conceived and given birth to two children, one with unknown father and another with an unidentified lover who wished to marry her and she him. The court ruled that the legal husband had no right of custody of the child with the unidentified father. The court here refused to follow the above mentioned case of Nyaberi V. Nyaboga (supra) on the ground that the later was decided upon facts of the particular case. It stated:

"The customary law on this subject is clear and long established, namely that the children of any irregular union between the wife and a man other than the husband, as well as the children of the marriage belong to the husband of the regular union."<sup>24</sup>

The court however gave custody of the second child the woman had with the unidentified lover to the woman because she wanted to marry the lover and also because natural justice demanded that she should keep the custody of the child.

A case reflecting the application of the Luhya customary law is Timina Olenya V. Elan Keya<sup>25</sup>. The dispute was over a nine year old child born to the mother after leaving the respondent. The respondent was granted legal custody but physical custody was vested in the mother. The father (respondent) had to pay her school fees, and any expenses connected with her education and would be entitled to receive bride price paid for her when she grew up. The relevant Luhya customary law is that the husband if he had not been repaid bride price is the legal father of all female children (in some location all children) born to the wife for whom he has paid bride price regardless of whether or not he is the natural father.

From the cases discussed above it is clear that customary law of custody in the colonial era was applied by African courts. All the same the African courts were not bound to apply customary law. They were only to be

guided by native law. This left considerable room for the application of principles largely emanating from the English type courts. Furthermore the repugnancy clause in the above mentioned ordinances gave the superior courts another opportunity to exercise their influence in customary law cases.

The intergration of the courts system in Kenya in 1967 by the enactment of the judicature Act should be conceived more as involving institutional structural reform rather than one entailing the unification and generalisation of substantive laws.<sup>26</sup>

It can be conceded that judicial opinion favourable to African customary law marriages have undergone some appreciable degree of legitimisation since the famous negative opinion expressed by the later chief justice Hamilton in the 1910s.<sup>27</sup>

On the side of custody and maintenance no significant changes have been made in regard to customary law. It has been argued correctly that repugnancy abuses<sup>28</sup> provided a formal basis for the exercise by the courts of discretionary control over the application of customary law. See for instance the Kenya (Jurisdiction of courts and pending proceedings) Regulation's 1963<sup>29</sup>, which provided for the application of customary law. It repealed the 1902 and 1920 orders in council.

Judicial attitudes reflected through case law as well as legislation remain to a large extent unchanged. The only change which has taken place is that customary law has been accorded a far more inferior status than it had under colonial rule. The Judicature Act still retains the repugnancy clause in Section 3(2). The courts are not bound to apply customary law but are only to be guided by it. As a result there has been a tendency by the courts to refuse to apply customary law even where both parties to the case are subject to it or one or more of the parties is affected by it if they consider the customary law to be old fashioned and outdated. It would appear from the above section that both parliament and the judiciary still maintain the view that there are some customary laws which are repugnant to justice and morality.

Where the repugnancy clause does not apply and then customary law is applied it leads to decisions which are reached per incuriam for the judges lack of proper knowledge to the customary law in question. In either way therefore we see that most of the cases which appear before the courts concerned with customary law ends up in much confusion. From the foregoing it suffices to say that there is no laid down rule which the judges are to follow in deciding customary law cases but the decision of each particular case is left to the discretion of the

judge deciding that particular case. That is why we see cases with similar facts and under the same customary law decided differently. Though no field research was carried out it would appear from unreported case<sup>30</sup> that if disputes are resolved out of court the customary law applies. But when the disputes are resolved in courts in most instances the statute law which is deemed to be superior than customary law is applied.

The constitution which in theory at least embody the highest legal norms and standards in the state to which all laws must conform provides general recognition of customary law. However within its very article<sup>13</sup> it allows for promulgation of discriminatory laws with respect to "adoption, marriage, divorce ..... or matters of personal laws." Therefore, customary law of marriage, custody and maintenance although legally recognised as noted earlier in the discussion is made subordinate to the other systems.

CHAPTER 3

THE CUSTODY AND MAINTENANCE OF LEGITIMATE CHILDREN:

Legitimacy is taken to contemplate a child who is born of a father and mother who are lawful married<sup>1</sup> at the time when the child is born. An illegitimate child therefore is one born out of lawful wedlock.

The statute law of Kenya as noted elsewhere began with the East African order in council 1897, which permitted the application of different laws into the country.<sup>2</sup> It was under the umbrella of this order that the common law concept of legitimacy was received into the laws of Kenya.<sup>3</sup> The law first received was that old English law but due to the changes it was necessary for the Kenya Government to accommodate these changes in its own law. Therefore in 1930 the legislative Council enacted the legitimacy Act of Kenya.<sup>4</sup> The Act is basically one of procedure and to determine the substantive rules relating to legitimacy one has to turn to the common law decision of decided cases for clarification of law.

Under common law the sanctity of marriage,<sup>5</sup> which stems from the Christian doctrines of that age was looked upon with honour. The influence of those teachings have to a large extent been the basis upon which the laws, the morals, and values of the society here developed their character and it would be correct for us to say that it is from those Christian doctrines that the concepts of legitimacy and illegitimacy have evolved. One of the teachings of the Christian theology was the disapproval of sexual intercourse between a married person and one who was not his or her spouse or between unmarried persons.

Although the state could not bar illicit sexual intercourse it provided for its discouragement by giving it legal significance in the form of rules relating to legitimacy and illegitimacy and also condemned illegitimate children.<sup>6</sup>

The position of the issue born out of lawful wedlock was such that not even the subsequent of its parents could render it *ligitimate*. This state of affairs was infant contrary to most systems of law including scottish law, Roman law and indeed the laws of the church.<sup>7</sup>

The legitimacy Act of 1926, however, ended the controversy between the church and the state by providing that when the parents of a illegitimate child, subsequently married, that marriage rendered that child legitimate from the date of the marriage.<sup>8</sup> In the case however, of a child born and its father or mother being married to a third person, there was a bar as to its legitimisation when its parents subsequently married. But by section 2(1) of the legitimacy Act 1959, the above bar of legitimisation was removed.<sup>9</sup>

By mid 20th century in England the support of an illegitimate child was primarily the duty of the mother, as she was usually the child's legal custodian. With regard to maintenance the position of illegitimate child had greatly improved under the bastardy law of England. Again the English law has improved the position of the illegitimate with regards to rights in succession.

At common law from which our law of custody derives, the right to custody of a legitimate child was vested in the father and was almost absolute. His rights were superior to that of the mother and it was only in the exceptional cases where there was the risk of serious physical harm or moral harm due to the father's cruelty or to gross corruption of the child resulting from proffigacy that the father's rights could be forfeited.<sup>10</sup>

So far we have been considering the legal position of a legitimate child with regard to custody and maintenance. The position of the illegitimate child, however, raises certain problems.

Technically speaking a bastard under common law was considered "filfues Nullius" or a son of nobody. It thus meant under the law a bastard had no legal parents as opposed to a child born in lawful wedlock who has legal parents. If this be the case, who then has control of illegitimate children? Initially there was no legal liability on the part of anyone to provide maintenance for illegitimate children and mothers of such children were only "forced by natural instincts to maintain their children," although they were not therefore bound to maintain them in law.<sup>11</sup>

The law during the last century had tried considerably to unite the gap and legal disabilities attached to a bastard. This reflects similar change in the illegitimate child's position in society generally. Since the changes brought about by the 1926 and 1959 legitimacy Acts which have been incorporated in the legitimacy Act of Kenya,<sup>12</sup> the custody proceedings has the same rights as the father of a legitimate child, and the same rights as the mother of an illegitimate child. This was said to be the effect of section 3 of the legitimacy Act of 1959.<sup>13</sup> It extended section 5 of the Guardianship of Infants Act of 1856 and section 16 of the Administration of Justice Act of 1928, to legitimate children.

Therefore today the father of an illegitimate child may apply under the Guardianship of Infants Act<sup>14</sup> to be awarded custody of his illegitimate children.

The effect of this legitimation was that parliament was trying to remedy a situation where the father of an illegitimate had failed to provide his child with normal family life could now at least claim custody instead of totally rejected his child.

As with the case of legitimate child where the father applied to court to be awarded the custody of his child, the overriding principle to be considered before awarding custody is the welfare of the child,<sup>15</sup> since such children come under the provisions of the Guardianship of Infants Act.<sup>16</sup>

Once the putative father has been awarded custody, he is treated as the lawful father of such child or children. We should also note that before he is granted custody he must first establish paternity. There is however a loophole in the Act. If the father is unable to establish paternity or where the mother denies the putative fathers claims of paternity he will not be awarded custody and there is no way in which such a father may uphold his claims in the face of the mother's denial.<sup>17</sup>

The major defect with regard to the maintenance and custody of illegitimate children is the fact that if the putative father makes no claims as to custody of his illegitimate children, generally without affiliation law, there is no legal liability on the part of any person to maintain such child or children.

Prior to 1969, there was the Affiliation Act in Kenya. The Affiliation Bill was first introduced in Kenya Parliament in 1959 following the recommendation made by a Select Committee which was charged with finding and compiling a report on problems of child welfare in Kenya.

The thrust of the Bill was to cover both maintenance and custody of illegitimate children. Therefore from the onset the Bill was to follow the English law patterns in the Bastardy Act. The effect of the Bill was to provide for the upbringing and Education of illegitimate children. The important thing was that contribution towards the child's maintenance was to be made by both parties responsible for the child's birth.



Introduction of the Bill meant at least tapping the pockets of the putative father instead of leaving all the responsibilities on the mother. This turned the status of a mother of an illegitimate child to that of a trustee for the child.

The operation of this legislation which went against the Kenyan Africans attitude towards this subject caused great anger and therefore the Act was repealed in 1969. Since the repeal of the Act<sup>19</sup> it now means that the mother of an illegitimate child is left with the difficult task of bringing up her child without the aid of the responsible father who contributed to the birth of the child. This is certainly unfair state of law and I hope it will be remedied in future.

Recently blood tests have been carried out in order to solve the problem of illegitimacy. In the case of a presumption of legitimacy it cannot be rebutted in the absence of evidence on blood test. The blood test is not a conclusive prove of legitimacy and this has led to limitation for the admissibility of blood test evidence to cases where there is independently of the blood test a chance of the presumptions being rebutted. However, this is a very limited exercise and would only be ordered whenever it is in the best interest of the child."<sup>20</sup>

#### LEGITIMACY UNDER CUSTOMARY LAW

The question is whether the term legitimacy under statute law connotes the same meaning under customary law. As already noted under English law a legitimate child is one born of a lawful union of two people. If this be the true view then the Christian definition of marriage is inapplicable to marriages contracted under customary law.

Many judges as well as writers have argued that marriage under customary law is not a voluntary union especially on the part of the bride.

Secondary<sup>1</sup> it has further been argued that marriage contracted under customary law are not for life and lastly since most marriages are potentially polygamous it would mean that any children born of such unions are illegitimate.

The judicial attitude on this delicate issue is explicit, as is evident with an examination of various court decisions such term as "wife purchase"<sup>21</sup> have been used to describe the union entered into by Africans. It is regrettable that the notion adopted by so many has been so biased, merely because an African marriage differs in certain material aspects from an European or Christian definition of marriage.

Marriage is a universal institution despite the fact that under different cultures the union takes various forms.

We may note at this point that an attempt has been made to remedy the existing situation.<sup>22</sup> It is thus a truism that English law has attempted to move from the strict position it occupied (that the only valid marriage is the Christian type union) to a more liberal view of the recognition of the potentially polygamous unions for certain purposes.<sup>23</sup> 19.

As a general rule under common law a valid marriage in the place it is contracted, must be recognised in any other place. The right created by the common law must be extended to all forms of marriage, even though the status given to marriage as defined in Hyde V. Hyde need not to given to it.

Writing on legitimacy under customary law, cotran and Rubin have remarked; "legitimacy is a contraversial topic among writers on customary law. There is a considerable debate as to whether there is any place in African law for the all.

It has frequently been argued that strictly speaking no child is considered illegitimate since its birth in or out of wedlock is irrelevant to its status in the community or its legal rights and duties. Such matters are determined by the acceptance of a child as a member of family and the only question that arises in customary law is in which family it adheres to, that of its father or its maternal grandfather. This view seems to be widely accepted today....."24

Contran and Rubin were recording their observation of legitimacy in African communities in general. The issue which is more relevant to this paper is whether Contran and Rubin remarks are true for customary law in Kenya.

From our finding we can then formulate a general principle and test it against observation of the learned authors.

"In African societies the birth of a child is a process which begins long before the child's arrival in this world..... Nature brings the child into the world but the society creates the child into a social being, a corporate person..... so that a child cannot exclusively be "my child" but only our child."25

As is apparent from the above quotation children under customary law hold a special position, both in the lives of the parents and in the society at large and no child can be regarded as "filius nullius" as under common law. We may correctly say that no child whether legitimate or illegitimate can be without a person to care and maintain it.

Here we may therefore say that although under customary law there is recognition of a legitimate child, it would be incorrect for us to state that there is a recognition of an illegitimate child as defined under statute law. Strictly speaking there are no illegitimate children Kikuyu customary law where a child is born of single woman,<sup>26</sup> the child is taken to belong to the woman's parents and is treated and regarded as any other child of that family.<sup>27</sup>

This explains why it is the father and not the girl who brings an action for pregnancy compensation. It must be recognised that procreation plays a very important role in the lives of the African<sup>28</sup> and the desire for a man to continue in existence after he has physically dies is so great, that no child is classed as being in a social category from the rest merely because of the issue whether or not he was born in lawful wedlock. This explains why in African societies there exists such practices as polygamy, widow inheritance, levirate and sororate unions.

Thus under Kikuyu customary law generally a child born out of lawful wedlock belongs to the maternal grandfather's family. The child enjoys full status that accrues to children born during the lawful wedlock. If the grandfather has no sons then such a child if he is a boy is specifically to succeed his maternal grandfather. If unmarried girl with a child wants to marry, she either leaves the child with her parents or goes with the child to her husband. In each case the child becomes a full member of the family it joins for all intents and purposes. So this is the fate of children born in Kikuyu traditional society. Clearly notions of legitimacy and illegitimacy are unknown in this society. Under the Luhya customary law and particularly those of the Maragoli sub-tribe, a child who is born in lawful wedlock, that is one who under English law would be considered as legitimate is accorded all the rights and privileges that the Maragoli confer upon such children.

A child who on the other hand is born out of lawful wedlock for instance when unmarried girl is made pregnant by unmarried man, that child will either belong to the maternal grandfather family or to the man's family. The child will belong to the maternal grandfather's family if the mother does not subsequently marry the father of the child, or if she marries another man but leaves the child with her family. If however, she marries another man and carries the child with her, the child will assume membership of the husband's family and shall inherit from there. Alternatively if the man who procreated the girl compensates the girl's father by paying several heads of cattle, he will be given the child and it will belong to his family. This point is illustrated by the case of Wande V. Nhola<sup>29</sup> where it was held that Nhola had no right to keep the cattle and therefore that he must return them to his illegitimate daughter.

Here we should note that in all cases then a child who is born out of lawful wedlock will be grafted to a certain family. Once a child receives membership in a family he is treated as a full member of that family and enjoys all rights and privileges and is subject to all duties which attend these children in the family who were born during the subsistence of valid marriage. Normally baby girls who are born out of lawful wedlock will invariably belong to the maternal grandfather's family or the putative father's family depending on circumstances already mentioned.

It should be noted this brief survey that it is clear notions of legitimacy and illegitimacy as understood in English law do not exist Maragoli customary law. What is important there is the family membership of the child. The Maragoli regard children as God's blessing and therefore do not subject them to any social or legal incapacities. In fact the more children that a family has the more important that family is in society

and this desire precluded Maragoli from discriminating legitimate from illegitimate children.

In the Luo customary law, it appears that the concept of legitimacy and illegitimacy as understood in English law existed. A child who was born of unmarried girl was referred to as "Kimwira" which means something akin to an illegitimate child. Such a person had nobody whom to inherit and was looked down upon by the society and regarded with contempt. A "Kimwira" was always under the custody of the mother. Even if "Kimwira" stayed with his maternal grandfather's family he still was regarded as a stranger and treated differently from the rest of the members of the family. A "Kimwira" was usually rejected by the natural father and that is why society rejected him in turn. If a "Kimwira" was a girl then on her marriage the dowry went to her maternal grandfather.<sup>30</sup>

On the other hand a child born during the subsistence of a valid marriage enjoyed all the rights and privileges such as those accruing to children born during the existence of a valid marriage in Luhya or Kikuyu societies.

A child who was born of a married woman from an adulterous union was regarded as the lawful child of that couple. He was not a "Kimwira". Here the paramour paid compensation to the husband and this act gave the status of legitimacy to that child.

From the proceeding survey it can seem that under the Luo customary law the concepts of legitimacy and illegitimacy existed as are understood under English law. Perhaps the only significant difference between the two systems of law arise when considering the issues of adulterous union. In English law such issues are illegitimate whereas in Luo customary law they are legitimate.

Having looked at legitimacy laws in the three main tribes of Kenya we have to determine whether or not the statement made by contran and Rubin that the concepts of legitimacy do not exist in African customary law hold good. From the above observation it should be emphasised that among the majority of tribes in Kenya this is an exception rather than the rule.

The writer therefore joins the contran and Rubin camp in declaring that generally speaking the concepts of legitimacy and illegitimacy do not exist in customary law in Kenya.

It is the child's family membership that is vital here. Presumption of legitimacy appears not to exist in customary law. There is no need of such presumption as the contractual equivalent of legitimacy and illegitimacy as earlier on declared does not exist in customary law.

CHAPTER 4

THE LAW OF CUSTODY TODAY:

Disputes over custody of children usually originate from divorce, spereation maintenance and sometimes from disputes over illegitimate children. As has been shown earlier even cases which should be decided in accordance, with customary law and practice are decided by the court in accordance with English law. In the unreported case of Margaret Ngolo Obara V. Joel Obara<sup>1</sup> although the parties to the dispute had contracted Marriage under customary law and conducted their affairs likewise the magistrate hearing the case approached at as if the parties had married under the African Christian Marriage and Divorce Act. The effect of Marriage unde statute is that the custody is also decided statutorily except in instances where as in Omwoyo V. Anginda<sup>2</sup> the parties have changed their family law and are conducting their affairs in accordance with customary law.

It is evident that many cases involving the question of custody arise from application for maintenace. But even the Guardianship of Infants Act is always applied regardless of whether or not the parties are governed by the statute law. A case in point is that of Mary Wambui Evanson V. Evanson Wambaya<sup>3</sup> where the applicant a mother wished to have custody of her children re-vested in her. She contended that the children were not fed or clothed properly and would be much happier with her. It was held relying on the Guardianship of Infants Act, that in matters of the welfare of the children it was desirable to grant her the application.

The recent case of Karuru V. Njeri<sup>4</sup> clearly illustrates the conflict that arises in Kenyan la between the customary law and the statute law relating to custody of children.



The rule under most of the customary laws of Kenya is that the husband gets the custody of the children on divorce, although there are a few customary laws (including the Kikuyu and the Kamba) which provide that the father only gets custody if he does not receive back the dowry which he had paid on marriage. If he does the mother has custody of the children. The question of the interests of the children is not taken into account under customary law and this of course is the paramount consideration under the written law.

Karuru V. Njeri was a second appeal by a husband from an order of Molo African Court which awarded custody of two children of the four of the marriage to the wife on divorce. The court called evidence of Kikuyu customary law and found that according to Kikuyu custom on divorce the children go to the father unless the father demands the return of the bride price in which case they go to the mother provided that the bride price is returned in full.

The court found as a matter of fact that the father had not demanded the return of the bride price and consequently under Kikuyu customary law. Custody of all children should have been granted to the father. The court went on to assert quite surprisingly that this customary law which denied women any claim of custody of the children on return of the bride price was not contrary to 5.3 (2) of the Judicature Act which gave authority for the use of natural law and Justice to override or modify customary law. It was correctly noted that the "paramount consideration in customary matters is the welfare of the child." But then the court stuck to the rigid customary law even though it noted that this would cause "Emotional disturbance" to the children as well as possible Interruption of their Education."

Because of apparent lack of reasonable homework and the absence of legal representatives the court declared not only that the stated customary law was not repugnant to justice but that it was not inconsistent with any written law. The court however went even further and declared with rather unfortunate disregard for personal freedom and dignity of the woman that she did have a remedy if she chooses. She is free to accept the appellants offer to take her back." Perhaps as his slave.

There is one case Wambwa V. Okumu<sup>5</sup> decided as recently as 1970 where the Guardianship of Infants Act prevailed over both the Magistrates Courts Act and the constitution. The facts briefly were these.

There was dispute over custody of an illegitimate four year old daughter. Originally custody of the child had been vested in her putative father in accordance with customary law practice. On appeal it was held that customary law did not take the child's welfare into account since a child of that age was best left in the care of the mother. The court went further to declare that customary law was not only inconsistent with S.17 of the Guardianship of Infants Act but was inconsistent with section 3(2) of the Judicature Act and lastly that "In the absence of Exceptional circumstances the welfare of the female aged four years demands that the infants be looked after by its mother rather than its putative father."

The above case was decided per incuriam because the holding contradicts the provisions of the constitution specially sections 78(1) and 84(4) (b). The true interpretation of the section in connection with family law is that there is an essential link between ones religion and ones family law. If that is the case and the constitution makes provision for the practice and observance of ones belief then the application of customary law is protected by the constitution just as the other laws are and for this reason all are at par.

It is quite clear from the case that constitution has been overlooked and the true picture is that statute law is still pre-eminent and that should there be any law in conflict with statute law, the latter prevails. No attempt has been made to resolve the conflict between Guardianship of Infants Act and the Magistrates Courts Act. The latter indicates by section 2(e) that custody is recognised as a claim under customary law and is therefore applicable.

In the case of Karuru V. Karuru<sup>7</sup> the Kenya High Court and the East African Court of Appeal applied the English law of custody to Africans.

In Krishan V. Kumari<sup>9</sup> it was observed by the Court that English law of custody apply to the Hindu in Kenya.

The position today would appear that if there is any conflict between statute law of custody and customary law the former would prevail. This is evident from the case of Nzoka V. Mwikari d/o Mule<sup>7</sup> where the high Court (per Justice Chanan Singh rejected the stated Kamba customary law which declares that on divorce, custody of children of a marriage is at the wishes of the husband." This was found to be in conflict with the Guardianship of Infants Act, section 6, 7 and 17. The Court stated that these sections were unambiguous and that "an unambiguous statutory provisions which covers circumstances of a case always overrides custody." In this case the issue was really not of custody of the children but rather for the maintenance for the wife and the children of the dissolved marriage.

The court rejected the wife's claim for maintenance for herself while accepting that of the children.

In Mohamed V. Yasmin<sup>11</sup> a marriage agreement between the wife and the husband stipulated that in the event of dispute arising with regard to custody of the issue of the marriage, the Shia Imari Ismailia provincial was to be the forum for the decision.

The Court rejected this and declared that matters concerning custody cannot properly be subject of arbitration under the Arbitration Act. The Court went further and said that "indeed any other body of persons can act between the father and the mother and with their consent endeavour to arrive at an amicable settlement of the dispute," but this cannot exclude the Jurisdiction of the High Court. The High Court may give full considerations to any views or principles or any religious body but must act within section 17 of the Guardianship of Infants Act which makes the first and paramount consideration the welfare of the child.

In Taabu Kazungu V. Kalma<sup>12</sup> the High Court in rejecting a claim made by the father that under Giriama customary law, the father alone is entitled to custody of the children except the very young ones - specifically ruled that the said customary law"..... is repugnant to justice and morality and inconsistent with the written law contained in the Guardianship of Infants Act within the meaning of section 3(2) of the Judicature Act and should not be enforced."

It also observed that "it is the generally accepted law that the interests and welfare of children are the paramount consideration and that it is natural for a young child, particularly a girl, to remain with her mother during the formative years."

Even today the pre-eminence of statute law is still evident and customary law is still treated as inferior. Moreover English authorities are still followed. This is evident from the case of M. V.M & Another<sup>13</sup> decided as recently as 1971 where the husband domiciled in Kenya petitioned for divorce and claimed custody of the children of the marriage.

Custody of the children was given to the petitioner, it was held among other things that the Jurisdiction of the Court under section 3 of the Matrimonia causes Act was to be

exercised in accordance with the law applied in Matrimonial proceedings in the High Court of Justice in England, subject to the provisions of the Matrimonial causes Act, that the African Christian Marriage and Divorce Act was silent, and that in these circumstances English authorities were more than persuasive. From the holding it is apparent that English law is the residual law. In another more recent case of Barbara Jean Sicken V. David Michael Sicken<sup>14</sup> the issue was whether custody of a child of tender years (3 years and 5 months) should be vested with the mother. In dealing with the point Court relied on "exceptional circumstances" principles and found that in this case there were exceptional circumstances justifying departure from this general rule. The Court held:-

- (a) That the mother's station in life was constryary to the child's welfare;
- (b) The mother was living with the co-respondent and her future plans into that direction were unknown and;
- (c) That the Infants would be disturbed, if she were removed from her present school and the matrimonia home. Custody was in these circumstances granted to the father and the mother was allowed access during the school holidays.

From the foregoing it suffices to say that both in the legislature and judicial opinion there is a definate bias towards making the welfare and interest of children factors of paramount consideration in making custody and maintenance orders, thus ignoring the customary law in question, although the constitution of Kenya Act number 5 of 1969 provides that the four system of family law should operate on an equal level.

The position today therefore would appear that if there is any conflict between statute law of custody and customary law of custody the former would prevail.

CONCLUSION:

The Kenyan society as the commission for the law of marriage and Divorce commented Was and is still multiracial as well as multi-religions comprising mainly of Africans, Asians, Arabs and Europeans. The religions common to most Kenyans are Christinity Islam Hindu and traditional African religions. Like other developing countries Kenya has been subject changes which have effected all spheres of life.

Urbanisation has brought its own special problems. One result of the physical mobility which has in turn given rise to increased urbanisation is intermarriage between Africans and Europeans. For this reason it becomes in-appropriate to apply customary laws based on traditions of rural life and family authority in its entirety to situations in the cities also. There has taken place tremendous changes in the African cultural religions, social and economic life, with their attendant problems. For instance in most bride-price transactions money has replaced the traditional live-stock.

Polygamy as an institution is on the decline especially in the Urban areas but concubinage is on the increase.<sup>17</sup> Statutory provisions which can be used to eliminate polygamy are rarely invoked by the Africans. A possible explanation for this is that the provisions are unsuitable to Africans. Sections 37 of the marriage Act Cap 153 of the laws of Kenya indicate that marriage under the Act is monogamous.<sup>18</sup> But it is not uncommon for African men married under the Act to marry other wives traditionally.

Their first wives usually petition for maintenance but there are a few cases where the wives petition for divorce on the grounds of adultery. It would appear therefore that the Africans still regard polygamy as an intergral part of their custom.

The past reforms in the law of custody and maintenance and other areas followed similar or parallel developments in England.<sup>19</sup> Often such reforms as were carried out were introduced too late for instance, there was no clear indication of the minimum age of marriage in Kenya until 1961 when ordinance number 14 of 1961 section 3 prescribed 16 years as the minimum age required. Past reforms has also tended to ignore customary laws which were not treated as an intergral part of the laws of this country.

From the the foregoing it is evident that the present situation is undesirable and badly in need of change. Some proposals may be put forward for dealing with the problems. The first is the integration of the various laws into one system of law.<sup>20</sup> This is perfectly possible but there are draw backs. This is due to the fact that as noted earlier in the discussion Kenya is a multi-racial and multi-religious country and therefore these different races with different religions have different concepts regarding marriage. To give one example Africans rule of exogamy differ from those of statute-law in that the Africans recognise a wider range of prohibited degrees.<sup>21</sup> Again as noted in the discussion these different communities have different rules in connection with custody and maintenance of children.

The dual nature of the Court system though discriminatory, helped to avoid conflicts in many cases because those on the bench were familiar with the relevant customary law.

However intergration can be achieved only by careful and thorough investigation of the customs and behaviour of the present society and the law which governs them. The object of any useful reform must be to preserve as far as possible the existing customs linked to the religions of the different communities in so far as they are genuinely observed and enforced. It must be noted that any reforms which ignore the present law is bound to produce a situation no better than the present one. Integration would be successful only if it sought to eliminate the present uncertainty confusion and conflict in the various laws.

Here I should not forget to say that the process can only be effected gradually for it to be successful because it is quite natural for people to cling to their customs and religions in which lie the foundations of family law.

The other better alternative which presents fewer problems is to retain the separate laws governing the various communities but to find ways of enforcing them.

The provisions of the constitution which are just observed in theory should be put into practice. This will therefore call for strict adherence to sections 78(1) and 82(4) of the constitution.<sup>22</sup> The four systems of family should be treated separately but equal. From the discussion we have noted that there are very many occasions where the provisions of the constitution have been ignored and general Acts followed. What needs to change is the judicial and legislative attitude especially in application of customary law. The attitude that there are some customary laws which are still repugnant to justice and morality should be done away with. The repugnancy clauses in the Judicature Act should be abrogated so that the application of customary law can be freely applied like any other system of law.



The composition of the judiciary should be made local or if not so judges conversant with customary law rules should be recruited so that justice can be done to those Africans who are governed by customary law. Provisions like section 35(1) of the marriage Act which permits conversion of customary marriages to statutory marriages should be dealt away with. This is because such provisions make the customary subordinate to the other systems. If the above recommendations are incorporated they would prevent the judges from being biased when applying customary law. If customary law were given a chance that is if the Courts applied it then it could develop in response to change. The discriminatory provisions in the constitution in respect to marriage, adoption, divorce..... or matters of personal laws should be abrogated so that all laws may be treated equally.

FOOTNOTES : IN RODUCTION

1. Cap 144 of the Laws of Kenya
2. Rodney W. in How Europe underdeveloped Africa Pg. 45 defines culture as " ..... a total way of life. It embraces what people ate and what they wore, the way they walked, and the way they talked, the manner in which they treated death and greeted new - born."  
Read J. S. - "Family Law in Kenya" P. 249
3. SS. 19, 21 Marriage Act: Cap 150 laws of Kenya
4. Hyde V. Hyde
5. Mbiti, J.S. - African Religious Philosophy pg. 133
6. Kamau G. - "Good intentions, Bad marriage laws" P. 4
7. Chesoni S.R. in Divorce and succession in tribal customary law  
Law." P. 165
8. (1917) 7 E.A.L.R. 14
9. (1962) 2 All GR 875
10. (1958) 6 court of Review law reports P. 4
11. Read, J. Restatement of African Law in Kenya P. 19
12. Guardianship of infants Act Cap 144 laws of Kenya Section 17
13. Marriage Act S. 35(1) and 11(d) (Cap 153 laws of Kenya)
14. P.V. Ankeyo (1917) 7 E.A.L.R. 14
15. The constitution of Kenya 1969 Article 82 (4) (c)
16. (1967) E.A. 639
17. Case V. Ruguru (1970) E.A. 55

## CHAPTER 1

1. Guardianship of minors Act 1971, Section 3
2. Many Acts of parliament draw a similar distinction, e.g the Adoption Act 1958. Section 4 of the children Act 1975, Section 12 require the consent of each parent or guardian to the making of an Adoption order.
3. 1851 Beau. 341 at P. 345
4. Bromley Family Law P. 385
5. Guardianship of Minors Act (1971) Section 4. The Act states that they may appoint "any person to be guardian" but Section 3 assumes that there may be more than so appointed. If the court appoints another Act as guardian with the surviving parent under Section 3 that person shall continue to act after the death of surviving parent together with any testamentary guardians appointed by the latter Section 4 (6).
6. Sleeman V. Wilson (1871) L.R 13 Eq 36 Bromley Family Law P.385
7. Now repeated and re-enacted in the marriage Act 1949, sched 2
8. Wills Act 1837 Section 11 Family Law Reform Act 1969 Section 3(1)
9. Guardianship of Minors Act 1971) Section 3
10. Ibid S. 5(1) A person can have parental rights only if he has the some legal rights as a parent and consequently they must have been vested in him e.g by a court order.
11. Per Chitty J. in Re Nevin (1891) 2 ch. 299 at Page 303. An appellate court will not interfere with the discretion of the judge at first instance except for very strong reasons.
12. (1970) 1 All ER 344 (C.A)
13. See Section 17 children and young persons Act of 1933.
14. Hewer V. Bryant (1970) 1 Q.B. 357 or (1969) 3 All ER 578 385 (C.A)
15. R V. Greenwill (1836) 4 ad 2E 624
16. For historical background of parents rights to custody see the judgement of House of lords in J.V.C. (1970) A.C 668 or 1969 A All ER Page 778 see also Bromleys family law 4th Ed chapter 11.

17. Equity recognised the father's right to custody as oppose to that of the mother but the welfare of the child was of paramount consideration, therefore under equity a father could be deprived of the right to custody if the child's interest were at stake.
18. See Lugard F. J. D. J. The Dual Mandate in British Tropical at Page 10. Wolff R. D.J. Economics of colonialism chapters 1 and 7 and Sawyerr, A. F. G. "Customary Law in the High Court of Tanzania" generally.
19. See Hoberson, J.W.J. Nation Building in Kenya; the role of land Reform Page 7 where he says "British interest in East Africa was part of a global stragy designed to protect British Interests in India
20. Mungean G. H. in British kule in Kenya 1895 - 1912 at Page 7 discuss British Interest in East Africa at some length and says "Although the humanitarian factor of opposition to slave trade played its part the real key to the change in policy was to be found in Britains strategic interests in the area of the upper Nile."
21. Read J. S. Page 273 confirms this proposition "early in the period of colonial rule statutes were enacted introducing to Kenya a system of Marriage and divorce closely based upon the system then in force in England."
22. See R.V. De Mcneville (1804) 5 east 221
23. See Johnson E.l Family Law page 1
24. See Bromleys Family Law pp 268 - 270
25. In G.S. Krishan V. Krishan Kumari 28 K.L.R. (1955) Page 32 note 3 reads:-  
"Neither the custody of children Act 1891 nor the Guardianship of infants Acts 1868 and 1925 are statutes of general application and non have so far been applied to Kenya."
26. Ghai Y.P. and McAuslan, J.P.W.B Public Law and Political Change in Kenya preface VI.
27. Supra 125
28. There were two classes of native courts established by Article 2 of Native Courts Regulations No. 15 of 1897 (a) Native Courts presided by a European Officer (b) Native Courts presided by a native authority.

29. See page (iii) I.K.L.R. 1897 - 1905
30. To this end article 3 of the Natives Courts Regulations of 1897 order in council read this:-  
"The native courts mentioned in article 2 shall as far as practicable be guided by Indian civil procedure codes ..... and throughout the protectorate guide by and have regard to any native laws and customs not opposed to natural morality and humanity."
31. Seidman, R.R. J. "Reception of English Law in Africa" 2 Eastern Africa Law Review page 49 where he says "The rule early developed that an Englishman carries with him English Law and liberties into any unoccupied country where he settles so far as are applicable to all circumstances."
32. Sorrenson, M.P.K., The Origins of European Settlement in Kenya Page 49.
33. (1893) 2 Q.B 232, Bromley's Family Law page 264
34. 10 K.L.R. 70
35. Art.2 of the East African order council 1911 read in part  
"..... provided always that the said common law doctrines of equity and statutes of general application shall be in force in the protectorate, so far as only the circumstances of the protectorate and its inhabitants and the limits of His Majesty's Jurisdiction permit and subject to such qualifications as local circumstances render necessary."
36. See Vol II 1925 legislative council debates page 105
37. (1951) page 184 (C.A.) discussed in Bramley's Family Law page 279
38. 20 (1) K.L.R. 19
39. See Vol 79 1959 legislative council debates page 421
40. Seidman, R.K. op, cit page 58
41. Goldstein, J, Et. at Beyond the Best Interests of the child page 3
42. Re (b) (5) An (infant) 1968 ch. 204
43. Mwanga V. Jiwani (1964) E.A. 171 John S. Mbiti, African Religions and Philosophy Heinemann 1969 chapter 9
44. (1968) H.C.D. 250
45. (1953) 1 C.O.R.U.R page 8
46. High court of Kenya at Nairobi, civil case No. 1280 of 1970 unreported.
47. Civil Appeal No, 5 1977 (Highcourt) unreported

13. Polygamy as a social and legal institution in Kenya vol 10 E.A.L.J. page 63
14. (1866) 1P & D 130
15. Court of Review Law Reports No. 5 of 1953
16. Among the masais' it is true that one can divorce one's wife on the ground of her inability to bear children see Mbarnati Ole Kamoiro V. Sironga Ole Pardiyo. Court of Review Law Reports application No. 4 of 1961.
17. Rubin, N.N and Cotran E, Readings in African Law Page 243
18. (1957) E.A.L.R 714
19. Criminal appeal No. 4/41 Phillips report op cit page 297
20. See court of Review Law Reports No. 6 of 1956
21. Application No.4 of 1961
22. (1955) 3 C.O.R.L.R. Nyandiko V. Kerubo Matanva
23. See footnotes
24. Court of Review law reports application No.6 of 1961
25. See footnotes (Judicature Act of 1967)
26. C.O.R.L.R. No. 10 of 1961
27. See footnotes No. 14 of the introduction
28. See 1902 East africa Order in Council Article 20. The Kenya colony order in council pending proceedings regulations, 1907 section 3(2)
29. See footnotes No. 28
30. Maintenance cause No. 3 of 1973 Kisumu High Court.
31. See footnotes.

### CHAPTER 3

1. Hyde V. Hyde (1866) L.R. 1p 2 D s 130
2. The East Africa order in council S. 20 applied. "The substance of common law doctrines of equity and the statutes of general application ..... " it also provided in all cases civil and criminal every shall be guided by native law ....."  
The place and future of customary law in East Africa. East Africa law today at Page 72.

3. The legitimacy Act (cap 145 laws of Kenya)
4. The Legitimacy Act (cap 145 laws of Kenya)
5. Marriage is defined "..... as understood in christendoom  
....., as the ..... se Hyde V. Hyde (1866)  
L.R. 1P 2D s130, 133 Bromley's family law 4th Edition page 12
6. Encyclopaedia Britannica vol 3 at page 58
7. Encyclopaedia Britannica vol 13 at pafe 879
8. The legitimacy Act (cap 145 of the laws of Kenya)
9. Section 1(2) provided that where a child is born when either mother  
or father is married to a third person such a child can be  
legitimated by the subsequent marriage of its parents .
10. R.V. Greenwill (1836) 4 and 2E 624
11. Affiliation law in Kenya p.1 Sia Waruhiu.
12. Cap 145 laws of Kenya
13. See Re C.T (an infant) (1957) ch. 48
14. Section 7(1) Guardianship of infants Act
15. Section 18 Guardianship of infants Act
16. Supra footnote 15
17. See (1969) C.I.J. P. 37 where the father was given access to his  
wife's illegitimate children by J.C Hall
18. Illegitimate children rights abrogated, problems leading to the appeal  
of the repaeal. How far were they justified.
19. The Affiliation Act repealed by Act No. 11 of 1969. The  
Affiliation (repeal) Bill 1969
20. Proof of legitimacy; Blood test evidence vol 33 M.L.K. 202,  
Jeppe C.
21. R V. Amkeyo (1917) 7 E.A.L.R. 14
22. "When is wife nto a wife" Journal of Denning Law society Vol 2.  
1964 Read J.
23. Baindaut V. Bindail (1946) Page 67 see also serinvason V.  
Serinivason (1946). These authorities decided a polygmous  
union consituted a bar to a subsequent monogamous marriage.
24. See Cotran C. and Rubin; Restatement of Africa Law page 25.
25. Mbiti J. S. African Religions and Philosophy Heinemann,  
London (1969) page 110
26. The Affiliation Law in Kikuyuland (1966) + Jornal od Denning Law  
society page 242, 64 Mindc D.G

27. Mbiti, J.S African Religion and philosophy.
28. Jomo Kenyatta: Facing Mount Kenya socker and Warburg, London (1968) page 5
29. Cotran E. and Rubin; Restatement of African Law.
30. See footnote 29

CHAPTER 4

1. Maintenance cause No. 1/73 Kisumu High Court Registry.
2. 1958 6 court of Review Law Reports page 4
3. K.H.C.D. 49/73
4. (1968) E.A.L.R.
5. (1970) E.A.L.R. 578
6. See A G. V. Reid op cit and Omwonyo V. Anginde op cit
7. (1975) E.A 18
8. K.H.C.D. No. 69/70
9. 28 K.L.R. 1955 page 32
10. (1971) K.H.C.D. 79
11. (1973) EA 533 (C.A.)
12. (1977) K.H.C.D. 77
13. (1971) K.J.C.D. 77
14. The commission was set up in 1967 and one of the major obstacles that faced it was the religious and social pluridism in Kenya.
16. See Migot - Adhde S.E's article "some sociological aspects of family in Kenya genrally.
17. Mbiti, J.S op at page 226
18. S. 50 of the marriage Act makes begany a criminal offence, it reads:-  
"Whoever having contracted a marriage under this Act, during the continuance of such marriage contracts marriage accordance tih native law and custom shall be guilty of an offence and exceeding fice years"
19. Most of the recommendations of the commission of the law of Marriage and Divorce reflected English Law. For discussion see chapter 2 of the dissertation.



20. An attempt was made by the above commission but was not successful.
21. For Africans those within prohibited degrees of marriage often include clans or villages
22. See chapter 2 of the dissertation.

BIBLIOGRAPHY

1. ROONEY, W. How Europe underdeveloped Africa.  
(Tanzania Publishing House, Dar-es-Salaam 1972).
2. WOLFF, R. D. Britain and Kenya 1870 - 1930:  
The Economics of Colonialism  
(TransAfrica Pub.; Nairobi 1974)
3. SORRENSEN, M.P.K. Origin's of European Settlement  
In Kenya. (Oxford university press,  
Nairobi 1968).
4. SEIDMON, R.R. "Reception of African Law in Colonial  
Africa." E.A.L.R. Vol.2 (1969).
5. SAWYERR, A. G. F. "Customary Law in High Court of  
Tanzania E.A.L.R. Vol.6. (1973).
6. RUBIN, N.N. & CONTRAN, E. Readings in Africa Law  
(Vol.II Cass & Co. Ltd.;  
London, 1970).
7. PEED, J. S. "Family Law in Kenya" (Memogrephed  
Article).
8. PHILLIPS, A. Report on Native Tribunals.
9. MUNGEAN, G.H. British rule in Kenya 1895-1912  
(Clarendon, pr., Oxford, 1968).
10. MIGOT - ADHOLA, S.E. "Some Sociological aspects of  
Family Law in Kenya" I.D.S. NBI.
11. MBITI, J. S. African Religions and Philosophy  
(Heinemann, London, 1969).
12. B. PITEK, O. Song of Lawino (E.A. Pub. House, NRB.,  
1966).
13. BROMLEY, P.M. Family Law (4th Ed. Butterworths,  
London, 1971.
14. CHESONI, Z.R. Divorce and succession in Luhya  
Customary Law, E.A.L.T. Vol. 2 1966.
15. COTRAN, E. Restatement of African Law (1 sweet  
and Maxwell London 1969).

16. Gretney, S. "Jurisdiction in Matrimonial Causes Act" E.A.L.T. Vol. 2 (1966).
17. CHAI V.P. & McAUSLAN J.P.W.B. Public Law and Political Change in Kenya. (Oxford University Press Nairobi 1970).
17. GOLDSTEIN, J. CIT AT Beyond the Best Interests of The Child (Free P. New York, 1973).
19. HARBERSON, J.W. Nation Building in Kenya: the role of land Reborn (North Western U.P. Evanston. 1973.)
20. JOHNSON, E.L. Family Law (2nd Ed. Sweet & Maxwell London, 1965).
21. KAMAU G. "Good, Intentions Bad Marriage Laws". (~~The weekly Review~~, 15th September, 1976 Nairobi).
22. LATEY, W. Tide of Divorce (Longman's University Press, Aberdeen, 1970)
23. LUGARD, F.S.D. The Dual Monatate in British Tropical Africa (2nd Ed. William Blackwood Edinburg, 1923).
24. MARX, K. & ENGELS, F. Basic writing on politics & Philosophy & Co. Inc. Golden City, New York).
25. BEVAN H.K. The Law relating to Children (Butterworths, London 1973).
26. ELIAS O. The Nature of African customary Law: (Monchester University Press, 1973).
27. HALL, J.C. Comment custody of Children (1962) C.L.J.
28. KAHN FREUND O. Custody and maintenance of Children (1974) 163 L.Q.R.
29. MINDO, D.G. Application of customary Law in Kikuyu-land. (1964) 4 Journd of Denning Law Society.
30. OJWANG J.B. Polygamy as a social and legal Institut-  
tion in Kenya (1974) E.A.L.J.  
Harvey W.B. Legal systems and Methods.

31. JENKS E. Recent Changes in family law (Sweet & Maxwell 1974).
32. KENYA GOVERNMENT Report of the commission on the law of marriage and Divorce.
33. WHITE C.M.W. African Customary Law: The problems of its concept and definition J.A.L. Vol. 9
34. STONE The putative father and the illegitimate child. (1962) 25 M.L.R.
35. JAPPE, C. Blood Test evidence; proof of legitimacy (1970) 33 M.L.K.

UNIVERSITY OF NAIROBI  
LIBRARY