L E G I T I M A C Y I N K E N Y A

A final year dissertation paper prepared by

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LEGITIMACY IN KENYA

Introduction

Independent Kenya is facing an urgent task of reforming and modernising her system of laws. During the colonial era, little or no effort was made in the task of harmonising the various systems of laws which existed in Kenya. Customary laws existed side by side with the received English laws. In addition, Muslims and Hindus were subject to their own laws in certain matters especially those pertaining to family law. These laws were administered by different courts. The High Court and the Magistrate's' Courts were responsible for administering English law while customary law was the exclusive province of the African Courts. This dual court system tempered the conflict which would have otherwise emerged in the administration of the various laws. However, it at the same time retarded and frustrated the efforts of harmonising and modernising the laws. After Independence, rapid economic and social changes have occurred in Kenya and have emphasised the urgent need of law reform. It is only when the laws of a society genuinely reflect and serve the values and ideals of that society will there be stable social development. In Kenya, the Magistrates' Courts Act of 1967[1] which among other things abolished the dual court system has been a remarkable response to the need of law reform.

In the realm of family law, the difficulties and the need for reform has been keenly felt. It is in this area that a lot of confusion arising from the different systems of laws exist. On the one hand there is customary family law that is well developed and firmly entrenched among the African Communities. Then there is the English and the Hindu and Mohamedan law with their own distinct values. In attempting to evolve one family law system in a post colonial age to cater for the interests of a plural society, the legislators are faced with the difficulties of choosing between various systems of laws which fundamentally reflect different natures of family structure. It is against such background that I propose to embark on a study of the law of legitimacy in Kenya.

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1. Laws of Kenya chapter 10.

The study of legitimacy in this paper shall mainly concern legitimacy in English law as was received in Kenya[2] and the law of legitimacy obtaining in customary law. The study is therefore going to be comparative and analytical. I have chosen to examine and analyse legitimacy under these two systems of laws because in Kenya most people are affected and governed by them. In the event of any law reform in this area this factor must be borne in mind. In the paper, I shall show how the concept of legitimacy arose and developed in English law and determine its significance. I shall further examine the place of legitimacy in English law today in the light of social and economic changes. That done, it shall be necessary to say whether today the law of legitimacy should be retained at all.

There is a controversy as to whether or not the concept of legitimacy exists in customary law. This controversy shall be examined in the specific context of Kenya. It will be interesting to find out whether the trend in English legitimacy law is moving towards that alleged to be obtaining under customary law: that is having no concept of legitimacy.

What is Legitimacy?

It is fitting to define what legitimacy means before we embark on a study of the law of legitimacy in Kenya. Legitimacy has two broad meanings: the dictionary meaning and the family law meaning. Legitimacy as defined in the dictionary means to do something which is prescribed by law. That thing or act is therefore lawful, proper and permissible in the eyes of the law. This is the broader meaning of legitimacy and shall be dispensed with as it is not the concern of this paper. The other meaning of legitimacy is a narrower one and is used in family law. The term is used to describe every child born of a married woman during the subsistance of a valid marriage.[2a] It is this later meaning that shall be the concern of this paper. It is worthy to note at this point that the legitimacy Act[3] of Kenya does not offer a definition of legitimacy. To understand the concept of legitimacy as it is now known to us, we have to turn to the common law of England.

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2. At the reception date 12th August, 1897

2a Re Lowe (1929) 2 Ch.210 at p.212-13, for meaning of legitimacy in English law. It should be noted that under Moslem law, the child must be conceived in wedlock, and the time of birth is often irrelevant.

3 Laws of Kenya, Chapter 145

At common law, a child was legitimate if its parents were married at the time of its conception or at the time of its birth. It was not necessary for the purposes of legitimacy that a child be conceived and be born in wedlock. Legitimacy was determined by reference to the existence of a valid marriage of the parents of the child. At common law there was also a presumption of legitimacy if a child was born within a certain period after the dissolution of a marriage either by death or otherwise. But for the presumption to be upheld the husband and wife must have had access to each other and must not have been impotent at the material time.[4] That was how legitimacy was conceived at common law. When certain specified English laws were received in Kenya on 12th August 1897, this concept of legitimacy was carried with them into the laws of Kenya. Legitimacy in Kenya today therefore means the same thing as legitimacy in English common law.

But it must be noticed that the fore-going concept of legitimacy is one obtaining under the English law. In Kenya, the English rules of legitimacy will govern those people who contract marriages either under the Marriage Act[5] or the African Christian Marriage and Divorce Act[6]. Customary, Mohamedan and Hindu family laws have their own concepts of legitimacy as well. I shall examine legitimacy in customary law in great detail later. However, it is vital at this point to realise that when one refers to the law of legitimacy in Kenya, one is talking about a plural legitimacy law and not a singular one.

The meaning of illegitimacy

Legitimacy and illegitimacy are two sides of the same coin. To understand what legitimacy is, one has to understand the meaning of illegitimacy. Conversely, an understanding of illegitimacy requires an understanding of legitimacy. In England under the common law, an illegitimate child or bastard was regarded as "filius nullis" (son of no one) or "filius populi" (son of the people). To such a child, the rights and duties between parent and child had no application to him. A bastard was a child who was born out of lawful wedlock. A child would be bastardised when either the woman was not lawfully married at the time of its birth or when the woman was lawfully married but the child was by another man.

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4. Hargrave v. Hargrave (1846) 9 Beav. 552
5. Laws of Kenya, chapter 150
6. Laws of Kenya, chapter 151

A posthumous child was deemed to be legitimate if born within the gestation period. Today in English law, this is what illegitimacy is understood to mean. In Kenya's law of succession Act[7], 1st Schedule art. 20 it is stated that the term child will be construed to include an illegitimate child.

The significance of legitimacy and illegitimacy

The role of an individual in society depends upon his place in that society. And an individual's place in society is determined by his status in that society. As a matter of legal theory, it is only after determining the exact position of an individual in society that we can be able to assess the extent of his rights and duties, the range of social activities in which he may or must participate and his opportunities. As one's status is an important legal concept, various jurists have made attempts to define the term but no satisfactory formula has yet been achieved.

John Austin stated[8] that in respect of English law the term could not be used with exactness, but went on further to suggest that "where a set of rights and duties, capacities and incapacties, specially affecting a narrow class of persons is detached from the bulk of the legal system and placed under a separate head for the convenience of exposition, that set of rights and duties, capacities and incapacties, is called status". Allan[9] put it simply and suggested that status should be taken to mean "the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both". Status may therefore arise from a variety of conditions e.g. Sex, minority, marraige etc.

The law of legitimacy and illegitimacy is one which deals with the status of offspring or progency of children. Under the various systems of laws, children born legitimate are accorded certain legal rights and duties distinct from those that attend illegitimate children. These rights include those of inheritance, maintenance, succession and certain claims in tort which are determined by one's legitimacy or illegitimacy. It is therefore the privileges of status attached to legitimacy and the disabilities and incapacities accruing from the status of illegitimacy that give significance to the issues of legitimacy and illegitimacy.

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7 Laws of Kenya, No.14 of 1972. The Act has received Presidential Assent but it is not yet in force.

8 In his "Lectures on Jurisprudence" (ed.Campbell), Lectures XL-XLIV, p.699-700

9 "Legal Duties", p.42

Origins and development of legitimacy in English law

For many years, England has predominantly been a Christian country. The laws, values and morals of the English society have been to a large extent influenced by christian teachings and culture. Realising this, Lord Devlin remarked that morals and religion were inextricably joined and that moral codes can only claim validity by virtue of the religion on which they are based.[10] Christian morals and theology among other things forbid illicit sexual intercourse between unmarried persons and among married persons with one who is not either their lawful wife or husband. Sexual prohibition of this nature is meant to promote and preserve family life and the institution of marriage and also avoid the problems that would emanate from the birth of unwanted children. To ensure that this objective was realised, the State in England, apart from adopting Christianity as its religion, also devised ways of giving legal recognition to this principle. In this pursuit, the State introduced rules relating to legitimacy and illegitimacy. These rules in turn conferred legal status and force to the Christian morals and values of the English society. With the religion of the state condemning illegitimacy as evil and undesirable and its laws punishing it, it was hoped that illicit sexual intercourse would be curbed.

The common law courts in England were responsible for evolving and moulding the rules of legitimacy. In the early stages of the development of common law, the rule that a child could not be legitimate unless born in lawful wedlock was strongly adhered to. At this time in common law, an illegitimate child could not be legitimated by the subsequent marriage of its parents. It was only the legislature that could legitimate an illegitimate person by a special Act of Parliament. So by and large, the rules relating to legitimacy were rigid and harsh and had to be relaxed and mitigated as society continued to change.

Until the 16th century, the maintenance of an illegitimate child was assumed by the parish in which the child was born. The first effort that was made to shift this burden from the parishes was by an Act of 1576. The Act imposed obligations of support of the illegitimate child on the mother and the ~~protective~~ putative father. In default of payment of maintenance dues, the parties responsible could be imprisoned.

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10 Sir Patrick Devlin: The Enforcement of Morals, Maccabaean Lecture in Jurisprudence, Read 18 March, 1959 at p.6

The Poor Law of 1601, inter alia, re-enacted the provisions of the 1576 Act. For over three hundred years, the law of legitimacy in England remained largely unaltered.

In 1926, a remarkable change in the law took place. By the Legitimacy Act of 1926, it was settled that when the unwed parents of an illegitimate child marry, the marriage would render that child legitimate.[11] However, this provision applied to children whose fathers were domiciled in England or Wales at the time of the marriage. The reason for this is that a child's status in English law is determined by the law of his father's domicile.

By the mid-20th century in England the support of an illegitimate child was primarily the mother's duty, she was usually the child's legal custodian. Between the illegitimate child and its mother there subsisted the rights of interstate inheritance. To all intents and purposes, the relationship between the mother and the illegitimate child resembled that between the mother and her legitimate child. But between the putative father and the illegitimate child, the legal ties were few. The putative father had conditional rights to custody and limited responsibility for the child's support. In 1959, the benefits of the Legitimacy Act of 1926 were expanded. By section 1 of the Legitimacy Act of 1959[12] a child who is born when either father or mother is married to a third person can be legitimated by the subsequent marriage of its parents. In all other cases such a child is legitimated by virtues of the 1926 Act. It should be noted further that legitimation does not have retrospective effect under either Act, so that if the parents of the child were married before the relevant Act came into force, the child was legitimated when that Act came into operation, and if they marry after the date, the child is legitimated on the day of the marriage.

Today, the law of Legitimacy in England standa as has been stated above. The general trend over the years has been to narrow down the gap that separates the illegitimate child from the legitimate one. The question to ask here is whether this process shall continue until the gap is closed so that the rights and duties of an illegitimate child are equal and similar to those of a legitimate one. We propose to deal with this issue later on in the paper.

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11. Section 1(1) of the Legitimacy Act 1926

12 Section 1(2) of Legitimacy Act 1959, removed the principal bar to legitimation.

The Law of English Legitimacy in Kenya

We have seen how the law of legitimacy developed in England and acquired its present status. It should be mentioned at this point that the law of legitimacy in force in England today is not the same as the law of legitimacy in Kenya. Admittedly, there are a lot of similarities between the English law of legitimacy and the legitimacy law obtaining in Kenya. But however, there are also some differences especially those that the 1959 English legitimacy Act brought. The modifications that were made to legitimacy in the 1959 Act are markedly absent in the legitimacy law of Kenya.

The English law of legitimacy first came into Kenya on 12th August 1897 when a whole body of specified English law was received in Kenya[13]. At that time, the modernisation and improvements that the 1926 and 1959 English Legitimacy Acts made to legitimacy were non-existent. The legitimacy law received into Kenya was therefore that ancient, rigid and harsh law of pre-1926. After the enactment of the English Legitimacy Act of 1926, it was necessary for Kenya to alter her law so that it could incorporate the changes that the 1926 English Act had brought. In 1930, such a step was taken and the then Legislative Assembly enacted the Legitimacy Act[14] of Kenya. Speaking about the need to change the law of legitimacy in Kenya so that it could reflect the changes that had taken place in the English law, the Honourable Attorney General in 1930 told the Legislative Assembly:

"It has always been a source of amazement to me, Sir, and I am sure that amazement is shared by many other Hon. Members, that it was only in the year 1926 that England, with its great tradition of equity and fairness, saw it fit to make legislative provision for the illegitimate children. But I am glad to say, Sir, that since the Imperial Parliament made that provision very many Colonies gladly and immediately followed that lead; and now, Sir, it is my privilege to introduce a similar measure in this colony"[15]

With very minor alterations, the 1930 Act is still the law of legitimacy in force in Kenya today. For a clearer understanding of the English law of legitimacy in force, we have therefore to study the Legitimacy Act of Kenya.

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13. See the Judicature Act, Cap.8 of Laws of Kenya, S.3(1)(C)
14. ibid at p.2
15. See - Kenya Legislative Council Debates Vol.1, 1930 p.282 at the Second Reading of the Legitimacy Bill.

The Legitimacy Act[16]

The Act came into force on 10th June 1930. The Act is a short one containing 11 sections and a Schedule. It does not codify the substantive rules of legitimacy. The rules contained in the Act are mainly procedural. This is why the Act is that much shorter. To determine the substantive rules pertaining to legitimacy, one has therefore to turn to the Common law.

At the Second Reading of the Legitimacy Bill in 1930, the honourable Attorney General told the Legislative Council that "the major part of the Bill (Legitimacy) .....deals with ..... quite distinct matter of legitimation .....". The honourable Attorney General went on to declare that, "the other provisions of the Bill ..... deal almost entirely with the consequences of the acquisation of the status of legitimacy by the child".[17] The Attorney General's summary of the provisions of the Act was remarkably accurate. S. 3(1) of the Act, which can be described as the nucleus of the Act, provides for the legitimation of a child by the subsequent marriage of its parents. The Section reads:

"Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled[18] in Kenya, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens".

This section is almost a reproduction of word for word of S. 1(2) of the English Legitimacy Act of 1926. This goes to confirm the Attorney General's assertion that he was merely introducing a measure that had been concluded in England and which so many other colonies had adopted. Needless to say that since Kenya was merely adopting a statute from the "mother" country, the Act was passed virtually undebated.

S.9(1) of the Legitimacy Act largely resembles S.3(1) It provides for the recognition of legitimation of a person by extraneous law. In effect, this section was conceding to the concept of legitimation in jurisdictions other than those in the Common law world.

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16 ibid
17 Kenya Legislative Council Debates, op.cit. p.283
18 The Law of Domicil Act, Cap.37, S.5

In extenso the section provides:

"Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than Kenya, by the law of which the illegitimate person became legitimated ..... that person if living, shall in Kenya be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage whichever last happens, notwithstanding that his father was not at the time of the birth of such a person domiciled in a country in which legitimation by subsequent marriage was permitted by law".
S.7 falls in line with the above two sections and provides that the spouse and children of an illegitimate person, who dies before his parents marry shall in respect of taking interests in property have the same rights as the spouse and children of a legitimate person when the parents of such a person (illegitimate) subsequently marry.

Other salient sections of the Act include S.4 (1) which provides for a procedure to be followed by a petitioner wishing to be declared legitimate by the High Court, S. 5 (1) outlines the rights of a legitimated person which to all intents and purposes correpond and are equal to those of a child born legitimate. Under S.8, a legitimated person is to enjoy the same rights and obligations in respect of maintenance as a person who was born legitimate. Further, claims for damages, compensation, allowance, benefit or otherwise in respect of a legitimate child shall apply in like manner in the case of a legitimated person.

Finally, S.10(1) provides that where the mother of an illegitimate child dies interstate and does not leave any legitimate issue surving her, then the illegitimate child, or if he is dead, his issue shall be entitled to take the interest in the mother's movable or immovable property.[19] Conversely, the mother of an illegitimate child shall be entitled to take the interest in the illegitimate child's immovable and movable property if the illegitimate child dies interstate.

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19. For the law regulating succession to immovable and movable property, See Law of Succession Act, 1972, S.4 (1) (a) and 4 (1) (b).
Note however, the Law of Succession Act 1972 is not yet in force.

To whom does the Act apply?

It has been pointed out that the provisions of the Legitimacy Act do not apply to all systems of marriage in Kenya. In fact, the Legitimacy Act, it has been declared only applies to statutory marriages under English law. This assertion has hitherto been made without justification and it is proper at this juncture to justify it. But before that, it is worthy to note that the application of the Legitimacy Act has not been a subject of judicial adjudication in the courts of Kenya; however, the views that are subsequently given indicate the stand the courts are likely to take if a dispute of this nature is brought before them.

On very general basis, it can be argued that since the law of Kenya relating to family affairs recognise four systems of marriage laws then it must also follow that four types of legitimacy laws are recognised since legitimacy is an aspect peculiar to a given family law. However, an argument of this nature cannot be conclusive and calls for further explanation. In 1930 when the Legitimacy Bill was introduced in the Legislative Council it was never explicitly stated to whom the Bill was going to apply. But it was strongly implied that the Act would apply to English type of marriages.[20] The Attorney General in moving the Bill categorically stated that he was merely introducing a measure that had been already concluded in England. The measure the Attorney General was referring to applied in England to marriages contracted under English law. So that part of Kenyan family law which was predominantly English had to be injected with a similar measure. In effect this meant that the Legitimacy Bill was to apply to English type of marriages in Kenya. In the same speech, the Attorney General is also recorded to have said that "..... if both parents are still alive and within the colony .....", then on providing the birth, parantage and their subsequent marriage, the child's birth would be registered as legitimate. Doubtlessly, the quotation above though it did not say in so many words was referring to those Europeans living in Kenya and who naturally would be governed by English family law. For as it has always been pointed out, "an Englishman carries with him English law and liberties into any unoccupied country where he settles, so far as they are applicable to the situation having regard to all circumstances."[21]

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20 Kenya Legislative Assembly Debates, loc. cit.

21 Jenkyns, British Rule and Jurisdiction Beyond the Seas (Oxford: Clarendon Press, 1902)

Perhaps with this view in mind, it did not occur to the Attorney General to state expressly the extent of the application of the Legitimacy Bill for it was clear among Englishmen that "as the law is the birthright of every subject (English subjects) so wherever they go they carry their law with them, and therefore every such new found country is to be governed by the law of England." [22]

So far, we have argued that the legitimacy Act does apply only to English forms of marriage in Kenya. Our assertion can further be strengthened if we go on to show that in fact the legitimacy Act is precluded from applying to other forms of marriage in Kenya. This approach is a negative one but it still proves the point. Let us first examine marriages under Islamic Law.

The Mohammedan Marriage Divorce and Succession Act[23] which governs marriages under Islamic law provides in S.3(1) that;

"Mohamedan marriages, whether contracted before or after the commencement of this Act, shall be deemed ..... and the parties thereto shall, subject to the provisions of this Act be entitled to any relief by way of divorce or otherwise which can be had, granted or obtained according to Mohammedan law .....".
The section thus guarantees the granting of "relief by way of divorce or otherwise" and this can correctly be interpreted to include relief in matters under the Act. To this extent therefore, the application of the legitimacy Act is excluded. However, a word of caution should be sounded here. One would expect that S.3(1) of the Mohammedan Marriage, Divorce and Succession Act would govern all the incidence of marriage under Mohammedan law including the question of the guardianship of infants. But in Bazmi v. Sultana [24] the Court of Appeal for East Africa considering the question of guardianship of an infant in a marriage that had been contracted under Islamic law ruled that

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22 Anon, 2P Wms 75 (1722)

23 Laws of Kenya, Cap. 156

24 (1960) E.A. 801

"the Guardinaship of Infants Act applies with full force to Mohammedan, not less than to other infants and under S.17[25] the welfare of the child and not the right under Mohammedan law of either parent is a paramount consideration in deciding questions of custody". Admittedly, the court was examining a question of the guardianship of an infant. And issues affecting the guardianship of an infant in marriages contracted under the Mohammedan Marriage, Divorce and Succession Act are provided for under that law. But at the same time, issues of guardianship are also provided for under the Guardianship of Infants Act.[26] Here then was a conflict between the two Acts and in the result, the court ruled that the Guardianship of Infants Act would prevail over the Mohammedan Marriage Divorce and Succession Act. To justify their decision, the court quoted S.17 of the Guardianship of Infants Act but did not proceed to consider the provision under the Mohammedan Marraige Divorce and Succession Act. Perhaps their decision can be defended more persuasively on grounds of public policy. For the purposes of this paper, it is submitted that the decision in Bazmi v. Sultana is only limited to issues of custody of infants and does not pervade the province of legitimacy. In this result therefore, the contention that the Legitimacy Act does not apply to marriages contracted under Mohammedan Law still holds.

We next have to show that the Legitimacy Act does not apply to marriages under customary law. S.2 of the Magistrates' Courts Act[27] recognises legitimacy to be a claim under customary law for which relief could be sought, This being the case, it is submitted that customarily law legitimacy must be peculiar to marriages contracted under customary law.

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25 "Where in any proceeding before any court the custody or upbringing of an infant ----- is in question, the court in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father, in respect of such custody, upbringing ... or the claim of the mother is superior to that of the father".

26 Laws of Kenya, Cap. 144

27 Laws of Kenya, Cap.

If this were otherwise, then there would have been no point in stating expressly that legitimacy was a claim under customary law. It is the contention of this paper that legitimacy has been emphatically stated to be one of that claims that can be made under customary law to contradistinguish it from the rules contained in the Legitimacy Act. Earlier in 1917, Hamilton C,J. had condemned customary law marriages in R v. Amkeyo[28] as not approximating in any way to the legal ideal of a marriage. So far the period when the decision in Amkeyo's case was binding authority,[29] the Legitimacy Act could not possibly apply to customary law marriages for they were regarded not legal marriages as such.

Finally, we have to examine the position of the Hindus. The Hindu Marriage and Divorce Act[30] is silent on the issue of legitimacy. Only in S.2 of the Act are illegitimate and legitimate persons mentioned. But this is only done for the purpose of determining a Hindu, Buddhist, Jain or Sikh in the context of the Act. The important point that can be drawn from S.2 is that the status of legitimacy and illegitimacy are recognised in Hindu law. In this book [31], Derret observes that "as soon as a Hindu child is born he or she has certain legal rights and certain legal status". He goes on to state "any child who is not legitimate is illegitimate". From the foregoing, it can safely be asseted that Hindu law contains its own rules of legitimacy. And if this is the case, as it must be, then the application of the Legitimacy Act is excluded in Hindu Marriages. To the best knowledge of the writer, no court in East Africa has been confronted with the question of deciding whether the Legitimacy Act applies to parties who marry under Hindu Law. But it is submitted that if the courts were to be called upon to determine an issue of this nature, they would most probably rule that the Legitimacy Act does not apply. This submission would be supported among other things by the Constitution of Kenya [32]. S. 82 (4)(b) of the Constitution allows the existence of discriminatory rules in matters of personal law.

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28 (1917) 7 E.A.L.R. 14

29 It was overruled in Alai v. Uganda (1967) E.A. 596. Per Sir Udo Udoma, "Onee a person goes under any form of recognised marriage in Uganda, he acquires the status of married persons for all purposes."

30 Laws of Kenya Cap. 157

31 Derret, Introduction to Modern Hindu Law, Oxf. University Press, 1963 pp.32 and 37

32 Act No. 5 of 1969

In view of this, legitimacy, being a matter that pertains to personal law would be recognised in the courts of Kenya. Further, since the three other systems of marriage in Kenya have their own laws of legitimacy it is only reasonable that the Hindu system should also enjoy its own law of legitimacy. Referring to the Nigerian family law, Kasunmu and Salacuse [33] conclude that "There is no unifield system of legitimacy in Nigeria as in England. Just as there are various types of marriages, there are various laws of legitimacy which apply with varying effects". It is submitted that the same argument would be made for the situation in Kenya and consequently the Hindu law of legitimacy would apply to Hindu marriages to the exclusion of the legitimacy Act.

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33 Kasunmu and Salacuce, Nigerian Family Law Butterworths 1966, p.207

PART B

ASPECTS OF LEGITIMACY.

Presumption of Legitimacy:-

The question as to who is the mother of a child is normally easy to answer. The fact of birth and identity can be given by a doctor or those persons that were present at the birth of the child. However, it is difficult to establish affirmatively the paternity of a child. Normally, paternity is inferred from the fact that the alleged father had sexual intercourse with the mother about the time when the child could have been conceived. The difficulty of establishing the paternity of a child is made more intricate when, for example, two men had sexual intercourse with the mother of the child at the time when she could have conceived.

It is the difficulty of proving the paternity of a child that led English law to adopt the civil law maxim, "Pater est quem nuptiae demonstrant" i.e. if a child is born to a married woman, her husband is to be deemed to be its father until the contrary is proved. This maxim then forms the basis of the presumption of legitimacy. Arising from this presumption, if it is alleged that a child is not legitimate, then the burden of proving the illegitimacy is cast upon the party alleging it. The presumption still applies even though the child is born so soon after the marriage that it must have been conceived beforehand. Expounding on this point, Lord Cairns, L.C. in Gardner v. Gardner [1] said:

"Where a man marries a woman who is in a state of pregnancy, the presumption of paternity from that mere fact is very strong .....Still further where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced ..... to the intended husband, a presumption is reared up which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome".

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1. (1877) 2 App. Cas. 723, 729

However, if the husband was ignorant of the wife's pregnancy when he married her, then the presumption may be rebutted. In the Poulett Peerage Case[2], the wife was three months pregnant at the time of the marriage. Two months later, the husband separated from her on the ground that she was pregnant by another man. The husband contended that he had not had sexual intercourse with her before the marriage. Evidence was also given that the wife had told a friend that another man was the father of the child. It was held that the presumption of the child's legitimacy had been rebutted.

Again in the case of a posthumous child, born within the normal period of gestation after the death of the husband the presumption will apply[3]. The difficulty that might be confronted here is if the birth takes place after an abnormally long period. The courts will take judicial notice of the normal period of gestation i.e. a duration of between 270 and 280 days. This was the view of the court in Preston - Jones v. Preston - Jones[4]. However, Lord MacDermott in the same case was of the view that the court should take judicial notice of the fact that the normal period of gestation is not always followed and may be considerably longer or shorter in varying cases. In the light of this observation, it would seem that the longer the period deviates from the normal gestation period, the more easily will the presumption of legitimacy be rebutted. Equally, it seems that the presumption applies in the case of a child born after a decree of divorce has been pronounced. In Knowles v. Knowles[5] the facts were such that the child could have been conceived before or after the decree absolute. It was held by Wragham, J. that the presumption of legitimacy would operate in favour of presuming that conception took place while the marriage was still subsisting. But the learned judge hastened to add that in such circumstances, the presumption could be rebutted much more easily.

The above instances when the presumption of legitimacy will be raised is summarised ~~by~~ in S.118 of Kenya's Evidence Act[6] in the following words:

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2. (1903) A.C. 395 H.L.
3. Re Heath (1945) Ch 417, 421-422, per COHEN, J.
4. (1951) I All E.R. 124 H.L.
5. (1962) I All E.R. 659
6. Laws of Kenya, Cap. 80

> "the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been ~~together~~ begotten".

The marginal note of S.118 talks of "conclusive proof of legitimacy". In this respect conclusive proof would mean that the presumption is irrebutable. But it would appear that the term conclusive in the marginal note of S.118 is wrongly used since the presumption raised can be rebutted by evidence showing either (a) that the parties had no access to each other or (b) that the circumstances of their access rendered it highly improbable for sexual intercourse to take place.

It will be seen later than the two methods of rebutting the presumption of legitimacy all related to the proof that the husband and wife did not in fact have sexual intercourse. The question that arises at this juncture is that if the husband and wife do in fact have sexual intercourse, is it possible to show that the child is not the issue of such intercourse? The Evidence Act seems to exclude this possibility notwithstanding the fact that one might be able to show conclusively that the child is illegitimate. Thus, for example, if a black Kenyan woman who is married to another black Kenyan man should have a white baby, the husband can only rebut the presumption of legitimacy by proving non-access, failure to do this will mean that the husband has to accept the child as legitimate though he could prove by other means that he is not the father.

Further, where a child must have been conceived during the subsistance of a marriage which has since been terminated by the death of the first husband or divorce, there arises two conflicting presumptions[8].

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7. A decision to that effect was given in a New Zealand Court in Ah Chuck v. Needham, (1931) N.Z.L.R. 559 where it was held that the fact that the white wife of a white husband gave birth to a child of Mongol stock, her paramount being a Mongol, was insufficient to rebut the presunption of legitimacy.

8. Bromley: Bromley's Family Law, Butterwoths 1971 4th Edn. p.2

However, it is submitted that in the absence of evidence to the contrary, it ought to be presumed that the mother has not committed adultery and that therefore the child is the legitimate issue of the first husband.[9]

Rebutting the Presumption:

The presumption of legitimacy involves the making of two assumptions: (a) that the husband and wife had sexual intercourse and (b) that that child is the issue of the intercourse. So in rebutting the presumption of legitimacy, one has to show that the spouses could not or did not have intercourse or establish by medical evidence that, in any event, the husband could not be the father of the child in question.

Standard of proof required:

Because of the abhorance which was attached to illegitimacy at common law, the standard of proof required to rebut the presumption of legitimacy was that of "beyond reasonable doubt". Since now the position of illegitimate children has been vastly improved, it was considered that the standard of proof of illegitimacy should rank the same with the general standard of proof in civil cases. In England S.26 of the Family Law Reform Act 1969 has put this into operation by stating that any presumption of legitimacy or illegitimacy can be rebutted by evidence which indicates the contrary on a balance of probabilities. In Kenya, however, there is no such statutory enactment but it would from cases, especially Daws v. Daws [10] seem that the standard of proof required for rebutting the presumption is more than that of a balance of probabilities but less than that of beyond reasonable doubt.

Rebutting the Presumption of Access:-

The classic statement of law relating to this subject was made way back in 1811 in Banbury Peerage case [11]. The House of Lords stated that the presumption of legitimacy could be rebutted only by proof of the husband's impotence or of the fact that intercourse did not take place between the husband and wife at such time as to make the child the issue of it.

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9. See Re Overbury (1954) 3 All E.R. 308 where HARMAN,J. on the facts found in favour of the first husband.
10. 27 K.L.R. 125
11. (1811) 1 Sim. & St. 153 H.L.

If it is shown that at the time when the child was conceived, the husband was permanently impotent or temporarily so, then this will generally suffice to prove that he cannot be the child's father[12]. However, if the wife becomes pregnant as a result of fecundation ab extra[13] or by artificial insemination with her husband's seed then the child will be deemed his legitimate issue. The presumption of legitimacy can also be rebutted by showing that at the time the child was conceived, the husband was absent and therefore the chances of there having been sexual intercourse were impossible. The proof of the absence of the husband is easy. The only difficulty that can arise in rebutting the presumption is when the husband has been absent for relatively short periods and it is sought to establish the child's illegitimacy by showing that it must have been conceived during that period.

The presumption of access can still be rebutted by evidence showing that at the time of meeting between the husband and wife, intercourse was so unlikely that it can be concluded on a balance of probabilities that it did not take place. If the husband and wife shared the same bed it would almost be impossible to rebut the presumption unless it can be shown that the husband is impotent. It is now settled law since the decision in Morris v. Davies[14] that in order to rebut the presumption that intercourse took place evidence must be given not only of circumstances existing at the time of the conception and birth but also of relevant facts both preceding and following these. Relevant facts would include the conduct of the spouses towards each other and statements made by them if they point to their having not had intercourse for sometime[15] the fact that the wife concealed her pregnancy from her husband would indicate that the wife does not believe that the child is that of her husband[16], and also the conduct of the parties towards the child after birth. If the putative father permits his name to be registered as that of the father or if he pays for medical attention at the birth of the child, then this is strong evidence that he is the father.

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12. Banbury Peerage case (Supra)
13. As in Clarke v. Clarke (1943) 2 All ER 540
14. (1837) 5 Cl. & F. 163 H.L.
15. Per Lord Langdale, M.R., in Hagrave v. Hagrave (1846) 9 Beev. 552 at pp.555-556
16. Morris v. Davies (Supra)

Rebutting the presumption that the child is the issue of the intercourse:

Banbury Peerage case[17] considered principally the method of rebutting the presumption that in fact the husband and wife had sexual intercourse. Our task now is to consider the circumstances in which the presumption that the child must be the issue of that intercourse can be rebutted. The problem here as has already been stated is this: suppose at the time the child was conceived the mother was having sexual intercourse with the husband as well as another man, how will the husband be able to rebut the presumption of legitimacy or alternatively, how will it be shown that the child is more likely to be of the other man than that of the mother's husband? The fact that the mother committed adultery per se cannot rebut the presumption. Again the fact that the husband invariably used contraceptives will not absolve him from responsibility[18]. Only if the husband is shown to have been sterile will the presumption be conclusively rebutted. It has also been the view of the courts that in a case where both the husband and wife are white and the man who commits adultery with the mother is black and the child in question is coloured, then the child must be the issue between the wife and the black man.[19]

More recently, however, much more reliable evidence of rebutting the presumption has been produced by the use of blood tests. It has been known through serology that a person's blood may have a variety of different characteristics and that these must have been derived from one or other parent. So if it is found through a blood test that a child's blood has some characteristics that is absent from the blood of both the husband and wife then the husband cannot be the father. The child must have derived that characteristic from some other man who is its father.

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17. (1811) 1 Sim & St.153 (ante)

18. Francis v. Francis (1960) P.17. Hitherto it was held that this was so even if the husband used contraceptives. But it is submitted that now the presumption would be rebutted on a balance of probabilities if the other man did not use contraceptives. However, the issue remains unsolved if both men used contraceptives.

19. In Slingby v. A.G. (1916)33 T.L.R. 120, evidence of this nature was apparently admissible.

If the blood of both men who might be the father possesses the same characteristic, then a blood test cannot establish from which of them the child inherited it. Blood tests are therefore used negatively to establish that a given man cannot be the father of a given child. Blood tests cannot prove affirmatively that a particular man is the child's father. In order to attain more reliable results, the blood of the child, the mother and the alleged father should be tested. Although blood tests are considerably accurate way of rebutting the presumption of legitimacy, yet the courts have no power to order an adult to submit to them. In S v. S,[20] Lord Reid emphatically reiterated this point when he observed "There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will". The courts inability to order blood tests will perhaps render this method of rebutting the presumption less important.

The effect of void and voidable marriages[21] on legitimacy.

At common law, a child born out of a void or voidable[22] marriage was considered illegitimate. This was so since such marriages were in law not marriages at all. However, the English Matrimonial Causes Act of 1937 changed this position. The Act provided that any child born as a result of a voidable marriage which was terminated by a decree of nullity would be regarded as legitimate,[23] The Kenyan Matrimonial Causes Act [24] incorporated this alteration in S. 14(2). The Section provides, "Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child notwithstanding the annulment". The 1937 English Matrimonial Causes Act did not however alter the position of children born out of a void marriage.

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20. (1970)3 All ER 107 H.L.

21. For historical distinction between void and voidable marriages, see "Void and Voidable Marriages" 1964 27 M.L.R. 385

22. Distinction between the two made per LORD GREEN in De Reneville v. De Reneville (1948) P.100 at p.111

23. S. 7(2) Matrimonial Causes Act 1937

24. Laws of Kenya Cap. 152

Such children as was the case under the common law still remained illegitimate. The plight of these children was only to be changed in England in 1959 by the Legitimacy Act. S.2 of the Acts states ". ...the child of a void marriage, whether born before or after the commencement of this Act shall be treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid". In Kenya, there is no such provision therefore under the law, children born out of a void marriage would be treated as illegitimate. Aware of the difficulties that face such children, both the Marriage and Divorce[25] and Succession[26] Commissions have recommended such children be treated as legitimate issues of their parents.

Legitimation

The Roman law rule that a bastard would become legitimate if his parents subsequently married was later adopted by Canon law. The common law however rejected this doctrine of "legitimation per subsequens matrimonium". As a result no form of legitimation was recognised by English Municipal law until the enactment of the Legitimacy Act of 1926 which expressly introduced the doctrine in English law. In Kenya, a similar step was taken in 1930 by the passing of the Legitimacy Act. The Act recognised the doctrine of legitimation in S.3(1) which provided, "Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Kenya, render that person, if living, legitimate from the commencement of the Act, or from the date of the marriage, whichever happens last". It should be noticed that the operation of the section comes into play only if the father is domiciled in Kenya at the time of the marriage. The reason for this is that a child's status is determined by the father's law of domicile; the mother's domicile at such is irrelevant.

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25. Report of the Commission on the Law of Marriage and Divorce, 1968 Govt. Printer Nairobi p.164.

26. Report of the Commission on the Law of Succession, Government Printer Nairobi, 1968 p.49

After legitimation, a person acquires the same rights and obligations in respect of maintenance and support of **himself** and other persons as if he had been born legitimate. Further, any legal claims for damages, compensation, allowances etc. that could be made by or in respect of a legitimate person can now be made by or in respect of a legitimated person. 26a

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26a See for example S. 32(1) of Kenya Income Tax Act ~~1973~~ 1973, No. 16 of 1973.

P A R T C

Legitimacy under customary Law:

General Remarks:-

Before we examine the specific topic of legitimacy under customary law, it is worthwhile to look at customary law in general, note its salient features and expose the problems facing a legal researcher in customary law. Only if this is done will a stage be set upon which legitimacy as one aspect of customary law can be analysed and be comprehended.

Research in African customary law is difficult and sometimes confusing. This difficulty is raised by a number of factors. First is the factor of diversity of the African communities. In Kenya, for example, there are up to 50 different tribes which possess different customary laws. Further, most of these tribes are sub-divided into clans and sub-clans. Again the laws of the clans and sub-clans within the same tribe might be different. As a result of the diversity among the African societies the job of ascertaining what "African customary law" is becomes almost insurmountable. So what is said to be African customary law in Kenya may be a generalisation and the reader must be aware of this. Notwithstanding the fact that some rules may differ from one community to another, there still are some features common to most if not all systems of customary law.

The second factor that complicates research in customary law is the changes that have occurred and are still occuring in 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 more than anything else into Commonwealth Africa has contributed a lot towards this change. The effect of this process is to render customary law rules uncertain from time to time.

The Judicature Act[1] has also contributed to the complexity of ascertaining customary law. S. 3(2) of the Act instructs that:

> "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 or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay".

It is to be noted from this provision that the High Court and the Subordinate courts are only to be guided and not to be bound by customary law. And customary law will only apply in civil cases and not criminal ones. Again if there is a customary law rule however well established, it will still be rejected on grounds of being repugnant to justice and morality. The question that immediately arises is whose morality and justice the courts have to consider.

In the Tanganyika case of Gwao Bin Kilimo v. Kisuba bin Ifuti[2], a revenue clerk had collected tax from the plaintiff on a forged receipt. He was subsequently convicted of the offence. The plaintiff further obtained a civil judgment against him and the court attached the defendant's father's animals. Witnesses gave evidence to the effect that according to their tribal laws a father was bound to pay compensation for the wrongs of his sons. Wilson J. considered whether this custom was repugnant to justice and morality and said:

> "Morality and justice are abstract conception and every community probably has an absolute standard of its own by which to decide what is justice and what is morality. But unfortunately, the standards of different communities are by no means the same. To what standards then does the Order-in - Council refer - the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example as the institution of slavery .... It is certainly contrary to the principles of British justice that the sins of the sons should be visited on the father".

Wilson J. consequently ruled that the attachment of the father's animals was repugnant to justice and morality by British standards. Here the African customary law rule was ignored.

Again in the Kenyan case of Momanyi v. Omwanga[3] 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 several children by him.

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2. (1938)1 T.L.R. 403

3. South Nyanza, Registry, Appeal No.16 of 1953

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.

These two cases above illustrate the blow the so called repugnancy clause has landed 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. Does such a rule remain operative under customary law? It is difficult to answer this question with any amount of certainty, but it is submitted that such a rule would still remain operative extra-judicially under customary law but would be held invalid in the courts.

A fourth factor that poses difficulties for researchers in customary law is the fact that it is unwritten. Customarily, customary law was passed from one generation to another orally by the elders who were well versed in the customs of a particular tribe. Now with the social changes taking place, it is hard to find elders who are conversant and competent at their own customary law. The few elders that are accessible often will give conflicting accounts of a rule under customary law. This point was again clearly brought out in Gwao Bin Kilimo v. Kisuba bin Ifuti [4]. In that case about six witnesses gave evidence endeavouring to establish the customary law rule that a father was obliged to pay compensation for the wrongs of his son. After hearing the evidence, Wilson J. observed:

> "Unfortunately, their evidence was mutually contradictory on essential points and the court (trial court) had to decide the matter by preferning certain parts of the evidence of two or three witnesses to the general drift of all the rest of the evidence".

In the Ugandan case of Mwanga v. Kabaka[5] the issue arose as to whether it was the duty of the reigning Kabaka to acknowledge his eldest son or to appoint him as a "Kiwewa" i.e. a trustee with the responsibility of looking after his brothers.

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4. ibid at p.35

5. (1965) E.A. 455

It was contended that the person who is named as the Kabaka on the death of the former Kabaka automatically assumes the title of "Kiwewa". The advisers of the Kabaka, court elders and others conversant with Buganda customary law gave conflicting evidence as to what was the right procedure. On a balance of probabilities, Sheridan J. had to accept one of the versions given:

> "On balance, I believe that the custom was for the reigning Kabaka to acknowledge his eldest son and appoint him as Kiwewa ..... other than the brother who was elected as Kabaka, after his death".

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 legitimacy should be approached. However, before legitimacy under customary law is specifically examined, the writer wishes to note two features of customary law which should be borne in mind when studying legitimacy.

It should be noted that marriages under customary law are polygamous or potentially so. In customary law, the polygynous aspect of polygamy is more abandunt than the polyandrous one. The effect of this is that children born from the many wives of the husband will still be regarded as legitimate unlike under English law. Polygamy has for a long time been recognised as a feature of customary law. In Mohamed v. R [6], two appellants were tried together and convicted of murder. On appeal the only substantial point was whether the first appellant's wife married under Makonde native law was a competent witness for the prosecution against her husband. It was held, recognising polygamous law marriages, that in Zanzibar, a wife married according to native law or custom which was potentially polygamous is a competent witness against her husband upon a charge of murder. The court in Alai v. Uganda [7] also agreed that S. 150A of the Uganda Penal Code applied with as much force to polygamous marriages as to monogamous ones.

Secondly, it should be noted that as customary law marriages lay great emphasis on procreation as the aim of marriage, those incapacities and social disadvantages attending illegitimate children are almost non-existent there.

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6. (1963) E.A. 188

7. (1967) E.A. 596

Having made these general remarks about customary law, we have now to turn to the specific subject of legitimacy under customary law.

Legitimacy in customary law:

Writing on legitimacy under customary law, Cotran and Rubin[8] have remarked:

> "Legitimacy is a controversial topic among writers on customary law. There is considerable debate as to whether there is any place in African law for the nation at 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 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 grandfather. This view seems to be widely accepted today....."

Cotran and Rubin were recording their observation of legitimacy in African communities in general. The issue which is more relevant to this paper is whether Cotran's and Rubin's remarks are true for customary law in Kenya. In determining this we have to look at the law of legitimacy if any, obtaining in some of the tribes in Kenya. From our findings we can then formulate a general principle and test it against the observation of the learned authors.

The Luhya

In Luhya customary law and particularly that of the Maragoli sub-tribe, a child who is born in lawful wedlock i.e. one who under English law would be considered as legitimate, is accorded all the rights and privileges that the Maragoli confer upon such children. Chief among these rights is the right of inheritance of land and cattle from the father of the child. A child who on the other hand is born out of wedlock, for example, when an unmarried girl is made pregnant by an unmarried boy, that child will either belong to the maternal grandfather's family or to the boy's family.

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8. Cotran and Rubin, Readings in African Law, Vol.11 Cass. London, p.44

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 baby with her father's family. If however she marries another man and takes the baby with her, the baby will assume membership of the husband's family and shall inherit from there. Alternatively, if the boy who made the girl pregnant compensates the girl's father by paying several head of cattle, he will be given the child and it will belong to his family. The paying of dowry as compensation to the girl's father was conditional before the returning of the child. This point is illustrated in Wande v. Nhola.[9] In that case the plaintiff was the illegitimate daughter of Nhola who had never paid dowry for her mother. When Wande married, the dowry was taken to her maternal grandmother. Nhola impounded the cattle that had been paid for the dowry. When the maternal grandmother died, Nhola claimed the cattle as her heir. It was held that Nhola had no right to keep the cattle and that therefore he must return them to his illegitimate daughter.

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 subsistance of a valid marriage. Normally, baby-girls who are born out of lawful wedlock will invariably belong to the maternal father's family and the baby-boys will either belong to the maternal grandfather's family or the putative father's family depending on circumstances afore mentioned. From this brief survey, it is clear that the nations of legitimacy and illegitimacy as understood in English law do not exist in the Maragoli customary law. What is important there is the family membership of the child. The Maragoli revere 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 had, the more important that family was in society and this desire precluded the Maragolis from discriminating legitimate from illegitimate children.

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9. D.C.'s Appeal No.1 of 1947, Shinyanga, Tanganyika.

The Kikuyu

Under Kikuyu customary law children born out of lawful wedlock have their status in the community and their legal rights and duties well defined. After some period of uncertainty as to what constituted lawful wedlock in Kikuyu customary law, the decision in Case v. Ruguru[10] settled the matter. It was held that the consent of the girl and the performance of "ngurario" ceremony were most paramount in the determination of this issue.

In Kikuyu society a family head is referred to as "mbari". So a child born out of lawful wedlock became authomatically a member of a particular "mbari". If an unmarried girl had children before she lawfully married, the children of such a girl belonged to the "mbari" from which she hailed; and depending on the social standing and wealth of the natural father's "mbari" the child could be declared to belong there by the girl's "mbari".

If the child was a boy he had the right to inherit land, animals and other household properties from the father. Girls had no inheritance rights. A father was also legally bound to pay dowry for his son. And the eldest son always succeeded his father as the head of the family.

Generally, a child born out of lawful wedlock belonged to the maternal grandfather's family. The child enjoyed full status that accrued to those children born during lawful wedlock. If the grandfather had no sons then such a child, if he was a boy was trained specifically to succeed his maternal grandfather. If an unmarried girl with a child wanted to marry, she either left the child with her parents or went with the child to her husband. In each case the child became a full member of the family it joined for all intents and purposes. Those rich men in society who had only daughters and no sons didnot permit their daughters to marry. They built them huts or "thingira" and invited men they respected to have sexual intercourse with them and the children born out of such unions belonged to the girl's father. Again if a widow was barren but rich she could herself "marry" a younger woman for whom she invited men she held in high regard to come and have sexual intercourse with. The children resulting from such intercourse would then belong to the deceased widow's husband and had full rights of inheritance from the deceased husband.

So this was the fate of children born in Kikuyu traditional society. Clearly notions of legitimacy and illegitimacy were unknown in this society.

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10. (1970) E.A. 55

The Luo

In Luo customary law, it appears that the concept of legitimacy and illegitimacy as understood in English law existed. A child who was born of an unmarried girl was referred to as a "Kimwira" which means something akin to an illegitimate child. Such a child had nobody from whom to inherit and was looked down upon in society and regarded with odium and contempt. A "kimwira" was always under the custody of the mother. Even if a "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 shyed away from him. The success of a "Kimwira" in society therefore depended entirely on his own industry. If a "Kimwira" was a girl then on her marriage the dowry went to her maternal grandfather.

On the other hand, a child born during the subsistance of a valid Luo customary marriage enjoyed all rights and privileges such as those accruing to children born during the existence of a valid marriage in Luhya and Kikuyu customary 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 preceding survey, it can be seen that under Luo customary law the concepts of legitimacy and illegitimacy existed, as are understood in English law. Perhaps the only significant difference between the two systems of laws arise when considering the issues of adulterous unions. In English law such issues are illegitimate whereas in Luo customary law they are legitimate.

Among the Sukuma of Tanzania, children born in lawful wedlock belonged to the father and were accorded all the rights of legitimate children in that society. On the other hand if a child was born when the mother was unmarried it belonged to the maternal family. If the child was a boy he was entitled to inherit from his maternal grandfather's estate. And if such a child was a girl, the bridewealth for her was received by the maternal grandfather or his heirs. By and large, the Sukuma legitimacy rules were similar to those obtaining in the Luhya and Kikuyu societies of Kenya.

Having looked at the legitimacy laws in the three main tribes of Kenya and the Sukuma in Tanzania, we have to determine whether or not the statement made by Cotran and Rubin that the concepts of legitimacy and illegitimacy do not exist in African customary law hold good. It would appear that this view is supported by the practice of the tribes mentioned above. Only in the customary laws of few tribes do these concepts not exist. Chief among them is the Luo tribe. But it should be emphasised that among a majority of tribes in Kenya, this is an exception rather than the rule. The writer therefore joins the Cotran/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. In Kajubi v. Kabali[11], Pearson J. succintly summarised this view when he observed:-

> "Concubinage is generally customary in Africa. The children of concubinage are recognised as family members. It is significant that here we have not bastardy law; it has not been found necessary by native custom as held by the principal court in this case, all natural children are provided for without prejudice ..... To ostracize children of concubines would be invidious and to the prejudice of a very large proportion of the African community; it would stigmatise perhaps a majority and would surely be contrary to natural justice".

Earlier in the same case, the Lukiko court in Buganda had agreed that:

> "All illegitimate children in Buganda are regarded as children of the deceased (father), unless somebody claims that they are not the children of the deceased (father) ..... According to Buganda customs all these illegitimate children must have a share from their father's property".

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11. (U) 11 E.A.C.A. 34

Legitimation in customary law:

The main question under this rubric is: how does a person who, at birth, was subjected to legal disabilities because his parents were not lawfully married at the time of his birth acquire certain rights enjoyed by a legitimate person?

It is recognised in customary law that the doctrine of legitimation or a procedure whereby a child who is not a member of his father's family at birth subsequently becomes a member of that family exists. This for example could happen if the two parents subsequently marry.

In certain circumstances, the father could incorporate the child into his family by making special payments and compensation to the child's maternal grandfather. Customary law also recognises the doctrine of acknowledgment but there is a controversy as to whether that legitimates the child. However, one thing is clear: such acknowledgment creates an irrebutable presumption that the man acknowledging is the father of the child. In this respect, customary law acknowledgment differs from Islamic acknowledgement where more acknowledgment by the father as to the paternity of the illegitimate child does not legitimate the child at all. In Islamic law, acknowledgment is merely an evidatiary principle and will only apply in the determination of a child's paternity. Under customary law, acknowledgment of a child by the father confer's a status on the illegitimate child and such child acquires the rights of inheritance and succession.[12]

It is also submitted that the presumption of legitimacy appears not to exist in customary law. There is no need for such a presumption as the conceptual equivalent of legitimacy and illegitimacy, as earlier declared, does not exist in customary law.

Among the Sukuma community of mainland Tanzania, the doctrine of legitimation is recognised in their customary law. Here, a father has a right to legitimate his illegitimate child by paying dowry and marrying the mother. If an illegitimate son wishes to marry and the putative father provides the dowry for him then this is deemed to be effective legitimatimation.

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12. See Kajubi v. Kabali, ibid at p.32

P A R T D

THE FUTURE OF LEGITIMACY

Hitherto we have examined legitimacy under both English and customary law. The origins of legitimacy in English law have been described and its development traced until it was received as part of the law of Kenya. We have submitted that by and large the concept of illegitimacy does not obtain in customary law. What is of consequence in customary law is the family membership of the child. Normally a child born out of lawful wedlock will either belong to the maternal grandfather's family or to the putative father's one.

Our task now is to determine the future of the law of legitimacy in Kenya in the light of the observations that have been recorded. Specifically, the question that we shall endeavour to answer is that: is there any point in retaining the law of legitimacy in Kenya at the present time? In answer to this question, we shall say whether or not the trend in the law of legitimacy has been towards the abandonment of that law and the assumption of the position obtaining in customary law.

In England, recent legislation has tended to assimilate the legal position of an illegitimate child to that of a legitimate one. The old sharp distinction between legitimate and illegitimate children has thus tended to be blunted. Under the 1959 Legitimacy Act in England, it was agreed that children of a void marriage could in certain circumstances qualify as legitimate ones, notwithstanding the fact that their parents are deemed not to have been married at all. This was a salutary step bearing in mind the fact that a void marriage is neither a marriage in law nor in fact. Again under S.11 of the English Matrimonial Causes Act, 1965, children of parties to a voidable marriage which is later on annulled still retain their legitimacy. Further, the Legitimacy Acts of 1926 and 1959 recognise that a child who is born illegitimate can subsequently be legitimated if its parents marry. These enactments have therefore to an appreciable extent tended to minimise the distinctions between legitimacy and illegitimacy that have prevailed in England for a long time. In Russia, the distinction between legitimacy and illegitimacy was abolished in 1918 but something akin to it was again introduced in 1944.

We have specifically to turn to the Kenyan situation. There is no evidence in Hindu law as practised in Kenya that an illegitimate child born to parties governed by that law is subjected to any social or legal disabilities as the case is in English law. In Hindu law, an illegitimate child is regarded as one belonging to the maternal grandfather's family. In Islamic law in Kenya, a child who is born illegitimate has rights to inherit from its mother and its maternal relatives. The decision in Kajubi v. Kabali[1] can be regarded to have stated the position of legitimacy under customary law. There, it was the view of the court, that illegitimate children should have equal inheritance rights as those of legitimate ones. This conclusion was tantamount to accepting the principle that the sins of the parents should not be visited upon the children.

Under the English law in force in Kenya, children born out of a voidable marriage are deemed to be legitimate.[2] However, those children born out of a void marriage are considered as illegitimate. It should be noticed here that whereas the law in England might in certain circumstances recognise children of such marriages as legitimate, the Kenyan law does not. The question that arises at this stage is whether the law of Kenya should continue to have a provision of this nature.

In the Report of the Commission on the Law of Marriage and Divorce[3], this question was considered and it was proposed under recommendation No.4 that:

> "....We further recommend that any children of such a void union should by statute be deemed to be legitimate".

In the draft Matrimony Bill of the same Report, the Commissioners stated further in S.48 (1) that:

> "Where children are born to persons who were parties to a ceremony purporting to be a marriage which is a nullity ..... such children shall for all purposes be deemed to be legitimate children of these persons."

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1. ibid.
2. Matrimonial Causes Act, Cap. 152, S.14 (2), Laws of Kenya
3. op. cit. at p. ~~34~~ 22

The Report on this issue concluded by recommending that:

> "No decree of any court annulling a marriage shall render any child of the marriage illegitimate".

The Commission on the Law of Succession[4] agreed with the recommendation of the Marriage Commission that children born out of a void or voidable marraige should for all purposes be deemed legitimate. In accepting this proposal, the Succession Commissioners emphasised that it was paramount in their minds that "a child should suffer as little as possible through a set of circumstances due to ~~the~~ no fault of his own"[5] The Commission also considered the issue of inheritance of those children born out of lawful wedlock. In the view of the Commissioners such children should be entitled to inherit their mother's property and her kindred's property and for this purpose should rank equally with the mother's legitimate children. It should be noticed that the later recommendation by the Commission is similar to the practice obtaining in customary law.

It is evident that if the recommendations of the two commissions were enacted into law, the distinctions currently existing between legitimacy and illegitimacy would disappear. Article 20 of the First Schedule of the Law of Succession Act, 1972[6] further provides that:

> "unless a contrary intention appears from the will, the term "child" shall be construed to include an illegitimate child and the terms "son", "daughter", "grandchild" and "issue" and similar words shall similarly be construed to include persons of illegitimate descent."

This provision is a valiant attempt to strike off the concept of illegitimacy and the disabilities attached to it in the Law of Kenya.

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4. op. cit. at p. 34
5. See paragraph 155 of the Report at p.49
6. Act No. 14 of 1972. The Act has received Presidential Assent but the date of commencement is yet to be announced.

Way back in 1923, the Commission of Enquiry on the Divorce and Bastardy Laws[6a] had felt the same when they proposed:

> "This commission has considered the very difficult position of those who are born bastards and considers that every effort should be made to ameliorate their lot so far as is consistent with the principle that no encouragement should be given to immorality".

The commission's terms of reference had been:

> "To enquire into and report upon what alterations, if any, are desirable and possible in the existing Divorce and Bastardy Laws of the Colony and Protectorate of Kenya".

The Affiliation Act[7]

The Act was enacted in 1959 and was repealed by Act No.11 of that year. We shall look at this Act insofar as its repeal lends support to the contention that the idea of illegitimacy should give way in the law of Kenya.

The purpose of the Affiliation Act was to create a legal nexus between an illegitimate child and its putative father in cases where the father was unwilling to maintain the child or where he denied paternity. The Act had universal application. Affiliation proceedings could under S.3 of the Act be commenced by any single woman within 12 months of the birth of the child or within 12 months after the return to Kenya of the alleged father. A married woman could not institute such proceedings.

If under S.5 of the Act, the court makes an affiliation order, the man against whom the woman was proceeding thereby was declared the putative father of the child. An affiliation order usually contained the following:

6a. See the Report of the Commission of Enquiry on the Divorce and Bastardy laws, Nairobi, Govt. Press, 1923

7. It used to be Cap. 142, but now repealed.

(1) that the putative father pays up to K.Shs.200/- per month for the education and maintenance of the child.

(2) that the putative father pays birth, hospital, medical and other expenses incurred by the mother and funeral expenses if the child died.

(3) that the putative father pays the costs of the case.

(4) that alternatively, a lump sum not exceeding K.Sh. 2,400/- be paid to the court to be used for the maintenance and education of the child.

Under S.5 (6), if a woman initiated vexatious and frivolous proceedings, the court could order that she pays the costs of the case. This was a measure designed to protect men against fortune seeking women. The affiliation order was to operate until the child attained the age of 16 years. When granted, an affiliation order could be enforced by the woman as if it were a civil debt.

Reasons for Repeal

There were two main reasons that the National Assembly advanced for repealing the Affiliation Act. First the National Assembly observed that women were abusing the purposes of the Act by attaching responsibility of a child to the men they felt could afford to meet the affiliation orders. If a man who could afford to pay was attached, the woman was assured of a regular monthly income. Secondly, it was argued that the Affiliation Act was contrary to the principles pertaining to child care under customary law and of the African traditional society.

After the repeal of the Affiliation Act there is now no legislation to cater for children born illegitimate other than by pregnancy compensation practised under customary law. This situation is rather an unhapply one because not everybody in Kenya is subject to customary law.

The repeal of the Affiliation Act has meant that the legislation that used to protect the status of illegitimacy has gone.

The repeal of the Affiliation Act can be construed to mean that Parliament wished to do away with illegitimacy and its consequences and revert to the position under customary law as it impliedly did. Some critics of Parliament on this move have asserted that the repeal of the Act was effected because most Parliamentarians were the main offenders under the Act and wished to be absolved. But whatever reason Parliament had in repealing the Act, it cannot be denied that the repeal has gone a long way in diluting the concept of illegitimacy as found in the laws of Kenya.

Having examined the various inroads that have been made in the rules of illegitimacy in Kenya, one cannot help asking the question: what is left of illegitimacy to warrant it being retained in the law books of Kenya? From the analysis that has been made in this paper, it is clear that all efforts have been made to erass the distinction between legitimacy and illegitimacy. It could be argued that complete extinguishment of illegitimacy would be a social hazard as it would tend to promote illicit sexual intercourse. But on the other hand, it could be argued more convincingly that in customary law societies where the concept of illegitimacy has not existed, there has been no evidence to show that illicit sexual intercourse was common-place. A look at the modern Kenyan society also indicates that the consequences of illegitimacy do not necessarily deter people from engaging in illicit sexual intercourse. More often than not, children born out of illicit intercourse will be governed by the customary law of the parties.

It is the view of the writer that the distinctions between legitimate and illegitimate children as currently existing in Kenya do not reflect the will and spirit of the majority of the Kenyan society. The rules of illegitimacy to a majority of Kenyans is an example of legislation that has been imposed on the people. Little wonder then that such rules are not adhered to. The writer wishes to propose that what little distinction is left between the status of legitimacy and illegitimacy in the laws of Kenya be completely removed, and legislation be introduced mainly based on the existing rules under customary law to fill its place. It is only then when genuinely the sins of the parents will not be visited upon their children.

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