

# **FOR BETTER OR FOR WORSE**

## **CHANGING TRENDS IN KENYAN FAMILY LAW WITH SPECIAL EMPHASIS ON THE PROPOSED MARRIAGE BILL**



**A Dissertation submitted in partial fulfilment of the requirements for the  
LLB Degree, University of Nairobi**

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## **DEDICATION**

*This work is dedicated to the memory of BETH MUGECI MUCHERU  
Beloved Aunt you are dearly missed*

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To joe, Liz, Amina and John for long days and even longer nights turning this manuscript into reality - I wouldn't know what I would have done without you guys. ~~Commit~~ ~~Success~~

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## CASES

### ABBREVIATIONS

AC	Appeal cases of England
CA	Court of Appeal of Kenya Cases
EA	African Law reports
EACA	Reports of East African Court of Appeal
EALR	Eastern African Law Reports
HC	High Court Cases
KHD	Kenya High Court Digest Cases
KLR	Kenya Law Reports
QB	Reports of Queens Bench

### Foreign Cases

1. The Ampthill Peerage case [1977] AC 547 England
2. Cole V Cole 1 NLR 15 Nigeria
3. Godwin V Crowther [1935] 2 WACA 109 SieraLeone
4. Hyde V Hyde [1866] 1 L&R PD 130 England
5. Nyali V A-G [1956] 1 Q.B. 1

### Local Cases

- |     |  |        |                                   |
|-----|--|--------|-----------------------------------|
| 1.  | Ali Genyuma V Ali Mohammed                                       |        | II KLR 30                         |
| 2.  | Athman bin Mohammed V Ali bin Salim                              |        | 6 EALR 91                         |
| 3.  | Ayoob V Ayoob  | [1968] | EA 72                             |
| 4.  | Besant Kaur V Rattan Singh                                       |        | 25 KLR 24                         |
| 5.  | Bishen Singh Chadha V Mohinder Singh                             | [1956] | 29 KLR 20                         |
| 6.  | Emily Cherubet V Berech Arap Rono                                | [1980] | Div Cause                         |
| 7.  | In the matter of Fatuma and others                               | [1971] | KHD 83                            |
| 8.  | Fatuma binti mohammed bin salim and another V Mohammed bin Salim | [1948] | HC Civil Appeal No. 28 KLR 20     |
| 9.  | Finch V Finch  |        | 9 EALR 64                         |
| 10. | Gonga Devi V Tulsi Dass  |        | 14 EACA 3                         |
| 11. | Hussein V Abdulla  | [1937] | HC at Kisumu Appln No. Case No. 6 |
| 12. | Irene Ngore V Maurice Ogila                                      | [1980] | HC Civil Appeal No. 19 EACA 1     |
| 13. | Ireri V Ireri  | [1990] | EA 404                            |
| 14. | Johnson Opiyo V Simon Olang                                      | [1975] | EACA 130                          |
| 15. | Kabui V Wanjiru  | [1983] | KAR 241                           |
| 16. | Karanja V Karanja  | [1976] | Civil Appeal No. 71               |
| 17. | Khamis V Ahmed   | [1934] | II KLR 56                         |
| 18. | Kivuitu V Kivuitu  | [1992] |                                   |
| 19. | Maathai V Maathai  | [1979] |                                   |
| 20. | Mc Neil V Mc Neil  |        |                                   |
| 21. | Mary Nyaki V John Kinyanjui et al                                | [1984] |                                   |
| 22. | Mbaruk Din Diwansop V Hamisi                                     | [1927] |                                   |

23. Miller V Miller	[1985]	
24. Miney Francis V Kuri		24 (I) KLR 1
25. Mizra Amir Beg V Saadat Begum abnd Mohammed Bashir	[1946]	22 KLR 12
26. Mohammed Hassan V Nona binti Mzee	[1943]	II EACA 4
27. M'mukindia M'Ikibuthu V Mporu d/o Kimuru	[1964]	Court of Review Cases No. 25
28. Patel V Patel	[1965]	EA 560
29. R V Kadhi Kisumu Exporte Bazreem	[1973]	EA 153
30. Shallo V Maryam	[1967]	EA 404
31. Shariff Abdulla V Zwena binti Abedi	[1912]	4 EALR 36
32. Shitandi Muroño V Abednigo Luyu	[1976]	HC at Nairobi Civil Application No. 12.
33. Singh V Singh		6 (2) KLR 73
34. Wariara Mbugua V Al Amin Mazrui	[1985]	HC at Nairobi Misc. Civil No. 209
35. Yawe V Public Trustee	[1976]	EACA Civil Appeal No. 13
36. Zenub Nurani V Sadrubin Nurani	[1981]	CA at Nairobi Civil Appeal No. 52.

## **STATUTES**

1. Constitution of Kenya
2. East African Order-in-Council [1897]
3. Law Reform Commission Act cap 3 Laws of Kenya
4. Marriage Act
5. African Christian Marriage and Divorce Act cap 151
6. Matrimonial causes Act cap 152
7. Mohammedan Marriage Divorce and Succession Act cap 156
8. Hindu Marriage and Divorce Act cap 157

## INTRODUCTION

Family law is one of the most dynamic aspects of the law. It encompasses much more than just the law in the statutes. It is the very foundation of civil society as the family is the basic unit of society. Law any law and indeed every law should be a mirror to the way people in the community feel.

This writer's hypothesis is based on the premise that the need for law reform especially in the area of marriage and divorce is long overdue. The need for a comprehensive, uniform, single, legislation on marriage and divorce is overwhelming. Firstly and most importantly it would resolve a great number of internal conflicts of law caused by having four different systems of family law operating simultaneously. Other secondary incidences of advantage include the fact that this law would apply to all Kenyans equally in that unlike the previous system jurisdiction would not be limited to religion or race.

The independence government recognized this lacuna in the law reform in areas of family law has been long (spanning almost three decades), tortured and ordous. The commissioners to whom the law reform was entrusted have faced an uphill task.

the aim of this dissertation is to ultimately explore this anomaly, that is why despite the obvious unsatisfactory position that the marriage and divorce laws at present reflect is there what can be mildly described as great reluctance on the part of parliament to enact new legislation in the areas of marriage and divorce, in line with the recommendations of the 1968 and 1993 commissions.

This dissertation is divided into 3 main parts. In chapter one the writer commences with the historical development of family law in Kenya, the aim of which is to portray the background of the institution of family law. This history explains the colonial undertones which still linger in most of the laws. Secondly it reveals that the concepts of law reforms and anglicization were inextricably linked, a trend that needs to be reversed. The historical development will be followed by an exposition of the jurisprudential analysis of family law. This will encompass a critical evaluation on what law is and what role should it play, in an attempt to



highlight to what extent family law has wavered from the ideal. The internal conflicts of family laws in Kenya conclude chapter one.

The second chapter deals with the ill-fated marriage bill. The first part traces the history of the bill from the 1968 commission of marriage and divorce, to the present day. The second part is an analysis of substantive provisions of the bill with the help of judicial decisions and opinions of learned jurists. This chapter concludes with an unabated call for the enactment of the provisions of the bill.

The final chapter tackles issues of law reform. The first part deals with the institutions that have carried out the process of law reform prior to independence until the present day. It also includes statutory enactments. The second part deals with the normative structure of the law reform institution. Finally the writer will focus on law reform in the areas of marriage and divorce.

The concluding part of this work which cannot be termed a chapter will be made up of conclusions that can be made up of conclusions that can be drawn and the facts that have been proved by this dissertation.

"Independent Kenya needs the ability and integrity of the Europeans, the adaptability of the African, the thrift and industry of the Muslim and the Indian and the tolerance and experience of the Arab."

The above passage was part of a speech made by Sir Michael Blundell in the Legislative Council prior to independence quoted in 'NOT YET UHURU'<sup>1</sup>. In the manner that endeared him to his adherents before his death that is direct, straight to the point and without mincing words Oginga countered thus

"Mr. Blundell wants a Kenya where Europeans govern, Africans follow, Asians supply the wealth and Arabs sit musing with tolerance".

It is this writer's belief that these two quotes go quite some way towards revealing the colonial attitudes and misconceptions towards most aspects of the legal development of various institutions in Kenya including family law in Kenya despite the fact that it was not used in this context. The fact that Blundell can group 'Muslims' and 'Indians' in the same category is quite indicative of just how little the colonist knew of the distinctions between the two religious communities. Mr. Oginga's words cut away at the shroud of syntax to reveal the intentions of the colonial government.

The first part of this work intends to trace the historical development of family law, and at the same end of which it will be seen that Mr. Oginga was not far from the truth. The adaptability of the African can be translated to mean that any changes in the family law governing them are in line with changes that have already occurred in the United Kingdom or England prior to independence. The colonial government in recognition of the role played by the Asians in the economic development of the country had left the marriage laws of the Hindus intact. Arabs are regarded as militant, there are many features of Islamic law that are incompatible with the English legal system which we adopt and the favoured status that Islamic law once had is gradually been eroded and there is nothing the Muslims can do hence their tolerance.

Most writers on the historical development of family law fall into two categories. Both

groups agree on the quadpartite nature of the family law in Kenya. The difference between these two groups are based on the distinctions on which they base the multiple character of Kenya's family law. The first group base it on race so that there are four legal systems in that the colonists, settlers and administrators had their own system of family laws, the Africans were guided by African customary law, the Arabs who had lived at the coast for years were guided by the Koran and then and the Indians who had come to work on the railway and then settled down as traders had brought their religious and customary laws. The second group based their distinctions on religion. Thus they had four systems or four kinds of marriage laws, Christian marriage laws, African customary laws, Islamic marriage laws and Hindu laws of marriage. A new breed of writers is now contending that there are five systems of family law so that the African Christians are put <sup>in</sup> a different category. In my opinion these distinctions are just details, matters of form only. It does not make so much of a difference what form you adopt so long as you include all the communities who are part of the Kenyan nation. What all these writers seem to agree on is that the Muslims and Hindus are distinct communities. The distinctions are blurred when it comes to how to categorise Africans, African Christians, European Christians and secular Christians. My opinion is that these distinctions serve no real purpose and this writer intend to deal with these groups together. This writer's belief is that there is a lot of interlocking, overlapping and weaving is the patterns of family law of these communities.

The historical development of family law in Kenya involves two aspects. The first relates to the development of administration system while the second relates to the content of the laws themselves. I intend to look at both aspects simultaneously following a chronological format.

The trend the will emerge is that the English law is always regarded as the highest form while the rest jostle for secondary positions. What does this trend reveal about the future of family law in Kenya? This will be discussed in the last chapter, but now the writer uses the words of another <sup>2</sup> to express the opinion that

"It appears to me that strong evidence would be required of the intention of legislative to effect such an unusual purpose as the wholesale application of all future English law, whether it might be on the subject in question [sic marriage] as well as divorce and

matrimonial causes."

In 1895 Kenya became a protectorate. Formerly it had been known as what was termed 'a British Sphere of Influence'. This meant that the imperial government took over direct administration from the imperial British East African Company. Two years later the English type of legal system was established by the East African Order in Council of 1897 made under the 1890 Foreign Jurisdiction Act of England. Before 1843 there was no legislation that governed the exercise of the crown's power in foreign territories.<sup>3</sup> The reason for this was that there had been no need for it. The scramble and partition for Africa and the Berlin Conference of 1888 changed all that. The 1890 Foreign Jurisdiction Act was explanatory only in that it sought to remove doubts regarding the exercise by the crown of its royal prerogative.

The 1897 Order-in-Council was based on the ignorance of the African ideas about law; the basic assumption was that disputes could be settled the western way. Thus it established a hierarchy of courts. Articles 51 and 52 of the order in Council were to the effect that African disputes were to be settled by native courts. Article 52 in particular gave the Commissioner for the purposes of administration of justice in native courts the power to establish or abolish any native court. He also had the power to define the local limits within which any native court was to exercise its jurisdiction. This Article in particular part (c) stated

"The Commissioner may with the consent of the Secretary of State make rules and orders and in particular.....(a) alter or modify the operation of any native law or custom in so far as may be necessary in the interests of humanity and justice."

In the case of *Miney Francis V Kuri*<sup>4</sup> it was held that by virtue of Article 52 natives were to be governed by native law and custom.

The 1897 Order-in-Council made provision for the establishment of the courts. In the same year the Native Court Regulations were passed to provide for the law to be applied in those courts. These regulations provided inter alia that in matters affecting personal status for Africans professing the Muslim faith Islamic law would apply and for those Africans who professed neither the Christian faith nor Islam the law applicable to them would be the law of the tribe as far

as it could be ascertained and so far as it was not repugnant to justice and morality. Articles 7 and 14 of the 1897 East African Order In Council stated that disputes of non-natives to be settled by His Majesty courts of East Africa. Non-natives would refer to those persons who had come to Kenya as colonial administrators or settler farmers. It would also include any person who fell outside the definition of a native as per Article 1 (a) of the 1897 Native Courts Regulations.<sup>5</sup> The law directly applied in those European courts was English law directly through the reception clause. These were "the substance of common law, the doctrines of equity and the statutes of general application in force in England on the twelfth day of August 1897 and the procedure and practice observed in the said common law, doctrines of equity and statutes of general application shall apply only so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary." Thus in relation to issues of marriage and divorce the law that applies to the Europeans was contained in the Indian Divorce Act of [1869] applied by virtue of Article II (a) of the 1897 order in <sup>Court</sup> court and the common law in force and English statutes in force in England on 12/8/1897. The reason for this enactment was to make it possible for Englishmen to lead an English type of life. This was the essence of the holding in the case of *Finch V Finch*<sup>6</sup>

The first Europeans in this part of Africa were the explorers. They were followed by the missionaries most of whom were zealots burning to convert the dark continent to Christianity. What law was to apply these new Christians. The imperial government realized the danger of allowing them to be governed by native laws and custom and yet they still could not be put in the same category as European Christians. The East Africa Order-In-Council by virtue of Article 65 merely defined who a native Christian was but it did not state what laws applied to such persons. The East African Order In council of 1902 enabled these native Christian to contract a English type marriage so consequently English family law was applicable to them.

The 1902 order in council also stated that in all cases civil or criminal to which parties were natives African customary law was to apply so far as it was applicable and not repugnant to morality and justice or inconsistent with any order in council or any ordinance or any rule or regulation made there under and the courts would decide all such cases according to substantive justice without undue regard to the technicalities or procedure and without undue delay. This was by virtue of Article 20.

In 1902 the East African Marriage Ordinance was enacted to enable Europeans, Westernized Africans and other westernised persons to contract an English type marriage. The general theme of this ordinance was to transplant the concept of monogamous marriage. 1902 was also the year the Commissioner made the East African Natives Courts (Amendment) ordinance<sup>7</sup> by which he could proclaim any district to be a special district. (Sec 2) In such a district the native courts regulations were not to apply.

In 1904 the formalities governing celebration of marriages under the 1902 marriage Ordinance were considered too complicated for the Africans. Thus the Native Christian marriage Ordinance<sup>8</sup> was passed to require the African to follow the formalities usual to his denomination. The ordinance introduced flexibility in the formalities that governed the marriages of native Christians. The substantive law governing those who had the capacity and the consequences of such a marriage was to continue to be the English law contained in the 1902 marriage ordinance. It was felt that the 1904 ordinance did not adequately meet the needs of the African who had converted to Christianity. To this end the African Christian Marriage and Divorce Ordinance of 1931 was enacted<sup>9</sup>. The Ordinance dealt with peculiarly African aspects of marriage. It served three purposes. It provided a simple way of celebrating marriages by African Christians<sup>10</sup>. Secondly by virtue of section 9 it enabled Africans who were married under customary law to convert their customary marriages into statutory ones. Thus potentially polygamous unions were converted into absolutely monogamous marriages. Sec 9(3) seemed to imply that customary marriages were not binding upon African Christians. Lastly it freed the African Christian widow from the obligation to cohabit with the brother of her deceased husband or any other relative under the institutions of levirate union or widow inheritance. Thus the widow had the right to be maintained.

In 1930 the Native Tribunal Ordinance<sup>11</sup> was enacted. It gave power to establish a native to Provincial Commissioners. The tribunal was to be constituted in accordance with native law and custom of the area in which the tribunal was to function. Section 12 laid down the law to be applied by these tribunals as native law and custom so long as it was not repugnant to morality or justice and it was not inconsistent with written law, rules made by the colonial administration and provisions of any ordinance or other laws. Section 22 stated that the practise and procedure in the native tribunals was to be regulated by native law and custom.

For the Europeans after the 1902 marriage ordinance there was the Divorce Ordinance of 1904<sup>12</sup> which was enacted to provide for the laws that came into existence under the 1902 Ordinance, the 1904 Ordinance was based largely on the Indian Divorce Act of 1869. In 1939 the provisions of two English statutes namely the Supreme Court of Judicature (Consultation) Act of 1925 and the Matrimonial Causes Act of 1937 were enacted as the Matrimonial Causes Ordinance<sup>13</sup>). The two Acts had introduced great changes in English laws relating to marriage, in particular they made divorce and nullity decrees easier to obtain by increasing the grounds on which marriages could be dissolved or annulled. Section 3 of the ordinance requires the provisions derived from the 1925 & 1937 Acts to be interpreted in Kenya the way they had been interpreted in England where the Matrimonial Cause Ordinance did not make a provision English law as it was in 1941 would fill the gap. Sec 37 of the Matrimonial Causes Ordinance repealed the 1904 Divorce Ordinance. The Matrimonial Causes (Amendment) Ordinance<sup>14</sup> of 1952 made no important alterations in the substantive law relating to matrimonial causes but it removed certain difficulties in connection with the jurisdiction of the courts and similar allied matters. The amendment enabled a wife who could not acquire an independent domicile to petition for either divorce or a decree of nullity if she was resident in Kenya or had been ordinarily resident for at least 3 years preceding the presentation of the petition in Kenya.<sup>(A)</sup> It declared that children of voidable marriages which were annulled by a court<sup>(B)</sup> were deemed to be legitimate. Thirdly it increased the courts powers of making maintenance orders for the wife and children.<sup>(C)</sup>

Affiliation law was introduced in Kenya to make the father of a child to support the child till the child attained the age of 16. The Kenya Affiliation Act was passed in 1959. It had retroactive effect from 1956. The Kenyan Act was based on the principle of the United Kingdoms Affiliation Proceedings Act of 1957. The Act removed any doubt concerning the obligation of the unmarried parents duty to maintain their child. It is my opinion that the affiliation principle is analogous to that of payment of pregnancy compensation under Africa customary law. The principle of affiliation was that a woman could get a court order compelling the natural father to pay maintenance to her in respect of the child. This Act was repealed in 1969.

At the time of independence the laws relating to the subjects of marriage and divorce were

- : The Marriage Act cap 150 dealing with statutory forms of marriage
- : The African Christian Marriage and Divorce Act cap 151 which dealt with Christian marriage.
- : Matrimonial causes Act cap 152 which dealt with the procedure and reliefs or remedies in divorce petitions.
- : The Subordinate Courts ( separation and Maintenance ) Act cap 153 which provided additional relief in relation to maintenance during aspiration. It was limited to monogamous marriages.
- : The Maintenance Orders Enforcement Act<sup>15</sup> whose purpose as stated in preamble was  
"to facilitate the enforcement in the colony of the maintenance orders made in England."
- : Customary laws as administered by African courts and applied by Africans.

There were two major developments that took place in the administration of customary law after independence. The first related to integration of the courts. The administration of justice in the colonial era was characterized by the dual system. There was one system for the Africans and one for non-Africans. The concept of separation of powers was a farce. The African courts were an integral part of the administration rather than institutions independent of it. 1962 saw important legislative reforms in the African courts system which marked a definitive step towards integration of the courts. This was by virtue of the African Courts (Amendment) Act <sup>16</sup> which transferred the whole system of the African courts from the administration to the judiciary. The process of gradually integrating the courts -was completed in 1967 with the passing of the Magistrates Court Act.<sup>17</sup> It abolished the African courts which had hitherto applied the customary laws of marriage and divorce and replaced them with three classes of district magistrates courts. The extent of civil jurisdiction depends on the class of magistrate holding the court and the nature of the claim. A district magistrate of *any* class had *unlimited* customary law jurisdiction and limited jurisdiction in other civil cases. The division between customary and non-customary civil jurisdiction had racial overtones.<sup>18</sup> It seems there was a deliberate policy not to accord customary law a status equal to other laws.

The second development was due to the restatement of customary laws. This was due to the restatement of customary laws. This was due to the result of research carried out from 1961



to 1963 which were published in 1968 in the form of two volumes. The first one was known as the Restatement of African Law Vol. 1 : Marriage and Divorce by Eugene Cotron published and Sweet and Maxwell. The second volume dealt with succession. Thus it became possible to ascertain the customary law relating to marriage and divorce. However these restatements were neither conclusive nor binding and were to be used as a guide.

We will now proceed to look at the historical developments of the laws that applied to the Muslims that is Islamic family law.

The family is the only group based on consanguinity or affinity which Islam recognises. The reason why Islam is opposed to tribal feelings is because the solidarity of believers should supersede the solidarity of the tribe.

Unlike other forms of law the formal juridical character of Islamic law is little developed. It aims more at providing concrete and material norms than more theoretical aims of analytical jurisprudence. The sacred law of Islam is an all embracing body of religious; the totality of Allah's' commands that regulate the life of every Muslim in all aspects. The Mohammedan law applies to Muslims whether by birth or by conversion. Any person irrespective of race who professes the religion of Islam that is accepts the unity of God and the prophetic character of Mohammed Muslim and is subject to the Muslim law. Marriage or *nikah* (as it is known in Islam) is a contract of civil law.

The history of Islamic family law can be traced to the concession granted to the IBEA Co the Imperial British East African Company regarding the administration of the sultans territory from Wanga to Kipini at the coast. When the British Government took over from the IBEA Co. in 1895 the commissioner for East African Protectorate stated that although the Coast would remain under the Sultan sovereignty he would take over administration but all the cases and law suits between the natives would continue to be decided in accordance with the Sharia Law. Thus from the outset Muslims stood out as a distinct community to have their own legal system regulating interdia marriage and family law.

The promise about the sharia Law was implemented by the Native Courts Regulations of 1897 promulgate under the East Africa Order In Council of the same year which empowered the

commissioner to make rules and order for the administration of justice in native courts. The regulations adopted a very wide definition of the term 'native' under Article 1 (a) it meant:

"Any native of Africa not of European or American origin but also any person not of European or American origin who within the dominions of the sultan of Zanzibar would be subject to his Highness jurisdiction even though such a person should not have been born in Africa."

Thus the regulations effectively bundled up the Muslims with those persons who practice African customary law while it is latter group who are natives stricto sensu. The issue of whether and how far Islamic law can be correctly identified with or enforced as the native law and custom of an African territory or people was dealt in the case of *Khamis V Ahmed*<sup>19</sup> where it was held that the law of Islam cannot be described as native law [for the purposes of Article 7 of the Kenya Colony Order In Council] "merely because it was/is the law applicable to many of the natives of the Kenya Protectorate."

Article 3 of the regulations stated in interalia that "within the coast region or in dealing with Mohammedans the Courts should be guided by and have regard to the general principles of Islam." One of such courts were the Kadis courts which were supposed to take cognizance of all matters affecting the personal status of Mohammedans such as marriage, divorce and inheritance, and the fulfilment by the Public ministers of the Mohammedan religion of the duties and obligations as such. This was by virtue of Article 55. Article 56 established the first Kadhis courts.

This regulations were repeated by the III schedule of the 1907 courts ordinance<sup>20</sup> whose main purpose was to establish courts subordinate to the High court. While this ordinance defined with clarity the jurisdiction of the courts so established it made no reference to the substantive law which these courts were to apply. What this meant was that the relevant provisions of the 1897 Regulations still applied by virtue of Article 28(1) of the 1902 East Africa Order In Council. The structure of the courts which were established in 1897 remained significantly unchanged until 1902. The 1902 Order In Council by virtue of Article 28 repealed the 1897 Order In Council. The proviso to this article was to the effect that where no provision was made

to cover a particular aspect, the legislation under 1897 Order In Council was to remain in force. Thus by extension we can say that the courts established under the 1907 ordinance were to apply Islamic law.

The Mohammedan marriage and divorce ordinance of 1906<sup>21</sup> was one of earliest Ordinances to give recognition to Islamic law. This Ordinance still applies today as cap 155. At that time its aims were to clarify the fact that Muslim marriage laws were recognised and to strengthen the Muslim legal system within which these laws were applied.

The principal Ordinance concerning Islamic marriage and divorce was the one promulgated in 1920 "to amend the law relating to divorce and matrimonial causes in cases of Mohammedan marriages and relating to intestate succession in certain cases." This was the Mohammedan Marriage Divorce and Succession Ordinance.<sup>22</sup> According to Kuria<sup>23</sup> the reasons for its enactment were four-fold. The ordinance was to amend the law relating to divorce and matrimonial causes, to state that the colonial courts of the English legal system too had jurisdiction to adjudicate upon matters arising from Islamic marriages, to indicate the classes of people governed by Islamic Laws of Marriage and Succession and the particular Islamic law applicable and finally to indicate the relationship between Islamic marriage laws and the African and European marriage laws. The 1920 Ordinance was amended in 1923 and 1926. The results of the amendments were that marriages contracted prior to the Ordinance which were contracted in accordance to and were valid under Mohammedan law were deemed valid under the Ordinance. The Ordinance was also amended to give the Supreme Court jurisdiction to hear and determine all matrimonial causes and suits arising out of Mohammedan marriages at the suit of either party to the marriage. In addition to this it was held that the supreme court was to exercise the jurisdiction and act and give relief upon the principals of Mohammedan law where applicable. Finally it was decided that Mohammedan law would have no application in cases where a person wished to contract a Mohammedan marriage while having previously contracted a marriage either under the marriage Ordinance of 1902, a Christian marriage, or one under native custom. Such a person would also be liable to a criminal offence.

While on the surface these provisions seem to be above board, careful scrutiny will reveal a subtle craftily constructed undermining of the Islamic law. First of all Islamic law was only

relegated to matters of personal status as opposed to all walks of life. Also giving the supreme court the final say so was another deliberate and indigenous weakening of the Islamic position. The third amendment meant a number of (English legal system based) Ordinances had a bearing on the application of Islamic law of marriage and divorce in Kenya and Islamic law was thus subject to the Marriage Ordinance, the African Christian Marriage and Divorce Ordinance of 1931, the Matrimonial Causes Ordinance of 1941, the Penal Code of 1930 and the Age of Majority Ordinance of 1933. The reason for this attitude can be attributed to a number of factors. One is that at this time Kenya's status was altered from being a protectorate to that of a colony. Thus the role of the Imperial Government had also changed. They were no longer bound to tolerate the laws of the persons inhabiting the protectorate. As the conquerors or colonisers they could impose their own laws on the natives. As stated earlier the Muslims were also regarded as natives. The basis for the administration of law and justice in colony was aptly summed up in the provisions<sup>24</sup> of the Kenya Colony Order - In - Council of 1921. The new role which the government had carved out for itself maybe the reason why none of its provisions made any direct reference, explicit or implicit to Islamic law. The second factor can be attributed simply to the green eyed monster: jealousy. The Muslims have always stood out as a distinct community having their own comprehensive legal system. There are certain circumstances which give Muslim communities a unique character of their own. Also adherents to Islam are almost fanatical in the following of the teachings of the Koran and the prophet unlike many Christians whose faith and belief is most questionable. Also the fact that Islamic marriages are as rule polygamous thus contradicting to classical definition of marriage given in the landmark case of *Hyde v Hyde*<sup>28</sup> was at the same time inimical to the British while attractive to the African natives. The Imperialists saw themselves in a revived crusade<sup>26</sup> to liberate indigenous Africans from the grasp of Islam.

This hostile attitude continued until independence and is evidenced both by statute and case law, but it was always camouflaged. For the 1920 Mohammedan marriage, divorce and succession ordinance was because the colonial authorities wanted to show that they understood the necessity of introducing legislation expressing affirming the validity of Islamic marriages and divorce among Muslims and in most cases authorising the supreme court to hear matrimonial cases etc. between such litigants under Islamic law. Section 17 of 1931 courts Ordinance ex-

pressly limited the jurisdiction of the courts established under the 1907 Court Ordinance to matters of personal status. These were defined as matters relating to marriage, inheritance and divorce. By reading between the lines what this meant was that the jurisdiction was regarded as limited to the application of the terms of the 1920 Mohammedan Marriage Divorce and Succession Ordinance but they could not hear matters of personal status such as those concerning custody and guardianship of children which also fell outside the terms of Ordinance but are relevant principles of Islamic law.

The Adoption of Children Ordinance of 1933, the Juveniles Ordinance of 1934 and the Custody of Children Ordinance of 1926 all did their bit in curtailing and restricting the scope of Islamic law regarding the rights of guardians over the custody of children and rights relating to the property of minor wards. In relation to guardianship or custody of minor persons while it had been previously held <sup>27</sup> that Mohammedan law would apply the British courts began to apply English law in all cases. This came about due to the ruling in *Sharrif Abdulla V Zwena binti Abedi*<sup>28</sup> which was to effect that

"questions of guardianship are part of the common law of England.... The right to determine this question in accordance to the principals of the common law of England has not been ousted by the Mohammedan marriage divorce and succession Ordinance."

In this writers opinion the issue not whether the Mohammedan marriage divorce and succession Ordinance has ousted the common law but whether any specific enactment had ousted the duty of the courts to decide cases in accordance with the general principals of Islam law.

This rule would have caused hardship and this may have been the reason why some mild concession was made in the case of *Mohammedan Hassan V Nana Binti Mzee* <sup>29</sup> which though it upheld the rule added a proviso that due regard should be had to the custom of the race and community concerned in deciding what would, in all the circumstances, be in the very best interests of the minor. This was because the common law right of parent could only ousted by consideration of the welfare of the child.

Other cases concerning the authority and scope of Islamic law are as follows:

Half a century after the 1897 order in council which incorporated the Islamic law as legal system, the validity of Islamic law was still being debated in *Fatuma binti Mohammed bin Salim and another V Mohammed bin Salim* <sup>30</sup> C.J. said obiter,

"it has always been regarded in this court and in the supreme Court of Kenya that in cases affecting personal status arising between Mohammedans the law to be applied is Mohammedan law as interpreted by judicial decision. Whether this rests upon a secure statutory basis in Kenya is however by no means easy to discover."

In the case of *Mizra Amir Beg v Saadat Begum and Mohammed Bashir* <sup>31</sup> a father had petitioned for the dissolution of his daughters' marriage with a man of whom he did not approve. It was held that the Mohammedan Marriage Divorce and Succession Ordinance only provided for the dissolution of a marriage at the instance of one of the parties thereto. This case provides two illustrations. One it showed that the law had no regard to the Islamic extended family and secondly it provides a striking instance of relief being refused not because it was inapplicable under the Mohammedan law but under the precise wording of the Ordinance concerned.

In the case of *Zuena binti Abedi* referred to above it was held that a wife who had served 6 months because of her recalcitrance against a decree of restitution of conjugal rights granted to her husband, as a mother was entitled to custody of a young child which was decreed to be the legitimate child of her husband. This decision departs substantially from Sharia law because a wife who unjustifiably refuses to live with her husband is disqualified from claiming custody of his children.

In *Hussein V Abdulla* <sup>32</sup> the court of Appeal for East Africa held that the decision in *Athman bin Mohammed V Ali bin Salim* <sup>33</sup> that "on a question of marriage between Mohammedans in a Moslem court the Mohammedan rules of evidence apply" was not a binding authority. While it is true that the Mohammedan rules of evidence which contain some marriage laws were to be replaced by the Indian Evidence Act of 1872 which is a codification of English law it is my opinion that regard should be had to the particular circumstances of each case.

At independence the government faced with threats of secession from the Islamic community, gave in to demands of special considerations in relation to their religion. thus the

maintenance of kadhis courts and Muslim law were two of the salient features of the constitutional bargaining agreement of the independence guarantees. The constitution carried out its part of the undertaking by providing that there should be a chief kadhi and not less than three other Kadhis empowered to hold a court of Kadhi, whose jurisdiction was to "extend to the determination of questions of Moslem law relating to personal status, marriage, divorce and inheritance in proceedings in which all the parties profess the Muslim religion."<sup>34</sup>

The Kadhis Court Act <sup>38</sup> of 1967 established six kadhis courts. The Act thus went further than the constitution in the establishment of these courts but no further in actual practise for these courts were already in existence, the Act was just putting them on a more formal basis. The jurisdiction of the courts in Muslim personal matters was set out in the same terms as in the constitution. The effect of this according to Ghai and McAuslan<sup>36</sup> was to finally settle the vexed question of the juridical basis for the application of Muslim law by such courts. However the jurisdiction of these courts was not exclusive. The High Court and all subordinate courts were not excluded from exercising jurisdiction over Muslim personal matters and in the exercise of such jurisdiction they would not necessarily apply Muslim law nor were they bound to transfer such cases to a kadhis court. Also kadhis courts had no jurisdiction in mixed cases that is between Muslim and non- Muslims. The kadhis courts could however apply Muslim law of evidence.

The position of Islamic family law in Kenya today can be briefly outlined by the following cases. In *Ayoub V Ayoub*<sup>37</sup> it was held that persons who marry under English law cannot convert their marriages into a Muslim one notwithstanding that such conversion is being done on the same day and even if the parties change their faith. This shows that a Muslim marriage is still considered a lower form of union. In the *matter of Fatuma and others*<sup>38</sup> it was decided that the English law of custody contained in the Guardianship of Infants Act {Cap 144} applied to Moslems. This shows that the pre-colonial position has not been altered. In *R V Kadhi*<sup>39</sup> the High Court held that the Islamic law rule that gives the kadhi power to order a married woman who has deserted her husband to return to him was unconstitutional<sup>40</sup> because it bound such a woman to servitude.

## Hindu Family Laws

In Kenya the Hindus had lived as a separate community without intergrating socially with either the Europeans or Africans.<sup>44</sup> Despite their aloof nature the Hindu community is still regarded as part of the Kenyan nation and subject to her laws.

The intention of the imperial government was that each community should have law reflecting its philosophy of law which is best reflected by the religion of that community.

Whether as deliberate policy or as an oversight the 1897 East Africa Order In Council made no provision for the Hindus when it came to determining their legal basis of the application of different laws to different communities. The general law of the courts set up under this order was termed non-personal and non-religious but it was in effect English law, common law and equity to the extent that it had not been modified or codified by local ordinances:

Thus they had two options. They could litigate in the English type courts where Hindu law would be taken to be a foreign law. On the other hand the Hindu community could regulate their affairs in accordance with Hindu customary law. The latter course of action was preferred. Thus the Hindus regulated their marital affairs in accordance with Hindu customary law. However they encountered difficulties when they sought reliefs in European courts.

Thus the need for an express legislative enactment was imperative. This passage from the 1946 Legislative Council debates<sup>45</sup> shows just how urgent this need was.

"For the last 20 years doubts have been expressed in legal circles concerning the validity or otherwise of Hindu marriages which have taken place in this country in accordance with Hindu rites. Efforts were made at least twice during the last 20 years to have some bill passed in this council to regulate the position but the matter was precipitated by recent decision in which judges gave it as their opinion that they had no jurisdiction whatsoever to grant any relief to Hindu marriages."

*One of the cases to which the unnamed Legco member is referring to (and undoubtedly the most notorious) was that of Ganga Devi V Tulsi Dass<sup>46</sup> where it was held that European courts did not have the jurisdiction to adjudicate on matters arising from Hindu marriages.<sup>47</sup>*



So in 1946 the Hindu Marriage Divorce and Succession Ordinance<sup>48</sup> was passed to clarify the position regarding the law applicable to Hindus. I will gloss over its salient provisions. Sec (3) indicated that Hindu marriages contracted in accordance with Hindu customary law were valid in Kenya.

The law of restitution conjugal rights applied to Hindus was not that set out in section 4 of the 1946 Ordinance. Sec 4 (5) of the Ordinance stipulated that in cases dealing with restitution of conjugal rights the rules made under sections 19 and 20 of the 1939 Matrimonial Causes Ordinance.<sup>49</sup>

There was still further evidence that Hindu law was readily ousted by a comprehensive local ordinance. In matters of adoption, minority and guardianship it was held that Hindu customary law was inapplicable and that the applicable law would be by virtue of Article 4 (2) of the Kenya Order-In-Council of 1921. Similarly it was decided that the 1928 Subordinate Courts (Separation and Maintenance) Ordinance<sup>51</sup> which had hitherto applied to English type marriages only was to apply to Hindu marriages recognised as valid from 1946.

In *Bessant Kaur V Rattan Singh*<sup>50</sup> the colonial supreme court refused to recognize the validity of a Hindu marriage that had been celebrated in India. Following this decision the 1946 Ordinance was amended in 1952<sup>52</sup> to indicate that section 6 which related to registration of marriages applied even to Hindu marriages not celebrated in Kenya. This amendments tentacles also affected sec 3 so that it was clarified to state that Hindu marriages so long as they were celebrated in accordance with Hindu customary law were valid irrespective of where they were celebrated.

The Hindus still looked to India for cultural and philosophical guidance. In 1955 when India reformed her law of marriage through the Hindu marriage Act of the same year in Kenya there was a desire to reciprocate this major overhaul of the laws relating to marital affairs.

*Thus in 1960 the 1946 Ordinance was drastically amended to take into account the changes that had taken place in India. This led to the enactment of the Hindu Marriage Divorce and Succession Ordinance.<sup>53</sup> It was in many ways identical to the 1955 Indian Act. The definition of marriage for purposes of the 1960 Ordinance included marriages in the colony which would have*

been valid under sec 3(1) of the 1946 Ordinance. These were marriages contracted in a manner customary in the colony among persons professing the religion of either party to the marriage. It also included marriages solemnized after the commencement of the 1960 Ordinance and also marriages solemnized under the special marriage Act of 1954 or the Hindu Marriage Act of 1955 or any amendment of those statutes or enactment substituted for them.

One important facet of the 1960 Ordinance was that the Matrimonial Causes Ordinance which contained English law was to apply to Hindu marriages in all cases unless special provision was made in the Ordinance. Thus section (9) of the 1960 Ordinance incorporated the Matrimonial Causes Ordinance within the general law.

After 1960 there was still some more measure of Anglicization. Hindu marriages in the strict customary sense are potentially polygamous. However after this period polygamous marriages after 1960 were declared to be bigamous and provisions of the penal code were to apply.

In 1961 the provisions dealing with succession amongst the Hindus were separated from those dealing with marriage. Thus the 1960 Ordinance became the Hindu Marriage and Divorce Ordinance<sup>54</sup> which is the present cap 157 the Hindu Marriage and Divorce Act.

The position of the Hindus was aptly summed up in the case of *Bishen Singh Chadha Mohinder Singh*<sup>55</sup>.

"It will be observed that the reason for not importing English presumptions..... seems to be the different customs, different conditions of family life and different social relationships which obtain in India and in England. This is a reason which would apply to the Indian community in Kenya who with few exception notoriously cling to India ways of life

Jurisprudential study concerns thought about law. The nature of law, its function and functioning and about its adaption, improvement and reform. Law as a social institution is an instrument of social control. Law, morality religion and opinion are all modes of social control because they prescribe the various ways in which people ought to behave. Law is distinguished from the others due to its criteria of validity.

Sociology is the theoretical study of social existence based on descriptions of social facts. Thus to the sociologist the administration of law is an observable social fact. To the lawyer it is obvious that laws can only function in a social environment. There are three aspects of sociology which are particularly relevant to the lawyers understanding of law. They are history, anthropology and economics. The historical development accounts for and explains present day doctrines. Anthropology<sup>56</sup> provides valuable insights into institutions of the modern state, while the influence of the economic order on the structure of both laws and society needs no enunciation.

Any jurisprudential analysis is inextricably bound up with the study of concepts. A concept is an idea underlying a general notion for example concepts of freedom or the concept of ownership of property. General principles are formulated which form the structure of that concept. Even the formal structure of concepts is being reshaped according to the functions they are being made to perform. Much juristic ink has flowed in an attempt to define the word law. The reason why no successful attempts have been made is that law should not be regarded as a word as such. It is a concept and a highly complex one at that. Thus the vital feature is not so much the form of words chosen as a definition but the accompanying elucidation of the manner in which those words are to function in all the diverse contexts in which they may be used<sup>57</sup>. Much of the confusion in defining law has been due to the different types of purposes sought to be achieved; it could be on elucidation of meaning at a criterion of validity. A definition of law is actually an inquiry into the nature of law.

The foregoing has been a short account of the idea of law generally. It will now be put in the context of family law.

According to Cretney<sup>58</sup> family law is exclusively concerned with the formation and dissolution of marriage and with the rights and duties of the partners and their children. Due to the changing nature of marriage and the family as social institutions. This has led to a lot of discussion of the legal implications of judicial trend that the family can exist outside marriage. Thus increasingly in modern times family law is concerned less with what is or is not a family and the quality of the relationship within any particular social grouping and more with whether family relationships give rise to legal rights and duties. It should however be noted that the concept one has of the nature of family relationships will influence the view of what the law should permit.

Family law is the process for deciding what relationship should be labelled 'family', under what circumstances such relationships may be established and administered and the consequences which should accompany their termination.

A quantitative definition of family law is that it is the law that governs agreements to marry and betrothals formalities that bring marriage into existence, maintenance, separation, custody, adoption, nullity, divorce and matrimonial property.

Various reasons have been alluded to for the study of family law. The study traces the development of rights of spouses especially the woman through the centuries from being a mere chattel to an equal and property owner in the institution of marriage. An understanding of the complex, procedural and substantive rules evolved by family law is necessary for the true appreciation of rights, obligations and remedies to each party in a marriage. Family law is an indispensable cogwheel for the functioning of other branches of law for example transfer of property. In post colonial states such as Kenya family Law takes on a new dimension in that it embodies the conflict of western and local culture, customs and religions. This is because the family law is usually a transplanted system, it is not autonomous. (I disagree with you).  
Idiosyncratic proposition.

Family law is law about the family. The difficulties that we talked about on defining law can be applied in the definition of family. The family unit forms the basis of society, it is the nucleus of society. Some scholars such as Maine<sup>59</sup> think

"The movement of the progressive societies is uniform in one respect. Through its course it has been distinguished by the gradual dissolution of the family dependency and the growth of individual obligation in its place. The individual is steadily being substituted for the family or the unit of which civil laws take account."

In my opinion Maine overstepped his mark and this article written in 1917 was far ahead of its time. The time is not yet here when we can write off the family. Notwithstanding the erosion and the weakening caused by the permissiveness of today, the family unit still remains the basis of contemporary society. However the fact still remains that the incipient disintegration of family life threatens our present concept of society. Family law is actually an evaluation of the interaction between two of man's creations for the development and social control of human beings- the family and the law. The law still assumes that the family is essential to the evolution and growth of a viable society. The family like the law is one of the basic processes of human behaviour.

Considering law and family as processes of social control what purposes should society strive for through family law and what goals should men seek to achieve through the law and family? This is basically an inquiry into the functions of family law. Bromley<sup>60</sup> is of the opinion that family law had four distinct but related functions. These were definition and alteration of status, this concerned the rights which one member of the family could claim over another or his property. Secondly the resolution of disputes. Thirdly protection: this could be physical or economic and lastly property adjustment and division especially in succession matters.

Social institutions arise and develop in response to the interests of a given community. Law is an institutional scheme to protect, advance and enforce those interests. Thus law is about the regulation and organisation of conduct. Since human conduct is the common denominator, variations in that conduct under different circumstances and different social economic conditions are bound to occur. Such variations are reflected in the laws of different legal systems.

The laws of every community governed by statutes or customs have their own peculiarities and common bonds with other communities. The former is due to the specific needs and interests

of the community they serve. They have common bonds to all social living. The history and development of family law in Kenya has shown a trend whereby western systems are considered mature as contrasted to African systems which are still represented as primitive. Our family law is lacking its own peculiarities not fulfilling its role of conforming to society's values. According to Justice Homes<sup>61</sup> values are the lifeblood of the law.

".....the secret root from which the law draws all the juices of life. They are considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views of public policy."

An anonymous raconteur said "it takes three to make a marriage. The male, female and the state." This witty remark underlines the issue of whether, how and to what extent the state should be authorised to regulate the relations of man especially in the realm of family law which are considered to be personal laws. A personal law is one which adheres to an individual because of a particular connection with a legal regime. The connecting factors could be race, religion, nationality or domicile. Bhalla<sup>62</sup> is of the opinion that

"Marriage, a social institution, the most personal aspect of human social life should be left alone without legal interference. Law should serve as a guardian, a sentinel to guard this (marital) relations but not to regulate them."

He goes on to give the example of proceedings for restoration of conjugal rights which he regards as both wasteful and humiliating and concludes that personal relations such as marriage should be *guided* but not controlled by the law. It seems difficult to reconcile our views with those of Bhalla. Marriage is a status. In the controversial case of Cole V Cole<sup>63</sup> it was said that "In fact a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law." Status means the condition of belonging to a class in society to which the law ascribes peculiar rights duties and capacities,<sup>64</sup>

The first part of this chapter shows that religion is heavily intertwined with the family law of Kenya. Karl Marx termed religion the opium of the people. Writers of jurisprudence especially those of the natural law school made little distinction between morality and religion.

The distinction should however be made. Moral ideas of right and wrong dictate behaviour but religion is a matter of belief and it only influences behaviour through the moral attitudes it fosters. Another distinction should also be made between the idea that moral considerations do influence rules of law and the issue of how far laws should give effect to moral values.

The jurisprudential analysis that has been outlined seems to point to an utopia, with our system of family law falling far short of the ideal. This is because jurisprudence is an abstract general and theoretical study of law and legal theory. The inclusion of this section was to show that family law does meet the criteria for law strictly so called for example the constitutional foundations of family law so expressed in sections 78 and 82 conform to Kelseins theory of the Grund norm.

The reason why I have kept this exposition brief is that jurisprudence and family law can only be so compatible. Jurisprudence is too theoretical, while family law deals with society changes, its quirks and mannerism which no legal theory can predict or sufficiently explain. As put by RodCliffe<sup>65</sup>

"You will not mistake my meaning or suppose that I can deprecate one of the humane studies [Jurisprudence] if I say that we cannot learn law by learning law. If it is to be anything more than a technic it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life."

### 1.3 INTERNAL CONFLICTS OF FAMILY LAWS

The last section of this chapter deals with the internal conflict of family laws in Kenya. These have been defined as a group of laws which regulates the often overlapping rules of substantive personal laws<sup>66</sup>.

Readers should note that we are dealing with internal conflicts of laws as opposed to conflicts of laws that is the subject that is also known as private International laws. Professor Allot in his study of internal conflicts of law<sup>67</sup> points to the danger of applying by analogy the rules of private international law to the internal conflicts of laws. Where as private international law regulates the legal contacts between one territorial legal system and another, internal conflict rules are not concern with the sovereign laws another state. A judge when faced with an internal conflict problem seeks guidance if at all possible, wholly from municipal law sources.

During the colonial period little progress was made in harmonising the different systems of law which operated. Yet little conflict of laws in fact appeared during the colonial period. This can be attributed to two factors. One was the heirachial system. It was the intention of the colonial government to civilise the natives. In doing so the colonial attitude advocated for the conversion of family laws from those of Africans, Islamic and Hindu families close to that of a western nature. Thus the western marriage was seen as the highest form of union any member of these communities could aspire to. Next were Hindu marriages these rise in rank can be traced to 1960 when polygamy became legal, As between Islamic marriages and those under African customary law by virtue of the decision in *Ali Gonyuma V Ali Mohammed*<sup>68</sup> the former was held to be a higher form of union. The irony of African marriages being ranked last on their own soil is further reinforced when one remembers that at first English law was an optional alternative to the native.

The second factor was due to the dual system of the courts. As we saw in section two these were abolished and all family law disputes were to be administered under the same courts system.

There is a fundamental cleavage between the ideas of family life reflected by the legal systems which operate in Kenya. To take just two the western ideal encompasses a man and a



woman equally bound in monogamy, subject to a judicial decree for divorce with a nuclear family, the Africa family, it had wider degrees of prohibited relationships and the wife had less rights.

There is no reason to regard any form of marriage as necessarily superior to another in law where each type of marriage is fully recognized by the laws of the country. The correct legal position is that whichever marriage is completed first is the valid one, the subsequent ceremony being of no consequence unless it takes the form of a conversion as provided for statutorily.

The problem of the conflict of marriage laws that apply in Kenya has its origin in the fact that a homogenous community with a legal system and marriage law reflecting a common philosophy of life is lacking. Instead we have different marriages reflecting the different philosophies of life.

Kuria identifies four types of marriage laws in Kenya. Firstly was the English type passed to enable the colonisers that the civil servants, the missionaries, traders and farming settlers to lead the family life that their line led in the mother country. Then there was the law which the colonisers passed which was intended to facilitate the civilisation of the colonised. Legislation was passed to enable those who had become Christians or had accepted the western way of life to contract western type monogamous marriages either in the same way as the colonisers did or in a simplified manner. Thirdly was the law of the colonised or the customary law. Under this head he includes Islamic and Hindu laws that governed the marriages of those people who served their links with their original communities owing to the new economy and political order for example in urban areas or plantation areas. This reveals a further dimension in that people no longer lived on clear cut communities, westernization urbanization and inter-marriages have led to overlapping of laws and more conflict.

The issues in the conflict of laws are numerous, mostly indistinct while the task of resolving them is onerous. The courts have to decide which law applied to whom. The extent to which one could be said either to have replaced his marriage law with another by adopting a new way of life or to have abandoned his way of life. There was also the issue of to what extent did the changes in the mother country affect the legal situation in the colony. On the part of the settlers there was the problem of ascertaining the law of the mother country which applied to them.

Social integration also raised a number of issues what of an African who embraced Christianity and had a marriage celebrated in accordance with the African Christian marriage and divorce ordinance. Did this outward manifestation indicate a desire to change his whole philosophy of life. There was also the scenario which also happens today where a couple celebrates a marriage in accordance with both Christian and customary rites. Which of the two laws had precedence. Note the application of double standards, in that conversion was always presumed to be one way. If there was a change in the law relating to marriage by either or both parties it had to be to the western type. It was never contemplated that the couple who appeared to have accepted the western way of life and willingly abandon it.

Kenya does not have a homogenous community having the same culture and religion. Instead the society has people of different cultures each with their own set family laws and principles. Interaction between the African people and other races resident in Kenya has also created a further dimension to this conflict that is inter racial marriages. The colonial judicial system attempted to find a solution by making assumptions. The spirit of these assumptions is still retained today, and the courts faced with an internal conflict of family laws issues can slot their case into any of the following. The first assumption can be traced to sec 39 of the 1902 ACMOO Marriage Ordinance this provision assumed that once an African contracted a marriage under the statute he automatically abandoned his African way of life culture and customary law. This was not based upon any fair jurisprudential attitude other laws in general, and to English law on particular. It was part of the wider scheme of the colonists to analyse the African by making him subject to a foreign legal system at the expense of his own.

The second assumption was that even upon conversion to Christianity the African retained certain aspects of his culture except in those situations expressly provided for by statute. This assumption was resolved to in those situations where it was clear despite embracing the western faith the African did not intend to be governed wholly by western law.

The third assumption was made by the courts on African despite having adopted a western way of life. This can be traced to the 1904 Native Marriage and Divorce Ordinance.

Before the advent of the white man urban areas were an unknown feature of the Kenyan traditional society. Away from the watchful eyes of the community at home, the persons who

moved to the urban areas either let their old mode of life lapse or adopted a new one.

This presented various problems. For example as to the time when the urban marriage law came into existence. This is because these people entered into relationships bore children without any formal overt acts or rituals. In *Yawe V public trustee* it was held that the common law presumption of a valid marriage could be applied to the union of a Kikuyu woman and Ugandan man who cohabited in Nairobi.

There was no clear cut distinction in the colonial era between Christian marriages and statutory marriages. Persons who no longer wished to be bound by customary rules embraced Christianity, yet they had no intention to live Christian lives. They wished to avoid the strict rules of customary <sup>law</sup> rules, for example the customary law had wider ranges of prohibited degrees and the fact that dowry was an essential. This distinction is however clearer in the post independence era but note that the regulations under the Marriage Act are more demanding than under the African Christian, Marriage and Divorce Act. This fact has been alluded to earlier.

The conflict between Islamic and customary tribes especially in the coastal areas, was due to the fact that there are Africans belonging to different tribes who accepted the Islamic faith without severing the communal ties. The tribe most affected are the Digos. In connection with this it has been stated

"One of the most difficult problems connected with the administration of this Digo district arises from the conflict between native law and custom on one hand and Mohammedan law on the other...it is in connection with inheritance that the consequences of the conflict of laws are most serious."<sup>70</sup>

The decision in *Ali Ganyuma V Ali Mohammed* was commonly accepted as establishing the fact that Mohammedan law must invariably prevail in any conflict with native law and custom regarding the disposition of the estate of a deceased African who had at any time professed Islam in however shallow or ignorant a fashion.

The problem arose because according to Mohammedan law no pagan could inherit from a Mohammedan. Thus if a man had once accepted Islam but his wives had not, then he later lapsed, the strict Mohammedan rule was that upon his death inheritance was not to the oldest

brother according to the tribal custom, but to the nearest Mohammedan relative thus leaving the wife and children destitute.

The Digos accepted Islam on a large scale while still in part retaining their customary law of inheritance. This customary law directly contradicted the terms of the Mohammedan marriage, divorce and succession ordinance of 1920, section 4 to be precise.<sup>71</sup> The conclusion of a valid Mohammedan marriage was thus considered the simplest test of whether one professing conversion to Islam really intended to live according to the tenets of the religion. It should be noted that the court in the Goyuma case made no reference to this question of marriage.

The last conflict I will deal with is between Islamic laws and Hindu customary law. There are three sects of Indian Moslems that is the Memors Khoja Ismalia and Khoja Ithanashari accepted the Moslem faith yet retained Hindu customary law as their personal law. The issue is whether they should be treated as distinct communities or as ordinary Muslims. The law only has clear cut divisions either you were a Muslim or you were a Hindu you could not be both or as in the present-day case of persons professing the Bahai faith, neither.

## END NOTES TO CHAPTER 1

1. OGINGA ODINGA Not Yet Uhuru An autobiography 38 AWS Heinemann Nairobi [1967] at p 164
2. See D.C. of Nairobi V Wali Mohammed. [1914] 5 ENLR 175 where this position was first made.
3. See page 9
4. Miney Francis V Samuel Bartholemew Kuri 24 (1) KLR 1
5. Finch V Finch 28 KLR 202 at 204
6. Ordinance No. 31 of [1902]
7. Ordinance No. 9 of [1904]. It repeated see 39 of the 1902 Marriage Ordinance which applied the English law of succession to the natives.
8. Our present African Christian Marriage and Divorce Act cap 151 of the Laws of Kenya.
9. Contrast sections 6 to 18 pf cap 151 with sections 8 to 30 of cap 150
10. Ordinance No. 39 of [1930]
11. Ordinance No. 12 of [1904]
12. Ordinance No. 33 of [1939] which came into operation in 1941 as is now cap 152 the Matrimonial causes Act.
13. No. 5 of [1952]
  - (a) See sections 4 and 5
  - (b) Under section 14
  - (c) Section 26
14. Enacted in [1921] as Ordinance No. 33 of that year

15. Act No. 50 of [1962]
16. Act No. 17 of [1967] cap 10 of the laws of Kenya.
17. There is no reason why a similar principle should not be applied to customary matters many of which are quantifiable in monetary terms.
18. Cap 144 of the Laws of Kenya.
- 19 [1970] EA 714
20. Civil Appeal No. 13 of [1976]
21. Macquarrie J in Godwin V Crowther [1935] 2 WACA 109 at III. It is a Sierra Leon case.
22. [1934] EACA 130 at 133
23. Ordinance No. 34 of [1920]
25. In his Article Trends in marriage and succession Laws in Kenya [1886 - 1977]
26. Ordinance No. 13 of [1906]
27. Article 4, 7 and 12.
28. [1866] LR 1 P&D 130
29. A military expedition by the European Christian Countries to recover the Holy Land from the Muslims in the Middle Ages.  
It also means any struggle or campaign for something believed to be good against something believed to be bad.
30. Mbaruk din Diwansop V Hamisi [1927] II KLR 56
31. [1912] 4 EALR 86
- 32 [1943] II EACA 4

33. Civil Appeal No. 33 of [1948]
34. [1946] 22 KLR 12
35. [1937] 14 EACA 32
36. 6 EALR 91
37. Independence Constitution sec 179 (5)
38. Act No. 14 of [1967]
39. Public Law and Political Change in Kenya.
40. [1968] EA 72
41. [1971] KHD 83
42. [1973] EA 153
43. Contrary to section 73 (I) of our chapter 5 of the constitution.
44. GHAI YB The Asians in East Africa: Portrait of a Minority [1970] chapter 2
45. Vol 23 Government printer Nairobi at p. 783
46. 9 EALR 64.
47. However a contrary opinion was expressed in Sign V Singh 16 (2) KLR 73.
48. As Ordinance No. 43 of [1941] it was then cap 149
49. Then cap 145 as amended in [1941] Now cap 152
50. 25 KLR 24.
51. Now cap 153 then cap 6
52. Hindu marriage Divorce and Succession (Amendment) Ordinance

53. Ordinance No. 28 of [1960]
54. Ordinance No. 15 of [1961]
55. [1956] 29 KLR 20 at 23
56. The study of mankind especially origins, development custom and beliefs.
57. p 47 of Lloyds Introduction to Jurisprudence
58. STEPHEN M CRETNEY Principles of Family Law 4<sup>th</sup> Ed Sweet and Maxwell [1984]
59. In his Article Ancient Law reproduced in Dias see bibliography.
60. BROMLEY LOWE Family Law 8<sup>th</sup> Ed Cutterwoths [1992]
61. HOLMES The Common Law reproduced in Dias Supra No. 59
62. BHALLA RS African law sources and analogies in English Law with reference to marital relations p 223. A report on the proceedings of the 3rd Annual Conference [1991] of the African Society of International and comparative Law.
63. I NLR 15 at 22 A Nigerian case.
64. The Amphill Peerage Case [1977] AC 547 per Lord Simon of Glaisdale.
65. Lord Radcliffe in an article The Law and its Compass reproduced in Lloyds see No. 57 Supra.
66. PEARL DAVID Interpersonal Conflict of Laws in India de Steven and Sons London [1981]
67. ALLOT New Studies in African Law London [1970] p 116
68. II KLR 30
69. GIBSON KAMAU KURIA in his article Internal Conflicts of Marriage Laws in English speaking countries.



70. ARTHUR PHILLIPS "Report on Native Tribunals Government Printer Nairobi 1945.
71. Where any person contracts a marriage in accordance with Mohammedan Law and such person dies after the commencement of this Ordinance and where the issue of any such marriage dies after the commencement of this Ordinance the law of succession applicable to the property both movable and immovable of any such person shall be in accordance with the principles of Mohammedan law. Any provision of any Ordinance or rule of law to the contrary not withstanding.

# **Chapter 2**

## **The marriage Bill**

## 2: 1 HISTORICAL DEVELOPMENT OF THE MARRIAGE BILL

To coin a journalistic phrase, at the time of going to press the Attorney General holds the Marriage Bill pending its presentation to the Parliament. The roots of the present marriage bill go back almost three decades. The first part of this chapter deals with the historical development of the bill.

On the sixth day of April 1966 the first president of our nation the late Jomo Kenyatta appointed a commission whose terms of reference were as follows:

"to consider the existing laws relating to marriage, divorce and matters relating there to make recommendations for a new law providing a comprehensive and so far as may be practicable uniform law of marriage and divorce applicable to all persons in Kenya which will replace the existing law on the subject comprising customary law Islamic law Hindu law and the relevant acts of parliament and to prepare a draft of the new law and to pay particular attention to the status of women in relation to marriage and divorce."

The commission on marriage and divorce which consisted of fourteen members then delineated several general principles by which it should be guided. The members while they acknowledged that changes in the area of family law were necessary felt that marriage and divorce should not be treated as part of the ordinary civil law under a statute of national application to the exclusion of personal law. There should be some kind of compromise with a uniform law regulating certain matters considered to be of national importance while leaving the individual the choice of a civil, religious or customary marriage. The uniform law would be founded on the way of life. On this latter aspect it was noted that this way of life was rapidly changing and urban and rural conditions were widely different.

The commissioners felt that the law would have to cater for non African citizens and for residents who are not citizens. The uniform law would be such that Kenyan marriages and divorces would receive general international recognition.<sup>1</sup> An important principle is that the law

must recognize the existence of different ethnic and religious groups in Kenya but should also contribute towards national unity by ensuring as far as possible equal rights and responsibilities for everyone. It was to take into account economic conditions and the requirements of the modern nation. It was also felt that paramount consideration should be given to the promotion of stability of marriage and family life and consequently that divorce should not be encouraged. The law should always lean towards holding a marriage is valid and that children are not illegitimate.<sup>2</sup> Finally that the law must be based on a recognition of human dignity and that matrimonial proceedings should be designed to cause the minimum of distress or humiliation.

In its modus operandi the commission proposed to follow two main avenues. An examination of the laws of other countries to see if they contained ideas that could be usefully be applied in Kenya. Secondly the use of questionnaires and field visits to various districts so as to gather information on from the public.<sup>3</sup>

As can be seen the commission had set very high standards for itself . The danger lay in that their recommendations would fall far short of these standards . To what extent this happened will be discussed in the concluding remarks of this chapter. In line with this the commissioners felt it was wrong to recommend measures which were unlikely to be observed and incapable of enforcement, they wanted to prevent themselves from falling into the trap of dead letter law.

The report of the commission on the law of marriage and divorce was published in August 1968. It contained a draft marriage bill for an act of parliament

"to consolidate with amendments the law relating to marriage , personal and property rights between husband and wife , separation, divorce and nullity and the custody and maintenance of children and to provide for connected purposes."

Before an act of parliament becomes law it is known as a bill in that a bill is a draft of a proposed act of parliament. The marriage bill was presented to the National Assembly on three separate occasions and each time the second reading proved to be its undoing. The second reading is the most important stage of a bill and the debate on the main objects of the bill can

range very widely. So widely in fact that a bill can fail on mere technicalities. With no disrespect intended to members of the august house the tendency of Kenyan legislators to get carried away on a wave of hysteria on inconsequential matters while ignoring the larger picture is well known. For example they rejected the bill saying that it was un-African and that we were aping western ways yet a cursory perusal of the bill will reveal that it incorporates a hefty number of African customary law aspects.

The bill would if enacted create a new comprehensive and uniform law which would have affected at least forty two statutes including the constitution.

Having been defeated thrice the 1985 bill as it was now being referred to was shelved for almost a decade. As it faded from the limelight scholastic interest in it also waned. In fact this writer found that while the bill created a lot of furor up to the very early eighties for a period of ten years from the 1983 to 1993 the articles concerning reform in the area of family law were few and far in between both in the national newspapers and legal journals.<sup>4</sup> The general feeling seemed to be one of defeatism in that little if any headway was being made.

Just when everyone had forgotten about it the bill like the legendary phoenix arose again. On the first day of October 1993 the attorney general vide Gazette Notice no. 4820 of the same year appointed a task force for review of the laws relating to women. It had four terms of reference, namely

- (i) To review all existing laws, regulations practices customs and policies which have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women of human rights in the civil political social economic cultural or any other field.
- (ii) To make recommendations to modify, amend or abolish existing laws, regulations, practices, customs or policies which constitute discrimination against women.
- (iii) To consider and recommend a comprehensive bill which will render unlawful any discrimination on the basis of sex and promote

equality of opportunity between all persons and

(iv) To make such further recommendations incidental to the foregoing that it may deem necessary

Thus under the guise of its mandate the task force revamped the 1985 bill. It did not make any major changes. The 1993 bill was presented to the attorney general in late February of 1996.

At the risk of being accused of splitting hairs, it is important to note that the 1993 marriage bill is not a result of part (iii) of the task force's terms of reference. The task force was set up to review laws relating to women. It was not set up to review family and marriage laws. It would seem that there is still a great reluctance on the part of the government to reinstate reform in these areas.

However the task force came to the realisation that the family laws in Kenya were indeed oppressive to women. Similarly there is an inherent futility in trying to effect a dichotomy between women's issues and family law - even part (i)<sup>5</sup> makes reference to "...women, irrespective of their marital status...". In this writer's opinion the efforts of the task force which culminated in the 1993 marriage bill should be attributed to the exercise of part (i) of its terms of reference.

Kibwana<sup>6</sup> states

"It is prudent and logical to reform the constitution before undertaking changes of ordinary laws...especially in the task forces dealing with human rights issues such as .... women's rights, it is impossible to proceed with reform without having a certain vision of an acceptable constitution."

One of the conflict issues in family law is that some provisions seem to undermine the supremacy of the constitution. This ghost still haunts us to the present day. The task force was appointed to modify, amend or abolish existing laws... which constitute discrimination against women. And also to recommend a bill which would render unlawful any discrimination on the basis of sex. The problem arises in that the constitution does not prohibit sexual discrimination *per se*. Section 82 of the constitution deals with protection from discrimination subsection (3) of

which defines discriminatory as "affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed."

It should be noted that no reference is made to sex as a factor affecting discrimination. Thus the task force findings will be inconsistent with the constitution as it now stands. This will create further conflict problems as the constitution as the supreme law is a grund norm from which all other laws derive their validity.

Sec 82 is also to the effect that the stipulation "no law shall make any provision that is discriminatory either of itself or in its effect" shall not apply to any law so far as that law makes provision ... "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."

## 2.2 ANALYSIS OF THE MARRIAGE BILL

The marriage bill of 1993 is entitled

"a bill for an act of parliament to amend and consolidate the law relating to marriage, personal and property rights between husband and wife, separation, divorce and nullity and the custody and maintenance of children and to provide for connected purposes"

This part of the chapter proposes an analytical inquiry into the changes the marriage bill has sought to make. The most obvious change is that there is now a uniform legislation on family law as opposed to the multi-structured system that had previously operated. The bill enacted will provide for a comprehensive legislation which will deal with ~~all~~ marriages whether contracted before or after the enactment of this act and whether contracted in Kenya or elsewhere. The advantages of these are that all persons resident in Kenya can look to the act if enacted for legal redress in that the issue of locus standi is disposed of secondly a uniform law of marriage and divorce means that the heirachial system of family laws, a common feature of the colonial <sup>era</sup> error where one system of law and a marriage contracted under it were considered superior to another - and the conflict of laws issues prevalent in the post independent era have been done away with in the case of the former and for conflict of laws there is little opportunity for that to arise under the present system.

The bill does away with the traditional definition of marriage given by Lord Penzance in the 19th century case of *Hyde V Hyde*<sup>8</sup> which was reproduced in sec 3 (a) of the matrimonial causes act as "the voluntary union for life of one man and one woman to the exclusion of all others." The bill defines marriage as "the voluntary union between a man and a woman intended to last for their joint lives."

This new definition of marriage means that the polygamous type of marriage is a *de jure* type of marriage as opposed to the *de facto* situation that has always operated. Thus the bill makes provision for two types of marriages - a monogamous union and one that is potentially





- 38 section 30(g) of the Registered Land Act Cap 300 of the laws of Kenya
- 39 [1984] C A Civil Appeal no. 71
- 40 [1967] EA 404
- 41 [1983] Civil Application no. 52
- 42 WANJALA S                    Towards a uniform law of matrimonial property in Kenya  
CLARION MONOGRAPH no. 1 [1994]
- 43 FAYZEE A A                Outlines of Mohammedan Law  
3 Ed Oxford University Press [1960] p.110

# CHAPTER

# 3

# LAW REFORM

### **3.1 THE ROLE OF LAW REFORM**

This last chapter deals with issues of law reform with focus on marriage and divorce. This writer commences with a general overview on the role of law reform . This will be followed by a discussion on how the process of law reform has been carried out in Kenya. Finally it is proposed to deal with law reform in the areas of marriage and divorce.

Amongst the kinder things that have been said about lawyers is that they are slaves to definitions. The concept of law reform has been defined as,

"every nation, every generation with new socio - economic [emphasis mine] with new political ideas, with scientific discoveries and technological developments demand change in the existing legal system. Law cannot remain a silent spectator to the developments around it, and it can ill-afford to remain stagnant in the dynamic society of today ,it cannot lag behind the developments in other spheres of life. If it fails to keep pace, if the legal system fails to adjust to the changing needs of the needy and their aspirations it is feared that it loses all its values."<sup>1</sup>

New socio-econimc ideas demand change in the existing legal system of a nation. Law reform must be seen as a critical evaluation of the prevailing social values in a given society at a given time and the concomitant updating of the relevant law so that it keeps pace with society's aspirations.<sup>2</sup>

Justice Okubasu the current chairman of the Kenyan Law Reform Commision is of the opinion that law reform may be looked at as the study of the prevailing social values in society and then updating the law so that it keeps pace with society's aspirations and expectations.<sup>3</sup>

Any inquiry into law reform should be based on the functions of law. The questions when or why must the law be reformed is answered by pointing to the fact that the law is not

carying out its functions and the law can also be reformed in a bid to improve its performance.

Law reform that is changed with a view to improvement is becoming a matter of high priority in the legal systems of practically all the countries with a unified legal system.<sup>4</sup> Thus law reform provides the framework that is the legal system within which reform of the individual laws will take place. Attempting to reform the individual laws is akin to bulding a house on no foundations the result of which a tottering edifice.

When talking of law reform it should be pointed out that law reform and reform of the laws are two separate concepts. While conceding that this work as not the appropriate forum for delving into the jurisprudential implications of the distintion between law and laws suffice it to say that the latter is only a particular way of organizing material and its formulation presupposes to some extent a concept of a legal system. A legal system entails not only the institutional struture byt more importantly the element of validity. Validity means not only that the law is legally effective beacuse it was enacted with proper formalities but also because it conforms to society's values. A legal system has three main tasks - to provide a framework within which people conduct their affairs; the educative function of shaping one's ideas and the achievment of justice in society. The aim of law reform should be the ultimate achievement of these objectives.

It is important to look at the system as a whole and decide on what foundation it should be based. The system that has operated hitherto is at best unsatisfactory. The case for 'kenyanization' in the area of law reform cannot be understated. Yet deciding on what kenyanization means leads to a whole new discouse. Adherents of fhe old school felt that more emphasis should be laid on customary law. This is clearly not the best approach. There are quite a number of customary laws which are outdated and cannot apply in a modern Kenya.

Other aspects are patently unfair as evidenced by the caseof *M'mukindia M'lkibuthu V iMparu d/o Kimuru*<sup>5</sup>The parties were married under African customary law. Upon divorce an issue arose as to whether the wife was entitled to take with her the livestock she had acquired. It was not in dispute that she had bought the animals out of her own sweat, her husband having having not contribeted a cent. In holding against the wife the court said that there existed a Meru

custom to the effect that a woman did not possess livestock and as such the property belonged to the husband.

Those who do not advocate for a full return to customary law feel that law reform should seek the desirable blend between English law and customary law.

In this writer's opinion Kenyanization means taking account of those situations that are uniquely Kenyan for instance acknowledging that the number of stable illicit unions is on the increase and therefore a characteristic feature of the Kenyan society, what should be the legal rights of cohabiting parties. In such situations neither African customary law nor English law can adequately provide a solution.

Cotran<sup>6</sup> is of the opinion that there should be a residual law to be applied in those cases where there are loopholes in the law, while the process of law reform is being carried through. What should this residual law be? The substance of the common law and the doctrines of equity are clearly inapplicable<sup>7</sup> and he suggests that a court faced with a problem or a case where there is such a lacuna in the law should apply the principles of justice, equality and good conscience.

In this writer's opinion such a residual law should be based on what the father of our nation<sup>8</sup> called for. The principles the system must satisfy are that it must draw on the best of African traditions and secondly it must be adaptable to new and rapidly changing circumstances and it must not rest for its success on a satellite relationship with any other country or a group of countries.

Justice Kirby the first Chairman of the Australian Law Reform Commission in his book 'reforming the Law'<sup>9</sup> defined law reform as "Keeping the legal system abreast of changing social circumstances and changing values" in illustrating the difficult balances to be attained he went on to say ,

"the process implies the conservation of what is good in the existing order and the moulding of that which is proposed as a reform so that it will fit comfortably into the present state of things."

His statement underlies the fact that the twin aspects of reform that is continuity and change should always be foremost in the mind of any law reformer.

The common and most important element in all these definitions is that the law should be based on society's values. The aim of law reform is to achieve the objective of having a sound integrated and efficient legal system that will meet the requirements, needs and aspirations of the Kenyan people. The law should never attempt to impose an alien way on the people's of a nation.

Salacuse<sup>10</sup> deals with an issue which has placed great obstacles in achieving a legal system accepted by all peoples of Nigeria. This problem is also common in most Anglophone countries of Africa. The situation in Nigeria was that in certain matters such as the nature of the marital union that parties wanted to enter in this they were allowed a free rein. In other matters such as matrimonial property rights the common law that is the law which was developed in response to social and economic conditions peculiar to England was imposed. After independence the Nigerian government followed a similar system that is in some areas customary law was applied and in others where the government wanted to "guide" the public a law which may or may not be in conformity with the customary law was imposed. Thus in a way the government was planning and organising people's personal lives trespassing into that realm of privacy that no law should cross. Salacuse terms the two legal mechanisms as the way of life theory and the inherent incident approach respectively. The reason why the government opposed the former was because it was uncertain. A person's way of life will very often include elements of the western and traditionally African values in constantly varying proportions and this will differ from person to person. However Salacuse notes

"The greatest objection to inherent incident approach is that it automatically imposes a system of law which was not developed in response to local conditions and which may not at all be in accord with the local habits and expectations. Thus while the manner-of-life theory is crude and difficult to apply, it does achieve what is probably the main goal of any system of conflict of law rules that is to give effect to the justified expectations of the parties. This goal is of particular importance in the field of family law where there must never be too great a divergence between what the law is and the way in which the people live."

### **3.2 THE PROCESS OF LAW REFORM IN KENYA**

After independence the process of law reform in Kenya was conducted mainly by the means of ad hoc machinery through the Commissions of Inquiry Act<sup>11</sup>. Section 3 (1) of which states

"the president, whenever he considers it advisable to do so, may issue under this act appointing Commissioners and authorising them or any quorum of them to inquire in the conduct or management of any public body and into any matter into which an inquiry would in the opinion of the president be in the public interest"

The provisions of this Act give a wide margin of latitude in that the commissions would not be confined to law reform.

Other bodies which were law reform agencies were the Law Reform Committee of The Law Society of Kenya and also Law reform was conducted by proposals generated as Bills by the Attorney General Chambers.

Kenya's representative to Meeting of the Commonwealth Law Reform Agencies held in London in 1977 said that the time was not ripe to establish such a commission in Kenya. He gave us cogent reasons the fact that as a developing nation Kenya lacked sufficient resources to mount such a project and secondly the fact that Kenya had in the past successfully relied upon the commissions (of inquiry) to consider and advice upon specific areas of law and their potentiability for reform.

Indeed the commission of 1968 to inquire into the law of marriage and divorce was appointed under the provisions of the Commissions of Inquiry Act.

Surprisingly less than five years after these sentiments were expressed the Kenya Law Reform Commission was established by the Law Reform Commission Act<sup>12</sup>. The Act came in to force on the 21st of May 1982. The commission started its work on September 1982 under the Chairmanship of Justice Miller. The Law Reform Commission was a permanent body charged with the duty of promoting reform of the law. It was distinguishable from other commissions setup for specific functions which had to be accomplished within a specified time. The then



setup for specific functions which had to be accomplished within a specified time. The then Attorney General J. K. Kamere in the Memorandum of Objects and Reasons which accompanied the Law Reform Commission Bill said

"the object of this Bill is to establish a Law Reform Commission a neutral body which shall examine objectively proposals for reform and generate of its own volition and proposals for Law reform in areas not specifically selected by interested parties."

At last it had been recognised that law reform is a continuous process which needed an independent body to generate it and keep it under review and in this respect Kenya had finally caught up with the United Kingdom and other Commonwealth countries which had established similar bodies. Also the establishment of the commission settled the controversy as to the proper agency of law reform.

The functions of the commission are set out in detail in section 3 of the Law Reform Commission Act which can be paraphrased as follows

1. To keep under review all the law of Kenya and to ensure its systematic development and reform including *the intergration, unification, codification* of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and its simplification and modernization.

The underlined words contain the nub of the provision. Allot<sup>13</sup> says that unification imposes a uniform law while intergration creates a law which brings together without totally obliterating laws of different origins. Intergration implies that various laws remain in being but there is an attempt to standardize their effects and remove conflicts between them.

In theory the high sounding words of this provision and the intended effect of their result if carried out would seem to show that Kenya is totally committed to its task of law reform. In fulfilling such duties as 'systematic development and reform, elimination of anomalies, simplification' etc the commissioners have their work cut out. It is only a die-hard optimist that would be convinced of the commission achieving the very high standards they have set for themselves.

2. To receive and consider any proposals for the reform of the law that may be made or referred to Ojwang<sup>14</sup> is of the opinion that the word 'consider' is nebulous and that a more satisfactory position would be if the commission were to inquire into every proposal it received.

3. To prepare and submit to the Attorney General programmes for the examination of different branches of the law with a view to reform including recommendations as to the agency by which such examination should be carried out.

4. To advise and inform ministry and government departments with regard to the reform or amendment of a branch of the law appropriate to that Ministry or department.

5. To make an annual report to the Attorney General as well as the National Assembly on its proceedings.

So that the law reform commission does not usurp the role of the legislature as a law making body section 2(1) of the Act makes it clear that the purpose of the commission is to promote reform of the law and not to effect it. The Commission is to promote reform of the law and not to effect it. The Commission's duty is only to prepare and submit programmes for the reform of the chosen area of law. The Attorney General may in his discretion approve the programme submitted and authorize the commission to undertake the examination of particular branches of the law and the formulation by means of draft Bills of proposals for reform therein. Thus in the final analysis parliament has the last word on how reform will be effected by either accepting or rejecting the bill. Since the act does not have any criteria which should govern the grant or refusal of approval by the Attorney General to any particular programme the Attorney General it can be said is able to control and determine the trend and direction of the law reform process in this country.

The Attorney General as the chief legal officer of the government is part and parcel of the Executive. The fact that he is always watching over the shoulders of the commissioners means that they walk a fine line. Their work should not mimic government policy yet at the same time

- 12 . Act No. 2 of [1982 n] Cap 3 of the laws of Kenya.
13. ALLOT A     What is to be done with African Customary Law? [1984] 28 JAL 56
14. OJWANG JB     Whither goeth the law A study of on experiment in law reform in Kenya  
[1983]
15. Lord SCARMAN     Inside the English Law Commission p. 869 *Quoted in* " Whither  
goeth the law" no [14] Supra.
16. [1984] 3<sup>rd</sup> Annunal Report of the Kenya Law Reform Commiission p. 18
17. ALLEN     Law in the Making 7<sup>th</sup> Ed 19 64 p. 65.
18. DR JK NYERERE     Freedom and socialism OUP [1968]
19. Nyoli V A-G [1956] 1 2.b 1at p16
- 20.PALLEY CLAIRE     Rethinking the Judicial Role 1 Zambia Law Jounal [1969].
21. Geoge PT     The Court in Tanzanias One Party State EAPH [1967].
22. Engels Fredrick     Originofhe Family , Private Property and the state p. 39.
23. KURIA Gibson Kamau     the Marriage Bill is Unconsttutional and Against Social Reali  
ties weekly Review 6th September [1976].
24. SANDERS AJM     Comparative Law and Law Reform in Africa with Special referene  
to the law of Criminal Justice [1982] p, 148.

the recommendation should not incur the displeasure of the government.

"One must accept the existence of a basic contradiction in the needs of a law reform agency in its dealings with the government. It must have the capacity to exercise independent judgement without which its advice will be suspect. Yet it must co-operate with the government firstly in order to hold the confidence of the government in its advice and secondly to assist the government to pass its proposals into law"<sup>15</sup>

Recent events would seem to give credibility to the view that the Law Reform Commission is being sidelined in its task of law reform. In 1993 the Attorney General Mr. Amos Wako established nine task forces whose mandate was to review specific areas of the law with a view to recommending reform. In our second chapter this writer dealt with the task force which covered the area of women rights. Eventually the recommendations of this task force will be debated by Parliament for possible translation into law. Under normal circumstances the law reform commission will initiate reforms of the kind proposed by the Attorney General. The route of the task forces has the possible advantage that ordinary people can be drawn into the reform process. The Attorney General has expressly requested the task forces to seek the views of the public. There is evidenced an intention to enhance the public nature of law reform but it bodes ill for the future of the Law Reform Commission.

### 3.3 REFORM IN THE AREAS OF MARRIAGE AND DIVORCE

The Marriage Bill has been the *bete noir* of the Kenyan Parliament for over a quarter of a century. In the second chapter this writer dealt with the new aspects that the Bill proposes to introduce. As would be obvious even to a person of elementary training and education the provisions present viable reform of the family law in Kenya. Why then has the Bill so unjustifiably raised the ire of members of our law making body the peoples representatives?

Even the Law Reform Commission approached the Bill with caution. In 1983 the Attorney General's Chambers revised the Bill to cater for the criticisms that had been made against it in parliament. The Bill was then sent to the commission for comment. Their response was as follows:

"We have recieved many suggestions for reform in this aspect of the ... (family) ... law. We have however not dealt with the matter in detail. The Attorney General submitted to the commission a draft marriage Bill which was to be tabled in Parliament and asked for our comments. The commission decided that since the draft was largely a result of the work of another commission appointed in 1967 which had done much of the work on the subject we could not deal with it exhaustively. We therefore submitted brief observations on the matter particularly in those areas dealing with matrimonial property"<sup>16</sup>

The lame reasons adduced by the Law Reform Commission for not pursuing matters relating to family law are not in the least convincing. The fourth annual report of the commission detailing the commissions activities up to late 1986 includes not one word on marriage, divorce and children.

It baffles the mind why the government and its agencies shy away from reform in the areas of marriage and divorce. The unwillingness of both the executive and the legislature has been illustrated. Our last hope would seem to be the judiciary. It has been said that the "aim of a judges office is to do justice between litigants and not to make interesting contributions to legal theory"<sup>17</sup>. This scathing remarks of Allen tend, no pun intended, to do a great injustice to the office of the

judiciary. What role then should the judiciary play in law reform?

"The fact that judges interpret law makes it vital that ...this interpretations must be made in light of the assumptions and aspirations of the society in which they live".<sup>18</sup>

Interpretation of the law is in itself law making. Judges should not shirk from their duty of developing the law. Lord Denning in a classic case<sup>19</sup>, was of the opinion

"... the people must have a law which they will respect. The common law cannot fulfil this law except with considerable qualifications. The task of making this qualifications is entrusted to the judges."

Judges are regarded as a mirror on the society. In an article entitled "Re-thinking the Judicial Role"<sup>20</sup>. It was said "A judiciary is prone to reflect the values of the mass of the people and appeals to these values". This view was expounded on by another writer <sup>21</sup> in this way

"Law does not operate in a vacuum but in a society and it is right that a judge should recognise that his pronouncements must affect that society. Such discretion as he has to exercise should be exercised towards helping rather than hindering the solution of social problems."

In conclusion it can be said that the social structure of the community should guide the format that law reform takes. Like all other social relations marriage is subject to social change so that it is affected in character and significance by the mode of production and the property relations arising from such production of any given society at any given stage of development. The mode of production and the corresponding relations of production and ownership therefore exercises great influence over the aspect of social life and reveal the link between the social economic relations and all other relations including personal relationships in a given society. The mode of production and the nature of marriage are closely related, the former influencing the perceptions as to the purpose and nature of the latter. Economic influences in the marital sphere are especially important when it comes to dealing with devolution of matrimonial property and with issues of maintenance. The mode of production influence is very strong in agrarian based

communities where polygamous marriages meant that additional sources of labour were easily obtainable. There has been a shift from labour intensive to capital intensive agricultural farming methods. This coupled with the fact that as people fall on hard economic times, they find that they can maintain only one woman and her offspring has led to the decline of polygamy. Engels<sup>22</sup> wrote "with the predominance of private property, marriage has become more than ever dependent on economic considerations"

In retrospect it may seem that the 1968 commission may have over estimated the influence of urbanization at that period in time in Kenyan history. Their only crime may have been in being overly ambitious . The recommendations they proposed were way ahead over of their time .In 1968 most of the Kenyan population were still clinging to their customary way of life. Kenyans were not united enough to warrant a uniform law on matters of personal law when the majority of the nation's people in the different ethnic groups had thier own laws which they followed . According to Kuria<sup>23</sup>

"There is overwhelming evidence which indicates that alot is being done to build a nation .But it is clear that sociologically and politically we are not one people.It is not advisable to have a uniform law until the future but until then people should not be deprived of the opportunity to give their lives meaning through the institution of marriage they want ."

These sentiments may have applied to the position in 1968 but three decades later the present position is untenable. It is difficult to administer, the various laws are based on different conceptoins of the family and derive from different periods in time and the whole emphasizes the distinctions amongst the peoples of Kenya and so represent a potential obstacle to building a united Kenyan nation.

In urban areas the inhabitants find easier to shake off the shackles of communal and tribal ways. The increase or high rate of urbanization all lend a case for a uniform law. Another factor which is also condusive is the increasing number of inter-tribal or inter- racial marriages. Such marriages are a potent measure towards nationhood and of fostering national unity where an

individual divests of his allegiance to his ethnic group and adopts a more cosmopolitan and nationalistic attitude.

It has been stated<sup>24</sup>

"the prudent law reformer will first restate the existing law in scientific but understandable terms, will then ascertain and formulate the aspirations and realities of his society and finally draft new laws when necessary."

This is the path that the commission followed and it would be a fitting culmination if parliament accepted its resolutions and passed the Marriage Bill as law.



## END NOTES TO CHAPTER THREE

1. TALUKDAR      Legal Miscellany p.6 Quoted in *Nairobi Law Monthly* of December [1988] at p.38
2. ONIANGO CMP      The Role of logic in the Kenyan Law reform Process with Specific Reference to the Law of Evidence *Refer to Bibliography*
3. OKUBASU E      The Role of the Law Reform Commission in Promoting the Rule of Law in Kenya . Quoted in *no (1) Supra*
4. BEEELZ J      Reflections on Continuity and Change in Law Reform *1972 22 University of Toronto Law Journal 129*
5. 1964 Court of REview Cases no. 25
6. COTRAN E      The Future of Customary Law inKenya *Nairobi Law Monthly April 1988 at p.17*
7. Reform of the Judicature Act especially section 3 (b)is long overdue to see if its provisions provide a sound legal system.
8. President J Kenyatta in sessinal Paper no. 10 of [1965]
9. Alice TAY & Eugene KAMEKE (Ed)      Reforming the Law *Melbourne 1980*
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## CONCLUSION

The aim of this work was to show how the legal relating to family law developed and what these rules were and the connection between these legal rules and both the social history as well as modern day reality. Secondly to extract the principles underlying these existing rules and to inquire whether they are still viable in present day Kenya. Lastly to explain why and in what areas reform is imperative.

In the first part of chapter one, it can be seen that although four systems of family law were applicable in the Kenya colony so that ostensibly each race was catered to, there was in place a hierarchical legal system the irony of which was that African customary law occupied the bottom rung of the legal order. Thus the dominant law was received law which was out of touch with the cultural pulse of the majority indigenous population. Early colonial legislation reveals only that there was no dearth as to the extent of colonial ignorance or at best misconceptions relating to especially African ideas as to native law and custom as regards marriage. In relation to African customary law, Hindu family laws and Islamic personal laws one trend that emerged was the gradual marginalization of the jurisdiction of these laws so that in certain areas for example custody of children; rules of evidence which applied in judicial hearings and other procedural matters and final right of appeal; it was held that English law would apply. In concluding chapter one the problems that have arisen due to having four parallel systems of law were explored. It was revealed that the internal conflicts of law present more than enough justification for reform.

The first chapter also dealt with the jurisprudential analysis that is what role should family law play. This was based on the premise that the family is the basic unit of society. Marriage as a prerequisite to forming a family (this is not always the case as cohabitation and illegitimate children attest) is thus a very fundamental social institution. Social institutions arise and develop in response to the interests of a given community. Law is an institutional scheme to protect, advance and enforce those interests. The feeling of this writer is that the family law as it stands at present in Kenya is unable to fulfill this function and this calls for a change.

How this change has been effected is the subject matter of the second chapter which takes the reader step by step through the provisions of the new Marriage Bill which represent a departure from the previous position or if not as radical as a departure then an amelioration. The provisions of the Marriage Bill present viable reform and while the opposition to it might have been justified soon after independence, such arguments do not hold any water at this time. The revolutionary aspects of the Bill include; a new definition of 'marriage'; statutory recognition of the institution of polygamy; child marriages are done away in principle; acknowledgement of the significance of dowry; establishment of marriage tribunals; registration of divorce; far reaching reforms in relation to matrimonial property; the concept of irretrievable breakdown of marriage replaces the matrimonial offence doctrine as relates to grounds of divorce. It will be interesting to note what reasons Parliament will come up with to justify rejecting this Bill for in this writer's opinion it will be a Herculean task.

In the last chapter the need for law reform was underscored by stating that if a legal system fails to adjust to the changing needs and aspirations of society it is feared it will lose its value. The dogged determination of the government to avoid reform of marriage and divorce laws would be amusing if it were not for the gravity of the situation. First of all two Commissions were appointed. Despite bitter objection from the Muslim community the Law of Succession Act was passed in 1972, less than five years after the commission appointed to inquire into the laws of succession had completed its report. The Commission relating to marriage and divorce however was not as fortunate. Next the government dealt with the issue of children as a result of which we have the 1995 Childrens Bill, yet to be debated by Parliament. Having chipped away at the periphery of family law it would seem that axiomatic that there was no option but to reform the marriage and divorce laws. Yet the reluctance is still evident, the latest ploy being to bring them under the head of women's issues that is reform of laws that are discriminatory to women. The third chapter also points out the road that future development of the law should take.

This writer's penultimate remarks consist simply of a passionate appeal for the enactment of the Marriage Bill for all the reasons that have been expounded on in this paper.

In conclusion I will focus on international concern relating to the family. The International

Year of the family was proclaimed by the United Nations General Assembly on the eighth day of the last month of 1989.<sup>1</sup> and was formally launched on the seventh of December of 1993. At this ceremony the Secretary-General said "In the change and confusion of the modern world families are a source of stability and promise...They are a force for progress a counterweight to alienation and a defence against breakdown and disorder ...yet families everywhere are under pressure. In some countries the rates of family disintegration are a cause of genuine concern. In other countries negative pressures have weakened their cohesiveness. The family support systems have been seriously undermined."

The theme of the year of the family was "Families: Resources and Responsibilities in a Changing World." This theme endeavors to give greater recognition to the role that the family plays in the evolution of contemporary society; to honour its functions and to enhance its role to strive for its well-being.

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