An examination of the status of polygynous and potentially polygamous marriages and whether the Law of Succession Act 1981 reviews that status in matters of Succession.

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By

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To my loving parents, brothers,
and sisters, who have made home
my most favourite place.

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ABBREVIATIONS

ALL E R	All England Law Reports
E A L R	East African Law Reports
E A	East African Reports (1957 onwards)
T H C D	Tanzania High Court Digest
U L R	Uganda Law Reports
N L R	Nigeria Law Reports
Misc	Miscelleanous
J A L	Journal of African Law
K L R	Kenya Law Reports.

TABLE OF MAIN STATUTES

1. 1897 Order in Council, 1869 Indian Succession Act
2. Marriage Ordinance of 1902 of 1902
3. The Native Christian Marriage and Divorce Act Ordinance of 1930
4. The Marriage Act Cap. 150 Laws of Kenya
5. The African Christian Marriage and Divorce Act Cap.168 Laws of Kenya
6. The PUblic Trustee Act CAp.168 Laws of Kenya
7. The Law of Succession Act (1981) Cap.160 Laws of Kenya.

INTRODUCTION

This dissertation is examining the institutions of polygamous and potentially polygamous marriages.

Throughout this text polygamy will be used to denote the union of one man to more than one woman simultaneously in marriage.

Potentially polygamous marriages are those marriages which are celebrated subsequent to statutory marriage. In addition to this, note should be taken of the fact that customary marriages which are actually monogamous have a potentially polygamous character in that the husband can legally add more wives to his household.

The problem as seen by this author is that: whereas bigamy is an offence under Section 171 of the Penal Code and Section 49 and 50 of the Marriage Act, it has remained a dead letter, despite the fact that people actually marry other wives while the first statutory marriage is still subsisting. The only time these cases come before the court is when the question of succession arises and heirs have to be determined. The courts as will be seen from case law have always consistently held that such wives (potentially polygamous ones) are not widows and neither are their children entitled to inherit. To this end Sections 26, 40 and 3 of the 1981 Law of Succession Act will be discussed to see if they in any way review the status of these marriages in succession matters.

It is the contention of this author that treating such marriages as not marriages is not only unfair but very unrealistic. This is because these marriages are in fact accepted by the communities from which such parties originate and in accordance with that the law should give them the protection that they deserve.

This introduction is a brief one, because to say more would amount to an unnecessary repetion of what will be said in the text.

Super, brilliant, excellent!

CHAPTER ONE

Kenya became a protectorate of Britain in 1895.[1] In 1897 the East African Order In Council was passed. The purpose of the Order was to establish a legal system in the protectorate. Later Kenya became a colony in 1920 but in reality there was no difference in the practice of the colonial administration distinguishing between a colony and a protectorate.[2]

At the time the protectorate was established there were four different communities living within it. These were the indegenious African people, the Moslems, Hindus and the Europeans. All these communities had different approaches to life. This was manifested in the area of their personal law.

The 1897 Order allowed for the co-existence of the different personal laws reflected by the above named communities. The Order classified "natives" as including the Moslems, and Africans were to apply there customary law, whereas the Moslems were to apply the Islamic Laws. The Order created "Native courts" to deal with disputes involving Africans as distinct from the Moslems. The commissioner of the protectorate was given power to make rules and regulations for the administration of justice in the "Native courts" pursuance of this could

> "alter or modify the operation of any native law or custom in so far as maybe necessary in the interests of humanity and justice".[3]

The Europeans organised their lives in accordance with received English law. These included the Indian succession Act of 1865, The Indian Divorce Act of 1869 and The Indian Contract Act. These Acts although called Indian, were in reality Acts codifying the English law as imported to India.
In matters of marriage it was not clear which laws governed the Hindus. The colonial administrators generally left the Hindus alone. Consequently they organised their lives in accordance with various laws, depending on which sect of Hinduisim they belonged to.

Alot of confusion was produced in the area of succession by the application of section 331 of the Indian succession Act of 1869 to Kenya. This section stipulated that in it's application to Indian, it did not apply to both testate and intestate succussion of property of Hindus, Moslems and Budhists. It's non application in Kenya meant that its was applicable to Hindus and Moslems. The Moslems were therefore being governed by two systems of law in matters of succession, Islamic law and the Indian succession Act. This section was however repealed in 1898. The Hindus were then able to apply Hindu succession and probate Legislation applicable to Hindus in India.[4]

THE RELATIONSHIP BETWEEN MARRIAGE AND SUCCESSION

Marriage and succession both belong to the domain of personal law. Rights of succession largely depend on the relationships created by the institution of marriage. It is true to say that if there was no institution of marriage, the contents of succession legislations would be very different especially intestate succession. This can be evidenced by the fact that whereas initially testate succession was characterised by an absolute freedom to disposed off ones property without interference, the progressive trend has been towards making it impossible for one to disinherit his family and to a lesser extent his dependants.[5] This trend

manifests the realization that the family unit is more important than the absolute control by an individual of his property during his lifetime and their manner of distribution on his death. It is thus obvious that succession laws revolve round the family unit, and the family unit is a creation of the marriage institution.

This dissertation is concerned with the conflict of marriage laws between the monogamous institution of marriage. The focus will be specifically on how this conflict is manifested in matters of succession. It is also seeking to discover whether the 1981 law of succession Act Cap 160 Laws of Kenya improves the situation of the women and children of potentially polygamous marriages. To facilitate the examination of this subject we shall look at the institutions of marriage. Basically there are two types of marriage, there is the monogamous and polygamous (including potentially polygamous) marriages. In Kenya the monogamous marriage is characterized by its western origin while polygamy was and still is practiced by some indegenous Africans and the Moslems. Polygamy was abolished among the Hindus by the 1960 Hindu marriage and Divorce Act section 3.

MONOGAMY

The monogamous marriage was aptly described by Lord Penzance in Hyde v Hyde[6] where he said

> "I concieve that marriage, as understood in Christendom maybe defined as the voluntary union for life by one man and one woman to the exclusion of all others"

From the above quotation we can see that the monogamous kind of marriage has four distinct characteristics i) It is marriage as understood in Christendom in other words in a Christian country. ii) This kind of marriage must be monogamous in

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nature i.e "one man", "one woman", in effect this means that a man or woman loses capacity to marry once they marry, in other words one cannot be simultaneously married to two persons. iii) The marriage must be voluntary. Engels[7] has argued that in a capitalist state there can be no voluntariness in marriage because in such a society marriage is largely based on the financial status of the intending spouces i.e money is the decisive factor in choosing who one marrie I think that even if this is true to a certain extent, it does not eradicate the fact of voluntary choice, this is because if the above contention was strictly true it would mean that only rich people would be married. There is no supportiveevidence to this effect. iv) The intention of the parties at the inception of the marriage should be that it is a permanent union i.e "for life"

Monogamy as practiced in the west has been identified with Christianity, for example Lord Devlin[8] has stated that the ethics and morality of the British society have for a long time been influenced by Christianity. It is therefore no suprising that Lord Penzance naturaly described marriage as understood in Christendom. According to this writer, monogamy and Christianity are not necessarilly synonymous. The Bible itself does not make monogamy compulsory, the life of the Old Testament personalities clearly show that polygamy was rampant examples are Solomon (who kept a Harem).[9] Abraham indulged in a Levirate union and had a chil by his maiden servant to get an heir. The new Testament[10] does not give a statement on monogamy as a condition for being considered a Christian. It is therefore the contention of this writer is that whereas monogamy may have been God's original intention for man according to the Christian faith, it is not made compulsory.

Monogamy however was understood by western Christianity as one of the tenements o Christian society. Taken as such it is obvious that this was not solely the case the British society was slowly becoming secularised, even by the time Lord

Penzance gave his ruling in Hyde v Hyde. Whereas the general contention was that marriage was for life, in I857 the matrimonial causes Act was enacted allowing the High Court to grant divorce. Previously the courts could not grant marriage reliefs, the eclesiatical courts had juridiction over marriage matters, and they could not grant divorce as they considered it a sin. They could only anull a marriage. But the passing of the I857 Act did not mean that the courts reversed their view on permanency as a characteristic of marriage. Thus we find that in I930 in Nachimson v Nachimson[II] the court held that marriage was still "for life" even if it could be easily dissolved.

STATUTES GOVERNING MONOGAMOUS MARRIAGES

In I902 the East African marriage ordinance was enacted. This ordinance was for the express purpose of facilitating the western monogamous kind of marriage. The colonial administrators felt that there was a need for a marriage Legislation to cater for the white population. Thus H. F MORRIS[I2] has said of the above legislation.

> "It will for example be noted that the legislation was not imposed upon the territories as part of any formulated policy for the introducion of English based marriage law to replace the indegenious customary law. In fact the initial impetus for its introduction came from Administrators in west and East Africa who merely wanted legislation which would overcome shortcomings in the recieved English Law."

Despite the above quotation, that is even though initially the ordinance was not meant to cater for Africans, it was eventually applied to the Africans who professed the ~~African~~ Christian faith. It was inevitable that this should happen as it was the only legislation providing for the celebration of a monogamous marriage as recognised by law. As has already been stated Christianity was one of the greatest influences in the west on the marriage institution. This aspect of European culture was introduced to the Africans by the missionaries. Due to missionary work many Africans became Christians and they were obviously expected

to embrace the institution of monogamous marriage. H.F Morris[13] states further in this respect that

> "The ordinance of course only provided facilities for monogamous marriages. The Africans were notcompelled to marry under it having the alternative of marriage under customary law. But in practice the African Christian was so compelled since his church insisted on a Christian marriage, on pain of expulsion from the Christian community and Christian marriage meant an ordinance marriage."

under section 39 of this Ordinance the English law of succession was applicable to all people who married under it. Later it was discovered that the formalities attending the marriage under the ordinance were too cumbersome for the Africans in other words they not "civilized" enough. Secondly it was discovered that these Africans had not become English enough as to justify the application of the English succession laws to him. It is interesting that in Nigeria where the same ordinance applied it was held in Cole v Cole[14] that an African who married under the ordinance was to be considered as having completely removed himself from the ambit of customary law in all areas concerning his personal law. But this did not mean that the administrators were satisfied with that state of affair Thus H.F Morris reports;

> "It is advisable to ammend section 39 without delay" the High Commissioner wrote to the secretary of state in March I902. As great difficulties would arise and dissatisfaction be caused if property of natives were under any circumstances distributed in accordance with the provisions of the law of England having regard to the method hitherto pursued under native law and custom..... If going through a form of marriage not in accordance with native custom were allowed to overide and upset such law and custom it is evident that trouble would ensue."I5

Apparently the Kenyan administrators soon realised the truth of what the Nigerian High Commissioner wrote of above, and so in I904 section 39 of the I902 marriage ordinance was repealed. In addition to this a native Christian marriage ordinan was enacted in I904, its objective was to make marriage formalities more flexible for the African Christians as opposed to the formalities provided for under the

Marriage Ordinance. However matters relating to capacity and relief orders continued to be governed by the same principles found in the 1902 Ordinance.

In essence these two ordinances have continued to govern monogamous marriages, In Kenya with slight modifications. The marriage Ordinances is the present day marriage Act. The native Christian marriage ordinance which was ammended in 1930 to provide machinery for the conversion of customary marriage into the monogamous marriage is the present day African Christian marriage and Divorce Act.[16] The obvious continuity of the basic principles in these legislations has led this author to disregard the time factor as of little consequence, unless it is viewed on the basis of a historical background. Thus whether we are looking at the Ordinances or the Acts the same values persist.

POLYGAMOUS AND POTENTIALLY POLYGAMOUS MARRIAGES

Even though by the time Kenya was colonised there was no polygamy being practiced in Europe,polygamy was not phenomenon peculiar to the Africans. Engels[17] had this to say about it in the primitive society:

> "For the period of the first temple, we find evidence that monogamy and polygamy existed side by side.....Men could be simultaneously be married to more than one wife.....In certain cases it was even a religious duty to practise polygamy for example when a married brother inlaw was requested to wed the childless wife of a deceased brother."

The above quotation is supportive of a proposition this writer would like to make that is: polygamy is part of human history and that at some time or other every culture practiced it. Whether a society practices polygamy or not will depend to a large extent on how it views marriage and what it percieves as the main object of the marriage institution. Professor Mbiti[18] has vividly expressed what marriage meant to the African, he put it this way:

"For the African 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 dimensions of life meet here and the whole drama of history is repeated, renewed and revitalized. Marriage is a drama which everyone must participate. Otherwise, he who dies not participate in it is a curse to the community, he is a rebel and a law broker, he is not only abnormal but under human."

Marriage as the above quotation indicates was the center of life for the African. It is therefore not suprising that polygamy was widely practiced. There are various reasons for this and one of these as stated by Kenyatta[19] was that polygamy meant that all the girls got married. Mbiti also brings in the aspect of the assurance of heirs, he puts it very explicitely that:

> "the more we are the bigger I am"[20]

Procreation as an object of marriage was therefore a very decisive factor in the practice of polygamy. Marriage to the African had a spiritual dimension in that he considered it a means of defeating death. So conceptually an African never dies as long as his lineage continued through procreation.

Marriage was also viewed as a communal affair. The African man or woman is a member of a family group the smallest group being the clan, and in this respect committment and loyalty was owed more to the group than to the individual. The social status, property and honour of the group is involved in the marriage and even divorce of any member. The membership in a given clan determened ones property rights and also dictated the clan from which one married. The African customary laws relating to land tenure inheritance and to personal and family relations cannot be understood properly except in relation to the law of marriage.

In the next chapter we shallsee how due to the differences potrayed by the monogamous and polygamous institutions, polygamy was viewed by the colonial administrators and judges. Whereas the colonial judge only recognised the western monogamous marriage, in Kenya he was confronted by a large population who were either actually or potentially polygamous.

Despite the fact that both recognised the importance of marriage, i.e as a secure basis for men and women to share confidences, fears and joys etc, and a secure structure within which to bring up children, differences were bound to and did arise because of the different formalities and the outward characteristics manifested by the different types of marriage.

FOOTNOTES FOR CHAPTER 1

1. Y.P. Ghai and J.P.N.B McAuslan: Public Law and Political change in Kenya (Oxford University Press, 1970) Chapter 1

2. Lord Lugard: The Dual Mandate in British Africa (Frankass & Co. Ltd. 1965)

3. 1899 Order in Council

4. Hindu Probate and Administration Act

5. Morton: Theory of Inheritance & Havard Law Review page 161-167

6. Hyde v. Hyde (1866) LR IPD 130 at 133.

7. Engels: The origin of the family Property and State Pages 72-82

8. Lord Devlin: Enforce of Morals (OUP 1965)

9. For Solomons Example See Holy Bible 1 Kings, Chap.II verse 1

10. Only time when mongamy is made compulsory is for a church Elder, Holy Bible 1 Timothy 3 v. 12

11. Nachimson v. Nachimson (1930) All ER.200.

12. H.F. Morris: The Development of Statutory Marriage in twentieth Century, British Colonial African JAL 1979 at page 37

13. H.E. MOrris (Supra) Page 38

14. Cole v. Cole (1898) 1 NLR 15

15. H.E. Morris (Supra) page 13

16. CAP 151 Laws of Kenya

17. Engels (Supra)

18. Professor J. Mbiti, African Religions and Philosophy (Heinman, London, 1969) Chapter, 13 page 133

19. Kenyatta: Facing Mount Kenya (Nairobi, Heinman Educational Books 1971)

20. Mbiti (Supra) page 142

CHAPTER TWO:

ATTITUDES OF THE COLONIALISTS TO POLYGAMOUS AND POTENTIALLY POLYGAMOUS MARRIAGES:

A General Attitude:

As has been stated in Chapter One of this text there were great fundamental differences in the way the colonialists viewd marriage on the one hand and the Africans on the other. Not only were the two different in nature i.e. Monogamous (English) and Polygamous (African) but the formalities which accmpanied the marriage celebration were alien to the English. For example within the English context marriage was basically an agreement between the intending spouces, whereas the African concept is based on an agreement between the two family units, a vi̇tal characterist i.e. of which is the payment of bridewealth or marriage consideration by the bridegroom's family t to the bride's family.

According to some western writers this aspect of customary marriages made the essentially unequal contracts, where the wife was not accorded the same competence as the man, and worse still was treated as a chattel.

Morris [I] states:

> The spouces in a customary marriage are by no means equal partners, the husband acquiring semi-propriety rights in his wife, whose consent traditionally would not be essential for the conclusion of the contract."

A similar view was stated by another writer and a colonial lawyer Arthur Philips
Arthur Philips [2] who states:

> "The idea of marriage as a personal relationship between two individuals is therefore at most a secondary feature of the transaction, although it may not always be correct to say that the woman is bought and sold as a chattel, she certainly has a very inferior status and is in a condition of perpetual minority."

These quotations show what understanding of customary marriage these writes had. However they recognised such marriage except for the status conferred on the women of such a marriage.. One of these writers, Arthur Philips, reports what apparently was athe view of a section of the

Europeans about the customary marriage. He reports that;

> "In fact, native "marriage" seems often to have been regarded as better than promiscous sexual immorality."

If one reads Arthur Philips' work even more carefully one will notice that he goes to great lengths trying to establish whether a customary marriage is a marriage as such or rather as understood in the "civilized" world.

From the above quotations the picture emerges that the customary marriage was generally regarded as an inferior sort of marriage. From this generalised position I would now like to discuss attitudes of three groups of colonialists who were influential either in promoting or demoting the fate of customary marriage. These three groups are the missionaries, administrators and the judiciary. The view of the judiciary will be seen at a latter stage.

MISSIONARY ATTITUDE TO CUSTOMARY MARRIAGE:

Most adamant in their criticism of the customary polygamous marriage were the missionaries, polygamy was infact seen as a manifestation of the very evil they had come to eradicate. To these missionaries polygamy was abhorrent. Not merely was it contrary to Christian doctrine (as understood by them) in itself, but the surbodinate position which it accorded women was irreconcilable with christian teaching. In some churches monogamy was made a pre-requisite for baptism. Accordingly christian converts who had been polygamously married before conversion were required to chose one wife and make her the "ring wife"[3] and remove the other wives from his home.

As was stated in chapter one before the enactment of the native Christian marriage Ordinance of 1904 the African Christians celebrated

their marriages under the I902 marriage ordinance. Initially the missionaries were not even in favour of the above ordinance because according to them this ordinance would have encouraged Africans ot celebrate civil marriages which had no religious character.[4]

The missionary attitude to the customary marriage was coloured by their endavour to christianise the Africans. It is of course a matter of general knowledge that in christianising Africans the missionary did the uttermost to replace African values with western ones. And in family life this meant introducing monogamy as opposed to polygamy as has already been stated. We shall later see how they were able to have a legislation passed to cater for the African coverts, to celebrate "christian" marriage and also for those already married under customary law to convert it to the monogamous English type.

ADMINISTRATORS ATTITUDES:

Anybody familiar with the history of East Africa, would automatically appreciate the controversy as regards the views held by the administrators and that held by the judiciary as far as customary law was concerned. The administrative officer in general maintained that justice was best done to the Africans primarily in the native courts applying native law and custom. This was supposed to be supplimented by the dispensation of justice by law magistrates, who were administrative officers. The argument advanced was that by virtue of their work (i.e they were always in contact with the Africans) the administrative officers understood the Africans better. The judiciary on the other hand were of the veiw that although the continued existence of native courts (which applied native law) was inevitable and unavoidable, native law and custom was an inferior form of law to the imported law. And consequently it was desirable in their view that English

law and procedure be made available for any African who wished to take advantage of it, and where possible this law should be administered by professional magistrates and that there should be no watering down of that law and procedure to meet the supposed needs of the Africans. The administrators of that day were greatly influenced by the doctrine of indirect rule, Whereby the colonialists used the African people and some of the African political and Legal systems to govern. This they did by inter alia setting up African courts, and also by use of African chiefs and Elders where they existed as part of the executive arm of the colonial government.

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In decentralised societies where there was no sovereign as embodied in the English jurisprudence they created chiefs from those who had apparent authority and clothed them with an amount of sovereighnity. H.F Morris[5] reports;

> "No disciple of the now fashionable doctrine of indirect rule with its emphasis on the strenghening of reform, and revitalising of traditional and essentially African institutions and intentions could fail to be interested in customary law, of all the branches of such law the most significant seemed to him to be that concerning the family especially marriages, and writings of anthropologists on such matters as the social function of customary marriage ~~him~~ and the symbolic significance of the bride wealth were read by him with avidity To such officers, customary marriage was no primitive relic of a babaric past but a vital social institution, protected by customary law, certainly not inferior, and preferable in the context of the social conditions to the alien form of marriage imported by missionaries and the marriage ordinances."

The Administrators and the missionaries were never agreed as is evident from the quotation. As the executive arm of the colonial government it is no suprise that the Administrators were of the above views. This is b ecause in the pacification of the colonialised people it was not desirable to change such institutions which were essentially social and cultural and posed no threat to the foriegn government. An interference in that area would not have been conduicive to the process of exploitation of the natural and man

power resources. Interference might have met with violent resistance, such violence would have hindered the objectives of the colonial government, and so such interference was totally uncalled for. It is the argument of this writer that in view of the fact that the Administrarors were involved in a process of exploiting the Africans and never accorded them any political autonomy (imposed chiefs on them), the above quotation does not necessarilly mean that they actually did respect the said African institutions. In actual fact these institutions were left to survive as a matter of political safety value.

THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ORDINANCE:

A brief history of these ordinances which are the same as cap I50 Kenya laws as of today has been given in chapter one. As was stated earlier these ordinances were the result of missionary efforts to christianise Africans.

According to A.N Allot[6]. Christianity as such had little impact or influence in common wealth Africa, nor is it usually a determining factor in what law applies to a party. If any effect at all it can only be used as a negative test i.e you cannot apply Islamic or Hindu law to a Christian. He goes on to say that the use of the phrase "Christian marriage" in legislation is deceptive because in effect this generally means monogamous marriage as understood in "Christendom" and not marriage between christians or by christian rites. He continues to say that we should neither be misled by laws entitled"African christian marriage ordinances" or the like, since these laws generally do not create a special legal regime at most what they provide are simplified facilities by which African christians may marry monogamously. These criticisms by Allot are fully true,. It is very true that in reality there is no legal regime as distinct from the civil western monogamous institution created by the so called christian ordinances.

These if contrasted with other religious marriage laws (e.g the Mohamedan Marriage and divorce Act) even becomes clearer. According to practice those who are married under these Act are not necessarily christians. Even though the Act provides that at least one intending spouce shoul be a christian. This provision was soon hit by a snag in that numerous Africans who were not christians wanted to celebrate marriages under the Act. This was motivated by an attitude described by L.P Mair[7] (he was talking about Uganda but this attitude was also evident in Kenya)

> "A marriage without christian rites.....in the eyes of the custodians of the law is no marriage and confers no legal rights. Their attitude is not based on legal reasoning but on the acceptance of the theory that a union not solemnised by the church has none of the characteristics of marriage.

This view clarifies why there was preferance of a statute marriage as opposed to customary marriage but this was not the end of the problems faced by the Africans who wanted to celebrate marriages under the Act. Sometimes the churches were reluctant to celebrate marriages if they were not satisfied in regard to the christian profession of the intending spouces. Some of the church leaders referred such people to the DC"s to perform civil ceremonies but even some of the DC's were reluctant to perform such marriages. A DC of Embu is reported as justifying his reluctance by saying[8]

> "such a marriage is merely a civil contract, without any religious background.....I feel that it is extremely difficult if not impossible to explain to the young man and much more to the young girl the implications of such a marriage and the difficulties involved shoul they desire to desolve it.....In my view native christians should be married inchurch or by native law and custom, a nd should not resort to the arid civil form of marriage which is entirely alien to them."

The justification by this DC is really not suprising after having examined the attitude of the administrators towards the missionary endavours to civilise the Africans by replacing customary marriages with western monogamous ones. As has been stated there was nothing radically different from the civil marriage ordinance and "christian ordinance", therefore the

the argument that it would not be easy to explain to the African the implications of a civil marriage is sheer racial arrogance. But even more basic to this justification is the underlying reluctance by the administrator to "civilize" Africans. So according to this author the DC would have been clearer if he had simply said that if missionaries converted Africans then it should be their responsibility to celebrate their marriages, in any case in the first place there was no need even for such marriages as the African already had a legal framework within which he could contract a valid marriage namely custom and law. In other words trying to distinguish a Christian and a civil marriage legal regime was void for lack of supportive evidence as to the existence of such two separate regimes.

These legislations (Christian ordinances) came under severe attack from a Mr Parr[9] the Governor of the Equatoria province of the Sudan in I938. Arthur Philips reports him as condeming "the use of state laws to enforce obedience to religious teaching" maintaining that "it is the faith of the individual which keeps him obedient to the teaching of the church and not the power of the law and its penalties". According to him these ordinances were enacted at the request of the missionaries who unable to keep their coverts thought that application of legal sanctions could aid them. "I am thus brought to the conclusion" Mr Parr states that the policy of applying practically standardised ordinances for the marriage and divorce of native African Christians was wrong in principle and disastrous in practice."

I agree with the contentions of Mr Parr, because I think that by importing the monogamous marriage institution the missionaries had failed to comprehend all the circumstances one of the most disastrous provisions in the christian ordinance is that dealing with marriages celebrated . .-

subsequently to the ordinance one, such marriages are regarded as bigamous unions and ~~are~~ in fact constitute a criminal offence.[10] This was a direct result of borrowing from the English family law. The issue is, how effective is this provision in stamping out polygamy. For such a provision to become effective there is need for a whole evolution of the society such that polygamy can be regarded as an offence and not just as a moral wrong. It is my contention that in reality bigamy is a dead offence in Kenya because the majority of Kenyans do not regard it as an offence. Since polygamy is a cultural relic, unless a custom evolves regarding it as not only an undersirable practice, but one which ought be punishable, then the law will remain a dead letter. The fact that there is almost a non existent case law on this crime proves that it is ineffective. A Tanzanian judge (Tanzania has the same provision) said of a bigamous case before him[11]

> "This is the first prosecution for bigamy to come before me on this my twentieth year on the bench in the country."

One thing that is certain is that marriages under the Act were and still are very popular. No doubt Christian influence was one of the main factors contributing to this. But not only those who sincerely professed the Christian faith, marry under the statutes.

From what has been discussed we can see that, there has been a great deal of degradation of the customary marriages. This resulted in many people accepting the statute marriages as superior. For those people the only "fashionable" and"respectable" way to get married was under statute. Another factor which contributed alot to the popularity of these marriages was the fact that many women were getting educated. It is a fact that women have always maintained an inferior position in many societies, and it is also true that Education has been one of the most liberating factors

for the women. It cannot be denied that polygamy is normally associated with a social system in which there is unchallenged male dominance. The customary African marriage was and still is potentially polygamous if not actually so in character. For these Educated women polygamy was now seen as a reflection and intensification of the fundamental inequalities of the sexes which was as has been said typical of the African social systems. To such women the statutory marriages offered better legal security in that it incapacited the men from marrying while the statutory marriage was still subsisting. As will be seen from case law this was not always the case.

JUDICIAL DECISIONS:

A landmark case in English jurisprudence dealing with polygamous or potentially polygamous marriages is that of Hyde v Hyde[I2]. The brief facts of this case were as follows: Mr and Mrs Hyde had married in U.S.A. as Mormons, and Mormons at that time practiced polygamy. Mr Hyde subsequently renounced mormonism and returned to England. He sought to bring an action for divorce against Mrs Hyde in England. The court held that the English courts had no jurisdiction in such a case because of its polygamous nature. And even though Mr Hyde was in actual fact monogamous, to the court he might have married another wife had he remained a Mormon, and that stamped the original marriage with a character fundamentally different from that with which the English courts could concern themselves.

Even though Lord Penzance was only laying down the limits of the jurisdiction of English courts in matters concerning divorce, the above case was taken up to mean that potentially polygamous and polygamous marriages were no marriages at all.

In the East African case of R v Amkeyo[I3] we have the most racial description of a customary marriage by a colonial judge. This was a criminal case and the question was whether a customary wife could be precluded from giving evidence in a case against her husband as was the case in English common law. Ruling that she could give evidence Hamilton C J said at page I

> "In my opinion the use of the word marriage to describe the relationships entered into by the African native with a woman of his tribe according to tribal custom is a misnomer which has led to a considerable confusion of ideas. I know of no word that correctly describe it, 'wife purchase' is not altogether satisfactory but it comes nearer to the idea than that of marriage as generally understood among civilized people. Marriage by native custom differ so materially from the ordinarily accepted idea of what constitutes a civilised marriage that it is difficult to compare the two."

According to this quotation the customary marriage was not a marriage because it was not comparable to a "civilized" marriage. Hamilton C J went on to give reasons as to why he did not consider these marriages as marriages;

> "In the first place the woman is not a free contracting agent but is regarded rather in the nature of a chattel for the purchase of which a bargain is entered into between the intending husband and the father or the nearest male relative of the woman. In the second place there is no limit to the number of women that maybe so purchased by one man and finally the man retains a disposing power of the woman so purchased."

The customary marriage as is described by Hamilton C J is a very good contrast for marriage as is understood in christendom, described by Lord Penzance in Hyde v Hyde (above). In an earlier case (Nigerian) Cole v Cole[I4] where two African Christians married in accordance with Christian rites in Sierra Leone. They later returned to Lagos where the husband was domiciled. The husband died and was survived by one son who was a lunatic and the wife. The question arose as which law of succession applied. The brother of the deceased following customary law applied for a declaration that he was the deceased"s heir and trustee of the son. A court of first instance found for him. An appeal against this decision was lodged, it being contended that English law was the one applicable. The appeal

was allowed. The court inter alea took upon itself to describe a customary marriage at page 22;

> "By native law a man can marry as many wives as he can pay for. The wife does not take the husbands name nor do the husband and wife become one."

on the same page the court comes to the conclusion that;

> "In fact a Christian marriage clothes the parties to such a marriage and their offspring with a status unknown to native law."

From the two cases above it is very clear that the courts were contrasting the African marriage with the western ones and they came up with glaring differences. What comes out very clearly is that the things which made the customary marriage not a marriage was because of its polygamous character as opposed to the "union of one man and one woman" as postulated by Hyde v Hyde. The kind of reasoning displayed by these courts lacks intellectual maturity. If they wanted to decide whether a marriage existed, they should have found out whether these unions (customary marriages) created a status distinct from that of unmarried people, within the context of that society. It was fool hardy to import foreign concepts into what were alien (to the English jurisprudence) marriages. A very enlightened judgment is to be found in the Ugandan case of R v Okumu s/o Achada[15] which showed a very liberal attitude towards African customary marriages. The High Court held that English definations of marriages must be adopted to suit the local conditions of the people concerned and that the terms "husband" and "wife" included parties to a customary marriage. To apply the principle laid down in Hyde v Hyde to a local ordinance said the court:

> "would be a sin against the rules of interpretation which attributes to the legislature or the law giver knowledge of the general religious, social and political conditions of the community or communities whom it is intended to affect the meanings of common words used by them."

I take it that the above quotation is indicating that every society is unique due to social, religious and political experiences which maybe

peculiar to it. And as law is generally a reflection of these basic elements of society, we cannot therefore expect that societies which are essentially so different in background can attach the same implications in a given concept. As judges are supposed to be men above the normal order of men, they are not supposed to bring in their background prejudices onto the bench. Even though this is just a legal fiction, at least one expects a minimum amount of impartiality. All that they were asked to do is recognise such marriages even if they did not conform to what they thought a marriage should be. At least if they knew that by declaring such marriages not marriages, they would have made the Africans stop celebrating such marriages because they lacked legality, then they would have been justified. But in these cases there was no such foreseability. These judges erred by insisting that such marriages were not marriages dispite the fact that in reality they were legally binding unions.

In the appeal case to Privy council of Mawji v The Queen[16] the court held differently even though the facts and the issues were almost similar to those in R v Amkeyo. It was thus held;

> "It is clear of course that the marriages contemplated by the rule in England were monogamous marriages but the rule being now part of the criminal law of Tanganyika, their Lordships are of the opinion that it applies to any husband and wife of a marriage valid under Tanganyika law..... The rule plainly applies here, at least to marriages recognised as fully valid and it should therefore apply in Tanganyika to marriages recognised as fully valid there."

The rule which was being discussed in the above case is that of criminal law under which a husband and wife cannot conspire together. This judgement had the positive effect of recognising all marriages valid within Tanganyika law. And since there was no law stating that potentially polygamous marrages were invalid, it should have become the authority, and subsequentely overulled the rule in R v Amkeyo. This however was not the case. In 1963 in the case of Abdulrahman Bin Mohamed and Another v R[17]

the East African court decided to rely on the authority of R v Amkeyo. In the instant case the two appellants were tried together and convicted of murder. On appeal the only substantial point was whether the first appellants wife by native marriage was a competent witness for the prosecution against her husband. The trial judge had found that the parties were married according to Makonde custom. He stated his understanding of such a marriage as follows:

> "In my view it is merely incidental in this makonde customary marriage that the union is temporarily Monogamous and that the woman gave her consent. In my opinion the essence of the union is its temporary nature. By payment of money the husband can buy one wife after another or wife secure release. This only differs from polygamy in that the husband does not posses the different women at the same time. The potential impermanency of such a union cannot create the mutual trust and confidence which exists in civilised marriage."

According to the trial judge the Makonde customary marriage could not be properly classified as monogamous because of the fact that either spouce could buy their way out of it. I think that this judge did not address his mind to the fact of divorce in the so called "civilized" marriages, The fact of divorce does not necessarily mean that the western monogamous marriage is impermanent in nature. I'm sure that had the learned trial judge used this anology he would have come to a more enlightened judgement. On appeal Newbold J.A held;

> "African customary marriages in East Africa are usually polygamous or potentially polygamous. Does the fact that the marriage in the present case was monogamous take it out of the class of customary marriages which were in the contemplation of the court..... We do not think so. The marriage appears to have all the elements of "wife pruchase" the description given to an African customary marriage in Amkeyo's case. There was no religious ceremony or indeed any ceremony at all. The first appellant merely paid Sh.200 for her, which money was paid through her father to her former husband to release her. Either party could buy his or her release at any time. It may well be a valid marriage in Zanzibar, but bearing in mind Amkeyo's case and the decisions of this court in which that case has been followed, we do not think the wife of such a marriage is within the purview of the general rule that the husband or wife of the person charged is not a competent witness for the prosecution. In our opinion therefore Fatume was a competent witness for the prosecution."

The judge of appeal thus did not differ with the trial judge and if anything borrowed from the latter's judgment. Both judgments are characterised by racial arrogance. The reasoning of these judges are not based on any solid legal principles but rather on biased racial opinions, thus as far as Newbold J.A is concerned no African customary marriage can actually amount to a monogamous union proper i.e as is understood in the western world. Secondly according to this learned judge even if such a marriage as the Makonde one was to be classified as monogamous it would still remain in that classof "primitive" marriages as practiced by the Africans. The very characteristics i.e "wife purchase" which makes such customary unions sub human and abnormal are to be found within the Makonde union, thus making it essentially a customary union and as such it cannot be put on the same level with a "civilized" union. The court justified their non-application of the judgement in Mawji v R by saying at page I92

> "In Laila Thena Mawji and Another v R..... Their Lordships based decision that the rule applied to any husband and wife of such a marriage on the ground that in the criminal law of Tanganyika the words husband and wife, if unqualified are not restricted to monogamous unions and that if it desired to deal with monogamous marriages as distinct from other marriages express words are used. The same reasoning cannot, however be applied in Zanzibar since the criminal law of Zanzibar does not distinguish between monogamous and polygamous marriages. We do not think therefore that this decision of the Privy council is of any assistance in the present case."

According to this argument the court considered itself bound by precedent and statutory provisions. This is a very weak argument because as commonwealth judges they must have been aware of the fact, that judges are capable of making new rules where justice demands so. It would have been in keeping with historical pattern if they had departed from an unjust and outdated precedent.[I8] This case and others like it[I9] only reinforce the argument already a dvanced that the colonial judges operated on a racially biased system and they were therefore not able to face the prevalent social realities.

MARRYING UNDER STATUTE WHEN ONE IS ALREADY POLYGAMOUSLY MARRIED.

In English case law, the situation arose where men especially from India married in their countries of origin came to England and subsequently married English girls who were not aware of these other marriages. Under their (the men's) Laws of Domicile polygamy was allowed, but English law did not recognise such marriages. To protect the unsuspecting English girls the courts allowed such marriages to be nullified.[20]

Until 1960s the English courts were unwilling to grant matrimonial reliefs to parties who had contracted potentially polygamous marriages. In thes 1960s there was a slight change whose half-heartedness is evidented by the fact that for matrimonial reliefs to be granted, it had to be established that a polygamous marrigae had become monogamous and therefore English in nature. Thus in Cheni v Cheni.[21] It was held that:

i) the time at which the monogamous nature of a marriage is to be ascertained is at the time a petition is presented, and

ii) that in that case the marriage had become monogamous after an event making so in the parties original personal law.

In Ali v Ali[22] it was held that a potentially polygamous marrigae contracted in India had become monogamous through the acquisition of a domicile of choice in England. In Parkasho v Singh[23] it was held that legislation passed in India where the parties had contracted the polygamous marriage had converted it into a monogamous marriage.

From the above cases we can see that the English courts were still finding themselves bound by Hyde v Hyde, so that a departure from it had to be based on some exception so to say. In another case Shahnqz v Rizwan[24] through the process called characterisation in English law, an English court was able to give a matrimonial relief arising out of a potentially polygamous moslem marriage, the claim was for maho, a certain amount of money that a moslem promises to pay the woman just before a marriage is contracted. The court reasoned that the claim was a contractual one and therefore not covered by the Hyde v Hyde rule. The legislature in England went further into ending the hostility to polygamous and potentially polygamous marriages - section 47 (1) of the Matrimonial Causes Act of 1973 reads as follows:

> "A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason that the marriage in question was entered into under a law that permits polygamy".

From the review of the English cases there is now greater tolerance for polygamous and potentially polygamous marriages. But this does not mean that an Englishman resident or domiciled in England can practice polygamy.

In Kenya one cannot marry under either the marriage Act or the African Christian Marriage Act if they are already married under customary law. The African christian marriage and Divorce Act however provides under section ~~a~~9 for convernsion of marriage from a customary to a Legal binding one under the Act. But this provision can not be implemented if it means that other wives will loose their status because of the converstion. In the case of In the Matter of the Estate of Samuel Hopewell Gacharamu[25] the issues were: The deceased Gaharamu married two wives under customary law, he then purported to undergo a marriage ceremony with the second wife in a Civil Registry. The matter was referred to court by the Public Trustee under section 9 of the Public Trustee Act.[26] The court was called upon to decide whether the two wives were to be treated as lawful widows for the purpose of the distribution of his estate. Justice Chesoni held that from the evidence adduced in court both were lawful widows and the ceremony with the second wife was nothing more than conversion of a customary marriage into a registrable marriage under the African Christian Marriage and Divorce Act. At page 6 he says:

> "Perhaps the most important fact is that if the man had only one wife, the spouce with whom he goes through the conversion after the conversion he cannot marry another woman while the converted marriage still subsists. On the other hand if the man was already married to more than one wife at the time he converts the marriage, as the case is here, in my opinion the conversion would not bar him from in the same way marrying one of the wives already married under customary law".

Sounds as Justice Chesoni's reasoning is, I don't think that the conversion provision intended that it should be used as a registration machinery for polygamious marriage. Such a proposition would ~~therefore~~ defeat the very purpose of the statute. If the legislature wanted to make customary marriages registable then they should do so in no uncertain terms. The conversion provision was meant to encourage those whose marriages were potentially polygamous to convert them to monogamous ones.

In fact Justice Chesoni says that such a conversion does not add to the validity of a customary marriage because it is valid from its inception. In my opinion indeed really, he should not have recognised the conversion even for registration purposes. In fact he finally decides the case on the basis that the ceremony performed in the Provincial Comssioner's office was of no Legal effect whatsoever. I agree with Justice Chesoni on this point. The fact is: the basis upon which the validity of the marriage can be determined, is by referenc to the compliance with the necessary customary rites. As has already been stated by the judge the first marriage was valid by customary rites and since custmary law allows polygamy, it is the only other law under which the second marriage could have been validly celebrated. Under normal circumstance, the ceremony in the Provincial Commissioner's office would change the character of a potentially polygamous union into a monogamous one. But in the instant case this change could not take place because the very statute provides that no marriage under it can be celebrated if it would mean that the validty of a prior customary marrigage would be affected.[27] So if the ceremony in the Provincial Commissioner's office were to have its full legal effect, it would mean that the first marriage becomes invalid, and this as we have said cannot happen. The Kenyan Law recognises polygamous and potentially polygamous marriages as such a statute cannot be used to defeat the said recognition. From this case we can conclude that the law recognise and protects legal status of a polygamous union. And therefore a purported conversion of a polygamous marriage to the exclusion of all others is an anullity at law.

The Consequences of Marriage Under a System of Law that allows polygamy while a monogamous Marriage is Still Subsisting

Whenever one marries under either the Marriage Act or the African Christian Marriage and Divorce Act, they lose capacity to marry while that marriage is still subsisting - But as has been observed elsewhere, this has been disregarded by some of those who have celebrated their marriages under the aforesaid statutes. These cases normally come before the court when the husband has died intestate and the Public Trustee has to determine his heirs. In some cases one party brings divorce proceedings and such subsequent marriage is treated as an adulterous union.

The issue one is faced with in these cases is that of whether people can marry under these statutes and still retain within themselves a unilateral freedom of reverting back to their customary or Islamic way of life which allow polygamy.

In general the view previaling in Common Wealth countries is that a change by faith evidenced by a reversion to ones personal law of origin does not alter the character of a western monogamous marriage.[28] In a Gambian Drammeh v Drammeh whose brief facts were: The parties who were at the time both Christians married in a Methodist Church in England in 1956. The husband later become a Moslem having returned to the Gambia. He subsequently went through a ceremony of Islamic marriage with one Mariamu Jallow in 1966. His first wife who had not become a moslem protested strongly against this second marriage and subsequently petitioned for divorce on the ground of that the husband had committed adultery, with Mariamu Jallow. Trial judge was satisfi that the husband and Mariamu had lived together as husband and wife and there was no consent or connivance on the part by the first wife and that whether or nc the second marriage was lawful in Islamic law, there had been adultery within the meaning of a Christian monogamous marriage.

In a Tanzanian case Rattansay v Rattansay[29], a very positive judgement was given but the facts were quite different from Drammen v Drammen. In that case the petitioner a member of the Khoja Ithna-Asheri community married the respondent who was a Christian by a Civil marriage ceremony under the marriage ordinance. The respondent soon became a muslim by conversion and was admitted to the Ithna Asheri community. On the same day they underwent marriage by Islamic rites subsequently the petitioner divorced the respondent by pronouncement of Talak according to Islamic law. He applied to the High court to declare that the divorce was recognised by the law of Tanzania as dissolving marriage between the parties.

The court held that because of the conversion by the respondent made her subject in all respects to Islamic law of that community and therefore the pronouncement of talak dissolved the marriage although the civil marriage was not invalidated by the subsequent religious ceremony. It was stated per curiam by SPRYJA

> "In Tanganyika where there is something like an Internal conflict of laws the validity of a divorce of persons domiciled should be decided according to the personal law to which the partieis are subject at the time of divorce unless there is any Statute Law to the contrary".

In 1963 SPRY J dicided a case similar to Drammen V Drammen in facts: Kristina d/o Hamis v Omari[30] he held

> "The respondent having contracted a Chrisitian marriage was incapable while that marriage subsisted, of marrying any other person. That position was not and could not be altered by any change of religion by the respondent alone. It might have been different had both the appellant and the respondent changed their religions".

A more radical approach to this issue was given in the case of AG of Ceylon v Reid,[31] In this case the respoendent had married under Christian rites, he was later left by his wife, he subsequently got converted with another lady to Islam the conversion was taken to be genuine and both were soon married under Islamic law. The man was charged with bigany under section 326 B of the Ceylonia Penal Code. He was convicted and on appeal the conviction was quashed. On further appeal to the privy council Upjorn LJ said

> "Ceylon is country of many creeds and has a number of marriage ordinances and acts. Whatever maybe the situation in a purely chrisitian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there. In their Lordships view, in such countries there must be an inherent right in the inhabitants domiciled there, to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country not withstanding an earlier marriage if such inherent right is to be it must be done by statute."

The crucial question that faced these courts was that of freedom to change ones religion and thus one's personal law. SPRY J maintains the argument that such a change is not effective if it is unilateral. The ideal situation would therefore be where both parties are converted but such situations are hard to come by. In the Kenyan context such a change will only be outwardly manifest if one is converted to Islam. If an African stops being a professional christian, it will be very hard to use religion as a determining factor in finding out whether he has decided to practice traditional religion, especially if he is

an urban African. As it is one hardly ever knows whether the African is completely western or a hybrid between the west and the traditional society, so that even a test using life-style would not be very useful.

The reasoning of Up Jorn LJ is indeed very radical in that it means one party can change the character of marriage without consulting the other. This judgement has very far reaching effects. One wonders whether the learned Lord justice would have reached the same judgment had it been a divorce case. I highly suspect that had it been a divorce he would not have made such a far reaching judgment. Under the circumstances of this case the judgment was however justified, in that the wife had already left he appellant. Secondly, biganny as a crime was ineffecture and only signified an unwarranted interference inopeoples personal lives.

The Kenyan courts were in the least influenced by the above decisions. They stuck to the line of reasoning potrayed by Drammeh v Drammeh. In a Kenyan case Ayoob v Ayood[32] the facts were similar to Rattansey v Ranttansey. The East African Court of Appeal held that a marriage contracted by civil rites cannot be dissolved by Islamic pronoucement of Talak, even though the parties had been converted to Islam. Spry JA this time held that Rattansey v Rattansey could not be applied to Kenya because Kenyan law differed from Tanzanian law. I think that if the court had used the argument earlier propounded by Spry JA in the Rattansey case that is that Kenya like Tanganyika has an internal conflict of personal laws, so that divorce law should be determined by the personal law at the time the proceedings are started and not by the law under which the marriage was instituted.

The Kenyan courts have subsequently followed the ruling in Ayoob v Ayoob with disastrous effect. Thus in Re Demji[33] a man went through a marriage ceremony in the western way, with the first wife and had two children with her. It is not clear when he did but he clearly changed his way of life from western to African (that is if one is to reason that by undergoing the first ceremony, he had become westernised). He married two other ladies in accordance with customary law and had children with them. The court held that the two ladies married in accordance with customary law were not widows and therefore they and their children could not inherit. The court held the same in the matter of the Estate of Boaz Ogolla[34] whose facts are similar to Re Demji.

The same view was upheld in the Nigerian case of Onwudinjo v Onwidinjo[35] as discussed by obi - In this case a man married under the Nigerian marriage ordinance whilst that marriage was subsisting he purported to marry another lady under customary law when he did the question arose as to who were his heirs. It become necessary todecide whether the second union was a marriage. The court held that since the first marriage was not dissolved, the deceased lacked capacity to marry the second lady. According to Obi the first western marriage had not been proved to be valid this was because the so called western marriages were not purely western in view of the fact that the Africans comply with customary marriages before undergoing the western ceremony. According to Obi the court should however explored the possibility of the deceased and the widow having reverted to customary way of life after contracting the English marriage. Accordance to Obi there had been such a reversion in this case. And since under customary law polygamy is allowed the second marriage was valid. Accordingly the court did not realise that "a valid judgment of Divorce" is not the only way of changing the character of a western marriage and that section 35 of the Nigerian Marriage Ordinance (which is identical to section of the Kenyan statute) deals with situations where the life styles of the spouces do not change from western to the African.

The arguments postrated by Obi are directly applicable to the Kenyan situation. Kenya in fact should follow the enlightned approach of ~~Tanzania~~ Nigeria.

The most disastrous consequence of these marriages is that they are void and as has been revealed by case law, such wives are regarded as not wives subsequently the children born in these marriages are illegimate and cannot inherit anything from their father unless he makes them beneficiaries under his will.

This is the problem we have to grapple with. As has been indicated these unions become public at the death of the husband. This means that these women who have for all pruposes been regarded as the vives are treated in law as if they have been leading an adulterious life. This is very wrong and the law should not be used to make the men virtous. The law as such should not be patternalist in nature, instead it should seek to help men regulate their lives as it finds them, especially so in what is a very personal branch of the law. My argument is that even if monogamy is a state to be desired by all Egaliterian persons, it cannot be impossed on unwilling persons. This is because it cannot be denied that marriage as an institution is really based on mutual trust and confidence of the spouces ine ach other. For such an atmosphere to develop to its fullest, I think it is only easier if one man is committed to one woman and vice versa. In my opinion marriage is a personal relationship which involves a life time committment, this relationship is best maintained if it is monogamous. In addition to this I think that one of the objects of marriage is to help each other develop intellectually, emotionally, socially and spiritually this is a very taxing job and I don't think one can do it to the best of their ability by relating to many different people at that same level. And lastly, in this age of women's liberation, it is very degrading for any person to suppose that women can still be treated as they were in the earlier days without protest. As a woman this writter thinks that one cannot support equality of the sexes and at the same time support polygamy, it is not in keeping with equality

there can never be equality of the spouces in a polygamous marriage. This is a personal opinion and I think it would amount to narrow mindedness if I insisted that only monogamy should be practiced. A lot of personal taste and choice is involved in such a matter and I think it is only fair that freedom of choice as is embodied in our constitution should be allowed to prevail. Since most of the first wives never lodge their protest to the subsequent marriages e.g. by lodging advance petitions, then it should be assumed that they have accepted to regulate their lives in accordance with customary law. As Obi (above) has argued I think tha divorce should not be the only way to change the character of a monogamous marriage. In countries like Kenya where polygamy and monogamy are forced to exist side by side as a matter of right, there is need to recognise the fact that there has to arise internal conflicts and when such conflicts arise, it serves no just course to treat one kind of marriage as superior to the other. As long as women agree to be married polygamously the law is not justified in refusing to recognise these marriages. As has been argued elsewhere, the law should reflect the social realities. Since people allow their lives to be regulated by laws, it would amount to gross injustice, if the law took it upon itself to impose the values of a minority on a majority.

FOOTNOTES FOR CHAPTER 2

1. H.E. Morris and J.S. Read: Indirect Rule and the Search for Justice: Essays East Africa Legal History (Oxford Clarendon Printers 1972) page 213(Hereinafter referred to as Morris.

2. Arthur Phillips: Report on Native Tribunals, (Government Printer, Nairobi 1945) Chapter 26 Paragraph 885

3. Meaning the wife chosen among the others and wedded in church by the husband.

4. Morris (Footnote no. 12 Chap.1) states further:"Indeed in some territories Missionaries were highly critical of its introduction fearing that it would deter Africans from Christian marriage."

5. Morris and Read (Supra) page 221

6. An Allot: New Essays in African Law Chapter 6

7. L.P. Mair: Native Marriage in Uganda (International INstitute of African Languages and Cultures Memo XIX 1930)

8. Arthur Phillips (Supra) paragraph 903

9. Arthur Phillips (Supra) paragraph 904-905

10. Penal Code of Kenya Section 171, Sections 49 and 50 Marriage Act Cap.150 Laws of Kenya

11. Per Biron J in RV Haule (1969) THCD No.210

12. Hyde v. Hyde (1866) LR IPD 130

13. R.V. Amkeyo (1917) 7 E.A.L.R.14

14. Cole v. Cole (1898) I.N.L.R 15

15. R.V. Okumu 510 Achuda (1915) U.G.L.I.52

16. Mawji v. The Queen (1957) (All ER 385).

17. Abdulrhman Bin Mohammed and Another V.R. (1963) E.A. 188

18. Dodhia v. Grindlays National Bank (1970) E.A.

19. E.G. R.V. Mwakio (1932) 14 K.L.R. 133 R.V. Toya (1932) 14 K.L.R. 142

20. Baindail v. Baindail (1946) 1 All E.R. 122

21. Cheni v. Cheni (1962) 3 All E.R. 813

22. Ali v. Ali (1966) 1 All E.R. 664

23. Parkasho v. Singh

24. Shahnqz v. Rizwan (1964) 2 All E.R. 993

25. High Court of Kenya at Nairobi miscellenous case No. 139 of 1974

26. Cap.168 Laws of Kenya

27. Marriage Act Section

28. Drammeh v. Drammeh 1970 J.A.L.115

29. Rattansey v. Rattansey (1960) E.A. 463

30. Kristina d/o Hamisi v. Omari (1963) E.A. 463

31. AG of Ceylon v Reid (1965) 1 All ER 812

32 ~~31.~~ 1968 E.A. 72

33 ~~32~~. High Court of Kenya Misc. Civil Case No. 136 -175

34 1976, High Court of Kenya at Nairobi

35 SNC OBI 1962 JAL 49-52.

CHAPTER 3

THE LAW OF SUCCESSION ACT OF 1981: POSITION PRIOR TO THE ENACTMENT OF THE SUCCESSION ACT:

As was stated in chapter one, in 1904 the section of the 1902 Marriage ordinance which applied the English law of succession to the Africans who married under it was repealed. It was thereafter stipulated that the law of succession applicable to all Africans was their customary law

This position was reinstated in the Kenyan case of Pricilla Nyondo V/ Benjamin Jembe [1]

> In this case the deceased had Married a woman not of his tribe by Anglican rites. He subsequently Married other wives under customary law. On his death the applicant applied to the court asking for a declaration that the law applicable was the English law of succession. The court held that as of 1904 the law applicable to all Africans was their customary law. The court in this case did not address its mind to the position of the wives married subsequent to the church Marriage.

As in the area of Marriage and divorce, prior to July 1 1981 each community (Hindu, Moslems, Africans and Europeans) applied different laws of succession. There were different statues dealing with the making of wills [2]

The law of succession Act was the result of a commission appointed by the late President Kenyatta in 1967. It's main task was to prepare a draft unifying the law ofsuccession.

> Section 2 (1) of the set provides:
> "Except as otherwise provided in this act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to, all cases of intestate or testementary succession to the estates of the deceased persons dying after the commencement of the Act and to the Administration of estates of those persons."

Our main concern with this Act in this dissertation is to find out whether it in any way alters the lot of women married subsequent to statutory marriages and the children born in such marriages. This is being looked at with the background of chapter two where we saw that such marriages have been regarded as no marriages by the Kenyan courts.

Section 40 of the Act provides that

> "Where an intestate has married more than once under a law that permits polygamy, his personal effects and the residue of this net estate shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."

This section does not clearly state anything in regard to the conflict which arises as a result of potentially polygamous marriages. It does not specifically indicate whether the law that determines the polygamous character of the marriage is the one governing the first or the subsequent marriages.

The crucial issue upon which we have to discuss this legislation is that of statutory interpretation [3] and the place of precedent in relation to those problems. Judicial preoccupation with statutory interpretation is based on the fact that most of our laws are contained in statutes. One however would think that statutory law is really easy to apply as it is in written form. However, this definately is not the case. There are two basic reasons for the difficuties involved in applying statotary law.

1) When making laws the legislators are confronted with the difficulty of anticipation. While they may see one facet of a problem reasonably clearly, or one specific context in which the problem may arise, it is frequently difficult to anticipate the various guises in which the problem may appear and even more difficult to state the legal solution

in a form of language that will embrace all the cases with which the legislature wants to deal, and at the same not include irrelevancies

2) The difficulties are also reflected in fluidity and the ambiguity of language.

However, adequate a language might be, words in themselves are not instruments of precision. Their meanings shift through time and through different contexts. Yet in theory at least the verbal formulation by the legislature is the enduring, official and authoritative text, until the legislature sees it fit to change it.

As I have stated it is only in theory that the statute is supposed to be an absolute authority, in reality judges have to interpret the statutes and it is their interpretation which will carry the day at the end of a case. To help them in statutory interpretation there are basically three schools or types of legal approaches.

The first is the pseudo-logical or text book approach. The social policy approach and the free instuition approach. In this text I will only deal with the first approach, because it is the one which is mostly used by judges and even by text book writers.

The second one is partly embrodied in the first approach where as the last one is a very radical approach, courts by there very native are inclined to be more conservative than radical. Therefore the third approach may not be very appealing to the bench.

The textbook approach has three rules, these are the literal rule, the golden rule and the mischief rule.

The literal rule says that if the meaning of a section is plain, it must be applied regardless of the result. The golden rule says that where the ordinary sense of the words would lead to some absurdity or inconsistency, the literal interpretation must be modified accordingly.

The Mischief rule expresses both the oldest and the most Mordern approach. It directs the interpretation of a statute with its general policy and the evil which it was intended to remedy.

By emphasising either one or the other of these rules the judges can adopt a narrow or a broad approach, a reformist or a conservative attitude.

If the courts are to adopt a broad approach to the interpretation of section 40 it would include all wives. Even if the commission was not aware of the inconsistencies created by the cases like Re Remji Rwenje and Re Boaz Ogolla, it is very clear that the courts are aware of them as they are the ones who decided those cases. Therefore if the courts are to follow the golden rule it is obvious that they cannot interpret the section as excluding wives married subsequent to the statutory marriages, this is because such interpretation would lead to absurdity as has been evidenced by the decisions in the above cases.

Secondly if the broad and reformistapproach is used then it would mean that the law of succession Act being statute law overules case law. It is one of the principles of interpretation that as a source of law statutes overule case or other existing laws which are contradictory to it, this is under the rule that the latter law superceeds the former Legislation is also supreme to case law because of the position powers vested in the Legislature as the supreme law making body under the doctrine of the separation of powers, the Judiciary strictly only have the powers of interpratation and not of making laws and therefore case law being judgemade law can never superceed legislation.

However if the wife of such marriage is not provided for adequately section 26 provides:

> "where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may if it is of the opinion that the disposition of the deceased's estate effected by his will or by gift in contemplation of death or the law relating to intestacy or the combination of the will, gift and law, isnot such as to make reasonable provision for that dependant order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

Section 27 gives the court complete discretion as to the amount payable to such dependants.

Section 29 says that for the purposes of this part dependant means a) "the wife or wives or former wife or wives and th e children of the deceased, whether or not maintained by the deceased prior to his death." It is the argument of this author that since the act has no categories of wives, it must be impiled that wives of potentialy polygamous marriages are included in this provision.

As far as the children of these marriages are concerned they can be able to inherit even if the court decides that their mothers cannot.

Section 3 (2) of the Act provides that

> "References in this Act to child or children" shall include -- in reference to a male person a child whom he has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent resposibility.

Section 3 (3) states:

> ".....a child of male person shall have relationship to other persons through him or her as though the child had been born to her or him in wedlock"

From section 3 (2) there are three ways in which a child can be legitimized if he has been recognized expressly, or has been accepted or responsibility for him has been assumed by the father.

The problem however is what is the standard of proof as to whether any of those has happened. For example does express recognition have to be in writing, and what amounts to acceptance? I think that this section should be given the widest interpretation, such that no child can be left out of it. In fact the fact that the man has undergone a customary marriage, should Ipso Facto make children born within such a marriage his legitimate children. There should be no further proof necessary because there is a presumption of legitimacy for every one born within a marriage, and marriage includes all marriages recognised in Kenya of which customary marriage is one. It is the contention of this author that children should be treated with utmost justice, because they do not choose to be born, the law should see to it that those responsible for their existence, carry out their responsibilities to the fullest.

However since there is no case law on the statute, we can only speculate on how the courts will interpret these crucial sections. Even though I have advocated for liberal approach, it is possible that the courts will not have the same approach. In absence of a section clearly dealing with the conflicts encountered in the cases like Re Remji, the courts will most likely rely on precedent. Precedentis based on the principle that courts are bound by their judgements unless there is good reason to depart from them or there is statutory provisions overruling those decisions. Thus in Dodhia v National Grindlays Bank LTD [4] Sir Charles Newbold P. said

> "The duty of this court in Kenya is to decide any case coming before it according to the laws of Kenya and this court may be unable to do so if it is bound to follow a previous decision which is obviously contrary to law and which this court feels that it would be wrong to follow, and the court must therefore as the ultimate court of appeal be able to depart from a previous decision when it appears right to do so."

So the court has discretion as to whether it should rely or depart from precedent. If the courts decides to rely on precedent they will do so with disastrous effects. This is because in Kenya most women are housewives and as such it means that if they are disinherited they become destitudes.

As has been stated before the law should not demand from those whose conduct it regulates unattainable ideals, and as long as the society does not accept a certain idea the standard of behaviour the law should respect it. As was stated the attitudes towards polygamous and potentially polygamous marriages was based on a misconception of customary law by the colonialists. However it is outrageous that an Independent country like ours should still hold the same legally unsound views of their former colonial masters. Our laws should not only reflect but should also accommodate a majority view. This author is not in any way suggesting that Monogamy should be suppressed as a foreign ideal, in fact I believe that Monogamy is the ideal situation. However for those who cannot or do not desire to practice Monogamy, polygamy should be accorded all the respect it deserves. As a society based on fundamental freedoms of the individual, we have to respect these freedoms So if somebody thinks that to exercise polygamy is his freedom of expression or choice, or to change from one kind of marriage system to another is his right, then we cannot sit on these rights, but they should be given legal force and all the consequences of such right should be legally protected. From the case law examined in chapter two this author has came to the conclusion that statutory provisions cannot stamp out the potentially polygamous nature of a marriage unless there is such a concensus by the society. This is a decision made by an individual and only the belief in moral or otherwise of idealness of

monogamy can keep an individual Monogamous. Therefore untill a time comes when society accepts that only monogamy can be practiced we have to accept and uphold the existence of all the other systems of Marriage law.

FOOT NOTES FOR CPAPTER 3:

1. Priscilla Nyondo v Benjamin Jembe 4 E A L R at page 160.

2. Eg African Wills Act CAP 160 Laws of Kenya.

3. Harvey: Legal systems of East Africa Chapters V and V1.

4. Dodhia v National Grindlays Bank Ltd (1970) EA at page 200.