FIELD OF STUDY

FAMILY LAW

TITLE

DIVORCE IN THE LUO COMMUNITY WITH PARTICULAR REFERENCE TO THE COMMUNITY IN EAST UGENYA LOCATION.

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By

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There are differences in meaning of 'Divorce' in the Luo concept and 'Divorce' in the Western concept. Divorce is a phenomenon that is increasingly becoming common in the Luo Marriages.

The purpose of this paper is to examine this phenomenon in the light of modern changes that have affected its practical application by the Luo people; the attitudes of the Luo as regards divorce, the fundamental difference in meaning. And since divorce affects one of the basic social institution - Marriage, it cannot be discussed in isolation. Therefore the social structure of the Luo people has got to be examined. This includes also the general geography and population of the particular area of study.

The discussion is limited to the Luo of East Ugenya Location in the SIAYA DISTRICT OF CENTRAL NYANZA PROVINCE. The reasons being that the writer was cut-short by time since the research was carried-out only during the December vacation of 1975. This being the position the writer concentrated on the area she was most familiar with having been born and brought up there. Recently her parents have moved to another place. The writer obtained her data from the research carried out in the mentioned location during the said vacation. She interviewed forty-three persons, aged between 45 - 103 years and young people as well.

The questionaires were concerned mainly with the marriage institution, Dowry, important ceremonies leading to a binding and conclusive Luo marriage, the social upbringing of Luo girls, the role of the traditional schools, importance of go-between, meaning of Divorce by the Luos, the procedures followed, the attitudes of the people. The writer also perused files in the Civil Registry in the District Magistrates Courts at Ukwala and Kisumu. She also talked to the Resident Magistrates at Kisumu on their views about the application of Customary Law by Courts to-day. The writer also obtained valuable information from text books and pamphlets from the Library at the University of Nairobi.
East Ugenya Location is a big location constituted of nine sub-locations. It is a low land with savannah type of climate and vegetation.

Luos are basically peasant farmers who attach great importance to the land just like any other African tribe. The land was held communally so that individual ownership like in the present day was unknown. A whole clan held vast area of land which in turn was distributed to families who formed groups of "WAGUR" to help in the cultivation of each other's land.

The produce were shared by all, when one's crops failed either because of rain or other misfortune he was not left to starve but was given enough since his turn would come when he was expected to help. A lazy person was of course strongly abhorred but he was not an out-cast. Instead he became a subject of ridicule by the harpists, children and rebuked by the elders. These were enough to put him right. He was thereafter praised and given the due respect upon his changing to a self-relying man.

Oginga Odinga gives an illustration of this when he talks of his great grandfather who was known to be very poor because of his laziness. But he at one famine surprised his people when he was able to feed his own family throughout that famine and to share his crops with others. His laziness was forgotten and later his home became the centre of all discussions affecting the village because his descendants had proved their worth to the community. The kind of security obtained in the Luo Community is very much like the security that Nyerere talks about "one of the most socialistic achievements of our society was the sense of security it gave to its members and the universal hospitality on which they could rely". Even children were entitled to the sharing of the communal wealth since they also contributed through tending cattle, milking cows, running errands and forming 'WAGUR' of Youths to work in the fields of the respective families.

Luo system of government was by consent and after consultation with the elders.
The clan head did not inherit his position but once he belonged to the right lineage, he had to prove his leadership qualities and use them to interpret tribal traditions and maintain the respect and admiration by his people. His strength derived from his closeness to the elders and his people. But this was to be changed by the Imperialists who did not want leaders in whom people had confidence, but men who could be used for their purposes.

African Society says Oginga Odinga had a very distinct image of leadership. Leadership was generally associated with maturity, experience, stead-fastness and wisdom and a thorough absorption of the teachings of the elders passed on by them or sung by our traditional musicians.

Discipline of the young offenders was not merely a concern of the parents but of the elders as well. Such habitual offenders were normally singled out by the elders. They were not reprimanded directly. The elders reported the child to his mother who would have to call him to order. If the mother resisted the disciplining of her child, she, together with her child could be driven out of the village for some time even months. The writer talked this issue with an elder of about 80 years, who recalled that on one occasion during his youth, he had refused to work in the field and despite this, his mother gave him the evening meal of sweet potatoes and pounded sim-sim. The mother was considered too protective towards a boy who had not done any work. Therefore both mother and son had to leave the village and stayed away for two weeks, a period during which their fields were unattended and children uncared for.

This custom the writer was made to understand was not to show the inferior position of the Luo woman as such, but an insistence that women are the mothers and educators of the children so that should any child misbehave the fault lies with the mother.
As regards the general position of women, they generally took the second place in the conduct of many affairs. But they had an important role to play. They were the custodian not only of the children but also of the granary. This was a responsibility to conserve food for times of drought and famine. Clans were named after women in recognition that they are the mothers of the children and thus the founders of the clan. Older women who through their hard and diligent work acquired wealth were consulted on many occasions by the council of elders. It is the joke that an elder who refuses to commit himself on a particular decision usually consults the "pillow" - (his wife) first before he can give his opinion.

No marriage could be solemnized without the presence of the mother as well as the father. And even in cases of the separated couples, both parents come together once more for the marriage ceremony of their children.

Though the area of study has been subjected to changes like other parts of Kenya since the colonial era, some of the values of the traditional life are still intact. For instance in the marriage institution, the essential ceremonies that govern a valid marriage are still carried out in some villages and in some cases even if the marriage was in accordance with Christian rites. Occasionally marriage by pulling - "ywacho", is seen and girls - "jondaria", pass by the road/paths singing quite some humorous songs which would be offending to the Christian's ears. Marriage ceremonies are occasions enjoyed by all, young, old, lame, blind .... food and gifts to help the family and the newly married couple are supplied in abundance. Mountains of the "Kuon" and its very special dishes of "gweno" can be seen in huge pots under open fires in the compound where the ceremony is taking place. And at night when the dancing hall - "Siwadha" is all lit with paraffin lamps and very special musicians are in attendance, the joys of the youth knows no bounds!
For here is the place for lovers to meet, others deciding to elope that very night! Women are still busy-bodies in finding out whether the couple are performing their duty to the society. It is not surprising therefore to see figures with ears glued to the outer walls of the bride and groom's bed-chamber.

Apart from marriage ceremonies, feastings amongst youths go on almost throughout the years. There are exchanges of visits by youths from different locations during the holidays. The young persons with no formal education still enjoy the night dances where they go armed with "rungus" and the dance is conducted in complete darkness so that even the shyest girl responds to the worth of her partner in particular if they are friends.

The traditional system of settling disputes is still functioning. The elders still have a lot of weight in matters brought before the Chiefs Council called Baraza. Baraza are normally held twice a week under a large tree in the Chief's camp. They are open to the public and there is no bar to any sex. The fact that the Chiefs today are civil servants of the Government does not mean that they have any greater power when it comes to questions affecting tribal customs.

This was seen by the writer when she attended a baraza where a case was brought before the Chief concerning a middle-aged woman who claimed that she had been burnt with hot-boiling porridge by her debtor who owed her Shs.100/=.

She alleged that on the day she got burnt, the debtor who was a man had promised to pay her the sum stated and that she had been instructed to go to his home to collect the money. And that on her arrival, she was instead burnt with porridge just from the fire. The debtor denied and claimed that it was his wife that burnt the old lady as a result of a quarrel which started between the two women.
The debtor's wife affirmed the same. The chief felt that he had difficulty in handing over the matter to the Police before he first knew the whole truth. The elders took a very strong view of this case which they said involved life or death of the woman as she had received severe burns on the breasts which are very delicate organs. There had been no proper medical attention from the time she received the injuries. The chief was told that even if he had received a bribe he should not let this influence his judgement. The elders were of the opinion that since both husband and wife actively participated in injuring the woman, they should be both locked in the cells and handed over to the police and that as to who was telling the truth was for the court to sort out. The Chief had to bow down as directed by the elders. And so much for the Luo life.

The discussion takes the following form:

Chapter One deals with the application of the Luo customary law.

Chapter Two, the Luo Marriage Institution.

Chapter Three which is the central theme of the discussion deals with divorce in the Luo community with particular reference to East Ugenya Location as the title indicates.

In Chapter Four, the writer is concerned with a review of all that has been said in the foregoing Chapters whether some of the values mentioned can be retained and by what machinery.
CHAPTER ONE.

THE APPLICATION OF LOU CUSTOMARY LAW.

The application\(^1\) of African Customary Law in Kenya is governed by statutes which also recognize\(^2\) it as the basic law of the Africans. With the system inherited by us from our colonial masters, it is not surprising that even after independence, our own customary law and institutions are still looked upon with the old colonial hang-over. The reason is that Kenya has retained the basic political and economic institutions of the colonial rule which were served by the colonial laws\(^3\). The position of customary law as a legal system is still down the scale compared with other laws which are in force in Kenya\(^4\). Customary law is considered as a fact which calls for evidence and proof. It has to be ascertained thoroughly in order for a wronged person to succeed. And even if it is proved, it does not necessarily bind any court of law. Judges and Magistrates have wide discretion in refusing to accept customary rules on several grounds as will be shown.

Since the family among Africans is governed in most cases by their respective customary laws, time will tell how the extent to which the African philosophy of life will be given effect by law. The Luos in particular, despite the changes which have taken place, have retained their traditional attitudes towards their customs and practices in this field - family - whether they are young, old, educated or illiterate.

It calls for a brief survey of Kenya during the colonial era in order to understand why our customary laws are under-rated and in the light of this whether there is hope for strengthening our customary laws and the institutions.

Right from the beginning, the British had a self-appointed mission of civilizing us and therefore they retained the power to interfere with our local institutions and customs to keep them on the path of "righteousness". It was therefore important that limitations should be put in the application of our customary practices since they were considered barbarous. We were seen as "so low in the scale of social organisation that our usages and concepts of right and duties could not
be reconciled with the institutions or the legal ideals of civilized Society". Hence our own legal system was to be developed for us in accordance with the English notion of what is right and wrong. A dual legal system was established where a more superior one applied English law, which catered for the interests of the propertied class of English people who had come to settle in Kenya. The foremost consideration was of course an economic factor. Thus as Sawyerr says "It was primarily to promote and service these sectors of the economy and thereby to facilitate the economic exploitation of the colony that English law and the system of superior courts like all other major colonial arrangements were introduced."  

Lord Lugard frankly admitted that "European brains, capital, and energy have not been and never will be expended in developing the resources of Africa from motives of pure philanthropy but that Europe is in Africa, for the mutual benefit of her own industrial classes."  

Along with the dual legal system was established a dual system of courts which as Ghai and McAnslan pointed out "the structure of courts hinted at different conceptions of the roles of courts depending upon whether they were to serve Africans or non-Africans."  

But even in the native courts, English law was applied in practice on grounds that customary law was repugnant to English justice and morality and further that it was inconsistent with English written law. This was bound to happen for as Sawyerr says "the system of formal courts has been the creation of statutes in the sense that all courts within it were created or formally recognised, or under authority of statutes, consequentially their jurisdiction and the law to be administered by them have always been statutorily regulated".  

The type of lawyers and judges under this system were of English legal training and in the native Tribunals they were English administrators like the Provincial Commissioners, District Commissioners, District Officers with no legal training but having appellate jurisdiction in customary matters. It was very difficult for customary issues to reach the High Court and the position is the same to the present.
The limitations imposed on customary law were as found in the judicature Act which states that "the High Court and all the Surbodinate Courts shall be guided by the African customary law in civil cases in which one or more of the parties is subject to it or affected by it. So far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law". This was the stand in 1902 and is still to the present day. Unlike her counter-part Tanzania, whose statute calls for the application of customary law by all courts, in Kenya customary law is merely a guide to the courts. Judges and Magistrates have discretion under the repugnancy doctrine to refuse to be guided by a particular customary rule. Again it is upon them to tell whether a particular custom is applicable or not. Unlike Tanzania where the courts are bound by their decisions in customary matters, in Kenya customary law is merely a guide and not a binding precedent.

And so the repugnancy clause was inserted in the 1902 code to serve the purpose of ensuring that barbarous customs were not practised and virtually to get rid of them. The approach of applying the clause was as stated in one case: 'It is a matter of common sense that there cannot be in one colony at one and the same time two conflicting concepts of natural justice, public order or morality. If there is conflict, then it is the concepts of the suzerain power which will prevail.'

The standard of justice and morality was of course the British standard as enunciated by one learned judge that "It was not justice according to English ideas to take away a man's property in order to compensate a party who has suffered injury at the hands of the man's son, the son being of full age and fully responsible in law for his own actions." In this case the court ignored the African view that there is no individual ownership of property in the African family but that the property belongs to every member of the family. As Sawyerr rightly says; "It is dangerous to pronounce upon the essential justice or morality of a rule of law divorced from its background, for a rule is given meaning and depth only in its relation to other rules within the system."
The judicial attitudes towards customary marriage institution in the colonial days was as stated by judge Hamilton in a Kenyan case,\(^\text{12}\) that "the word 'marriage' to describe the relationship entered into by an African native with a woman of his own tribe according to tribal customs is a misnomer which has led in the past to a considerable confusion of ideas.... the elements of a so called marriage by native custom differ materially from the ordinary accepted idea of what constitutes a civilized form of marriage that it is difficult to compare the two." The attitude might have changed since the enactment of the evidence Act,\(^\text{13}\) which recognises all types of marriages including customary marriage as good and valid marriages for the purposes of the Act. But the stigma is still there in that the inadequacy of our customary marriages is still clawed at. We are given an option under the pretext of fundamental human rights to convert our customary marriage into a more civilized form - christian form\(^\text{14(a)}\) which has monogamy as its basic principle of validity. An alternate is to abandon our traditional practices altogether and contract a civil marriage \(^\text{14(b)}\) right at the onset.

Arthur Phillips talks of a whole host of influences all calculated to instil into the African's mind a new idea of marriage - the idea that it is first and foremost a personal relationship between two individuals."\(^\text{15}\) Some of those influences mentioned are the tendency for the married/to remove herself from her own kin, thereby being dependent on the husband, the promotion of the status African of women, hence her consent is needed before a marriage can take place. Her education and therefore independence even from the husband, cultural influences which are also geared towards the promotion of greater independence of African women, the conscious adoption of European ideas and habits, changes in economic conditions, etc yet a person with a clear insight will discover as one such man did "that the first thing these Europeans had to do to use us was to destroy the confidence the African had in himself and that which people had in us."\(^\text{16}\).
The equitable doctrine of laches or delay is applied to our customary cases, yet we have never had such things as limitation of actions! If anything the Luo believe in real justice where the events have accumulated for so long that the wrong person cannot bear it any longer.

The writer has gone great lengths about this in the following chapter. She fully agrees with Wasserman when he says that "Independence was granted on the basis of the continuation of the system and not its destruction". But she is convinced that people's attitudes do not change overnight. As long as the Luos still feel strongly that they owe a duty to their community to observe the rules and that these rules are as good as any other rules of law, it will be difficult to wipe out completely the Luo family structure and the institutions supporting it. Also bearing in mind that the foreign institutions are here in Kenya to serve the purposes of the foreigners, we should also be proud of our institutions that serve us!
CHAPTER TWO

THE LUO INSTITUTION OF MARRIAGE

This Chapter calls for the examination of the ideal marriage by Luo standards; the institutions attached to it e.g. the traditional schools, the role of "Jagam" or go-between, the dowry institution and the effects of changes on the institution as a whole.

To the Luos, marriage was and still is seen as a sacred union. It is the primary unity of two families. Marriage is a happiness - a fulfilment of every Luo person's desires in life. Marriage is a continuity of life. Hence goes the Luo saying "KEND EN YADH THO" - that "marriage is the cure for death". The seed of life continues to sprout after the death of the parent tree. The dead are remembered and honoured in this way. To a Luo therefore it is important that even a fool should marry, and it is the duty of the whole community to find him a wife and such a wife does not belong to the individual fool but she is taken care of by the community. Her co-operation is needed to prevent misfortunes that may befall the community if such a fool does not marry. Luos fear moral blame. A man who is of age to marry and who dies without doing so is not wholly blamed but rather the blame shifts to the community for having let him die without securing him a wife to continue his lineage. It is a pathos that pierces the heart when at a funeral of such a young man, the mother often laments "Nyathina odhi mana gitonge duto!" that "my son has gone with all his seeds!"

The importance of marriage and procreation as held by the luos sounds very much like what Professor Mbiti says on the African marriage institution :- "Marriage is the focus of existence. It is the point where all members of a given community meet, the departed, the living and those yet to be born. Marriage is a drama in which everyone becomes an actor or actress and not just a spectator. Therefore marriage is a duty, a requirement from the corporate society and a rhythm of life in which everyone must participate otherwise he who does not participate in it is a curse to the community. He is a rebel and a law breaker......."
Marriage to a Luo means respect. It is the stage when a Luo man and woman discard their titles of son and daughter of so and so and become husband and father of so and so, and wife and mother of so and so. It is also the stage when a Luo man is accorded his due proprietary rights to land which has been held in trust for him by his family. The man is no longer just "a small boy" to be snubbed by married people. He is a full grown-up man whose wisdom in family matters can be used for the benefit of the whole community. He is eligible to become an elder in his village not because of his youth or education but because he is now a responsible man. The married woman is given her due respect by both women and men for the important role of being a founder of clan through her marriage.

The ideal marriage to a Luo person is that marriage where the strict rules regarding its formation have been strictly observed. It is a marriage that has received the sanction of the two families that are so united. It is a marriage where the parties' background were brought into the open before the marriage was finally entered into. It is a marriage that is finally sealed with dowry. It is a permanent union which even death cannot conquer! Marriage is a protracted affair among the Luos. It is not just one day occasion like in the Western World where after the two parties are given a paper as an indication that they have contracted a valid marriage, the matter ends there so that what the couple do with each other is none of the laws business unless and until the parties themselves call the law to intervene.

It was therefore important that a Luo couple were well prepared for the demands of the marriage institution. This was a role played by the traditional schools. The two sexes were prepared for marriage by respective elders from both the women and mens quarters. Those that had already embraced the union had a duty to impart their knowledge and experience to the young persons. Thus a Luo girl and boy were much maturer than their actual age by the time they got married. A Luo
girl saw marriage in its practical sense. She was well aware of the happiness and consequences of a marriage, unlike today's youth who visualize marriage as a kind of fairy land. The young man was toughened, he was to be the head of his family and was to behave like one. This did not call for his being a tyrant - and so at an age which would now be considered too early to marry, a Luo couple were joined together in an institution, well aware of "the game" to be played by them.

Marriage is not a private affair between a couple. It is an affair of the respective families. In order that its sacredness be maintained, certain rules and institutions must be strictly be observed. It is a rule first and foremost that a Luo man should marry in the order of seniority. A heavy consequence will follow not just the couple who break the rule but the family as a whole. It is also the Luo sense of fairness that even if the senior son is young in age unlike the sons of a junior wife, he should be allowed to "marry" first or at least the father should pay the first dowry instalments as an indication that his marriage is in progress, then only are the bigger sons of a junior wife free to marry and therefore free of the consequence or "Chira".

During the research, the writer talked to a middle-aged Christian mother whose younger son had a child with a woman he wished to marry. But the eldest son was not married and had no child. The daughter of the same woman also had a child. When the writer asked the old lady whether, being a Christian she could allow her younger son to marry as he wished, her reply was that being a mother, she loves her two grandchildren very much because they are God's gift, and that she was proud of her son and daughter for they had proved their worth to their community. But she said that by being a Christian, she did not completely remove herself from all the traditional rules and practices. She did not want to wreck the future happiness of her family by permitting the younger son to marry before the eldest son. She pointed out that Luos believe very strongly that nothing happens without its proper cause. And in this particular case should the eldest son in future fail to beget children of his own, or even get involved in
an accident whose cause can be explained in no other than making reference to the marriage of the younger son with the mother's consent, an accusing finger would always be pointed at her. She would be a curse to her family. She feared that her children may turn to hate each other, a thing they never did as small children to the time they are now grown up. She also observed that strange maladies such as madness, imbecility may afflict the children and grand children of her younger son as a result of the non observance of this rule. And so in order to respect the rule despite the grandchildren that were born to her prematurely, the old lady abstained from holding the children on her lap before she holds her very first grand child i.e. that of the eldest son!

The writer learnt that in order to repair the damage done by the non-observance of this rule, it calls for expensive cleansing ceremonies. And even now when Christian Parents and educated children oppose the idea of having to be treated by traditional herbalists, the rule is still very strong so that parents whose families have been affected as in the case of the old lady mentioned above, have resorted to conducting the cleansing secretly so that even their children do not know that they have been cleansed. What they do is to get the right herbs, follow the instructions as to how they should be applied e.g./drinking water or in very nicely cooked food which the children will drink or eat together. In this way the parents are relieved that at least they have complied with the rule if not prevented the consequence - "Chira". The writer has dwelt on this rule because it still binds even the most educated or Christian Luo when it comes to the question of marriage. Those that have broken it have been forced to stay away from their senior brothers until the latter marry. And even in towns, we find that the senior brothers are not free to eat the food cooked by his younger brother's wife when his own wife has not cooked him any. It is not very interesting to see one's brother refusing food even when there are important guests who might not know the custom.
The investigation of family backgrounds helped in preventing a sad marriage. The Jagam — or Go-between played a very important role here. He or she is supposed to be related both ways to the two families, he may either be a nephew in the girl's home or a son-in-law where the girl will be married. She may be a daughter of the village where the girl lives and a wife of the village where the man comes from. Jagam is an impartial person whose duty is to disclose all material facts that may lead into a marriage or may terminate it. The first duty is to find out whether there is any relationship between the extended family whether by blood or close affinity e.g. that they are descendants of one ancestor or that the founders of their clans were brothers, etc. Secondly the character, habits and practices of the two families have to be investigated into thoroughly and reports to be made to both families. The Luos have a strong presumption that children will practice "what they saw being practiced in their homes, thus the saying that "A WENDO OKWE YIERGE". that "a guinea fowl never leaves the feathers of its parents". And so practices like that of witchcraft are believed to be inherited by children of those families where it is practised. It is only fair that a man or woman of such a background should marry a person of the same background. And if after such a revelation the couple still insist on going a head with the marriage, then should the marriage fail, the whole blame will be on the parties and not upon Jagam and the parents. In particular, the qualities of a girl are very important. It has to be found out whether she is hardworking, pleasant, knows how to talk to people of all ages, cooks very well, for all these are qualities indicating that the girl is mature and therefore capable of making a home. A greedy family is always subject to much scorn and laughter by traditional harpist and the rest of the community. Their children do not marry as quickly as they should.

Thus Jagam has a very tough undertaking for marriage negotiations will only go ahead with his assent having compiled all facts and reported them. A whole blame lies on him in case of a misfortune arising from some hidden factors which
he ought to have found out or which he knew but refused to reveal.

Payment of dowry is an essential validity of a Luo marriage. This institution has been the subject of many attacks by different sections. But as we shall see shortly, it still remains a very important institution in a Luo marriage. Since marriage is a long process, payment of dowry is equally a long process. The two families have to agree on the amount payable whether in livestock or monetary form. The final figure arrived at is by mutual agreement it is not by coercion as some people have tended to say. But before the dowry is properly paid, the negotiation is opened up by the payment of "AYIE" (or I agree) which is more or less the opening of doors to the negotiation. This is paid by the young man himself and it can be as much as Shs.450/- but here again it is up to the means of the young man and his willingness to pay more. The payment of the dowry proper is not just an obligation of the young man but his father, the uncles, etc. On the occasion when the dowry proper is discussed at the girl's home, it is with the parents of the boy and the girl that figures are arrived at. The husband to-be is never invited on this occasion. The father of the girl opens up the negotiation by offering liquor - "Mbare" to his prospective "Nyawana" or brother.

The functions of dowry are many. It makes a marriage valid and binding in the eyes of the Luo. The children are legitimate and belong to their father's lineage. Without payment of dowry the children of a marriage are considered illegitimate therefore can only belong to the lineage of their mother. They are referred to as "Rwath Mopor ipundo." literary meaning that when a cow gets a calf while eating grass with other bulls, it is difficult to tell which of the bull fathered its calf. Dowry embodies the African concept of a good life. Dowry achieves that security aimed at in marriage. Both families are happy, the women's parents are compensated for the loss of a mother while the man's parents get a mother and founder of their sons lineage.
She becomes a life companion of her husband. Dowry is a seal to the mutual friendship created between the families. It is respect for the woman where she is married so that she is not subjected to the challenge by fellow women "why do you feel proud to live in a house that you have not built with your own hands!"

Dowry is the only traditional pen that can dissolve a marriage by its repayment.

Dowry institution was seen as a commercial bargain by the Europeans. They interpreted it as the purchase of a wife who was not a free contracting agent in the purchase. And that therefore it was no different from slavery which was strongly abhorred by Christian nations, forgetting that they had actually profited a lot from the labour of African slaves! This was one of the barbaric customs that needed to be rid of by the repugnancy doctrine obtained in the judicature Act. Thus the good way of life for the Africans was to forget their fundamental rules and practices and to adopt the Christian form of marriage which does not have dowry as one of its essentials to a valid marriage, the paper certificate is enough to show that the marriage is valid and it presumes that all the formalities have been complied with.

Cotran's Restatement states that a Luo marriage is still valid even if no dowry is paid as long as there is a promise to pay. What Cotran fails to observe is that to a Luo person marriage does not come into existence without first paying the dowry and that there is nothing like a promise to pay because it is the first consideration to be given. And that a father whose daughter is taken from him with a promise to pay or even with a small instalment is entitled under Luo Customary Law to call back his daughter and detain her until the husband pays the rest of the instalments or that he is free to accept a better offer from another man and marry off his daughter to that man as was in the case of AMULAN OJWANG.
Dowry is a reciprocal gift since even the girl's father indirectly pays dowry to the man's family e.g. through very expensive ceremonies which are mostly held in his home from the start of the negotiations to the finalization of the marriage.

Phillips reported some views that the levirite union is necessitated partly by the dowry institution. That a woman automatically becomes the wife of the deceased husband's male relation because the dowry paid by the deceased husband is as good consideration for the man who steps into his shoes, also that there is little chance of the dowry being refunded by the woman's parents if one chooses to go away now that the husband is dead. But it is submitted that the major purposes of the levirite union are security of the widow and her children for they have someone related to the dead husband and father to fulfill the two roles. And secondly the continuity of the dead man's seeds is very important for children born of such a union belong to the dead man.

It is also argued that polygamy is still strong because African man marries more wives in the hope that he gets more daughters who will fetch him much dowry. But it has to be remembered that Luos look upon polygamy as a test for one's wealth. To afford more wives and children is not an easy task and therefore the conclusion usually is that such a man must have enough resources to be able to look after his large family. Children are still regarded as wealth by the Luos. The more one has the easier the labours are accomplished by the many hands.

It has also been said that dowry makes a marriage temporary because the parties from the onset contract to refund the dowry in case of divorce and that people will divorce each other merely because they want their dowry back. This, like other attacks on the institution, gives a very distorted picture. It is the considered view of the writer that it is in the statutory kind of marriage one is well aware should the marriage work not according to their expectations, the parties will be free to leave each other in Court. The same statutes that bring the marriage into existence, have provisions that cater for its dissolution.
It is the opinion of the Luo elite that marriage is better-off without the payment of dowry. They see the troubles arising from domestic life in dowry because as one man said, the woman becomes big-headed and feels she is equal to the husband because she fetched some dowry for her family. The women on the other hand feel they are treated as servants by their husbands because they paid dowry to their parents. Some young men further argued that the old fathers are exploiting them with this dowry institution and that it is no better than English contracts of sale where one party is more equal than the other! It is argued that women should fetch the same amount of dowry whether they have formal education or not because of the common femininity of the two. It is true that the form of payment of dowry has changed in that it used to be livestock, which is now being replaced by money. But this change is evident in all other capitalist organizations which Kenya retains. The writer’s conviction is that a young person who understands the values of his or her society will not be easily swayed by such irrational arguments as the above. She or he will not ignore the role of the parents and elders on marriage issues merely because the western education and economy has given her independence. For as Oginga says "The purpose of education was not to train for independence but for subservience. It was also to teach the African that his ways were alien to civilized living."7

Even in the days of old, a girl with the best qualities who thoroughly absorbed the teachings by the traditional schools fetched more dowry. The payment depended very much on the husband’s capacity to pay. The same principle still embodies the payment of dowry to-day.

Marriage institution, like all other institutions affecting it has not remained intact after the assault by the changes. Mbiti talks of "African being invaded by a world revolution and a new and rapid rhythm is beating from the drums of science and technology, modern communications and universities, cities and towns. The man of Africa must get
up and dance for better or for worse on the arena of world drama...."\(^8(a)\) Engels says that the idea that mutual inclinations of the principal parties should be the over-riding reason for harmony has been unheard of in practice of the ruling classes from the very beginning. Such things took place at best in romance only or among the oppressed classes which did not count"\(^8(b)\) The same author goes on to say that "Marriage is a political act, an opportunity for the accession of power through new alliances....and not individual inclinations are the decisive factor."\(^9\)

And since we have retained the economic and political superstructures brought by our Colonial masters we cannot blind ourselves to the changes, however minimal they might be.

Take the emancipation of women for instance. Ours is a society where every sex has an important role to play. She or he has to be taught for no one is grown up and wisdom is not acquired overnight. Our mothers and fathers understand each other and respect their different spheres of influence. Emancipation like all other western concepts is a misfit in our society. It is abused by those who do not know how to apply it. Our African women think that it is a concession for them to get illegitimate and detribalized children who will turn into criminals and delinquents and haunt the once peaceful society. She thinks that because of emancipation she is to be the dominating influence in the home and the husband to bow-down to all that she commands. She thinks she can contract short-term marriages because she will always be market-able even after divorce. Prostitution and concubinage are climbing the zenith especially in big cities and towns. They are fast spreading to small urban areas and soon the rural population will be affected as well.

While we are being swallowed by this kaleidoscope of modern changes, a time comes when we stop drunkenly and try to focus our swollen eyes into our surrounding. We are slapped hard with the full realization that the changes are alienating us from our traditional cultural roots and without giving us a satisfactory substitute to cling to. We become foreigners to
our own culture as well as that of the western world. And as Mbiti says, "paradoxically the individual is involved in the change yet alienated from it. He becomes an alien both to the traditional society and to the new life brought about by modern change!"
PART A. THE TRADITIONAL DIVORCE BEFORE THE LUO ELDERS

Divorce in the modern sense has taken a different cloak. It has cast away the dull traditional gear of animal skins, whose toughness made it impossible for a marriage to break down completely. It withstood heat at various temperatures hot, boiling hot, or cold. But now we see a soft colourful cloak which captivates many hearts but which tears into shreds leaving the wearer naked torn and worn-out. It needs mending but the tailor who is the court of law often does not know the different threads that were woven together to make a permanent patch-work.

A resort has to be made to the old traditional needle "the Okwato thorn" that sewed the old taut skin that clothed divorce! The writer has shown in the previous chapter that marriage is a permanent bond between not just the couple but the community which the couple are part of. It is not just the writer's view. The courts of law too to-day view marriage as a sacred union. One learned Magistrate has this to say about the institution, "It has its professional hazards, the reasonable consequences of which should reasonably be expected and foreseen by those interested in the adventure. Marriage cannot be allowed if sanctioned by law to be broken up at a whim or at the first instance of mild disappointment." It appears therefore that Divorce is a contradiction of terms for we cannot say that a marriage is permanent and at the same time give room for its dissolution. This is why Luos regard divorce as a very temporary separation. Moreover the Luos are a very religious people who believe not in the western God but a God called "WEREI" who is worshipped at dawn and at sun-set. He is not worshipped in a temple or Church once or twice a week. He is an everyday God who is a-creator and omnipresent. He is perceived in nature i.e. the sun, moon, rocks, etc. He is a moral God who brings health and wealth to those who live according to the customs of the Community. He visits the offenders of communal laws with disease. He
entrusts his powers of social control with the ancestors and elders of the Luo people. And thus a true saying that "A sound social life must be based upon a truly religious system of values, that is one which reflects the revelation to us of the existence of spiritual and moral order." Therefore the Luo religion is a religion that grows with the people unlike the western religion that is thrust upon them as an ill-fitting garment with the hope that they will grow onto the Luos. The Luo religion expresses certainty in the future and carries it beyond the rhythm of life itself which, when it is upset by the out-of-jointedness of the world, the Luos look nowhere for peace but in their own religion.

Divorce being an accident that affects the moral standards set by the Luo religion, it is important therefore that the wisdom of the Luo elders who are the agents of the Luo God should be involved to keep in check this damaging phenomenon.

The term 'divorce' is a misfit in the Luo vocabulary for there was no such word describing the dissolution of a Luo marriage. The most appropriate word therefore should be 'Separation' which was more popular and whose effect was to render a couple to stay separate from each other for a while. It was a period of letting-off steam in pent-up emotions accumulated during a domestic life.

The only time when dissolution of marriage was effective in a Luo marriage was during that period of trial marriage. This was a period between the pulling of the girl and immediately before the Ris0 ceremony.

During this period of trial marriage, the writer learnt that the married couple were not regarded as permanently married because either of them was free to change his or her mind not to go on with the marriage. It was a stage when the couple learnt each other and the people around them. The girl was free to move with her former lovers whenever she was on visits to her home. She was subject to a second pulling by either one of her former lovers or a total stranger altogether. When this happened, any dowry that might have been paid was refunded to the husband's family and the relationship ended there and then.
Marriage was a kin to avoidable marriage at common law which can be annulled. If the term 'Divorce' is appropriate, then this is the stage when divorce was most effective in a Luo marriage.

Dissolution of marriage after the Riso ceremony was impracticable. It involved very grave issues which did not take a matter of hours or days or months to solve. It was weighed with deliberate slowness. There was and there still is under customary law only one ground for dissolving a marriage. It must be shown that the marriage has completely broken-down. This has been adopted by the western courts to-day. Therefore other factors which have been treated by various researchers in customary law as common grounds for divorce are merely items of evidence to establish the one ground—that a marriage has completely broken-down. Apart from proving strictly this sole ground for divorce, other very crucial factors were taken into account which made divorce impossible. They included inter alia the existence of the children, the refund of dowry by the wife's father and the existence of alternative remedies like the sororate union in case of a sterile wife and for the impotent husband, his closest male relatives helped to raise his seeds. And so as Cotran and Rubbin say "In most traditional African Societies, divorce was very rare. In some societies it was altogether unknown, in others it was recognised but subject to procedural intricacies which involved not only the parties but also their parents, and other members of their immediate kin groups."  

Emphasis was on reconcilliation and arbitration by the respective family groups of the disputant spouses. This indeed was the first step made by the elders of each family only if this failed was a larger group including even outsiders constituted to decide whether or not divorce should be granted. It should be noted that even with this large group including outsiders, divorce in the traditional framework was still a family matter and not for any courts of law. The place where the meeting was always convened was in the woman's home. It served as the court rooms of to-day. It was where the first
marriage negotiations were discussed and finalized and it was also the place where marriage disputes were settled and the marriage finally dissolved if possible. It was also the place where children of a dissolved marriage were brought up until they became of age to go back to their father. In other words the woman's parents served as Custodians of the children of a broken-down marriage though these children were legally recognised to belong to their father. The reason for this arrangement was that the father even if he remarried was not capable of playing both the role of a father and the mother and therefore the children's upbringing would be endangered if entrusted to such a man. The same reason applied to their mother in that she could not play the two roles and also that she had no property of her own to bring up her children so that even if she remarried she would still be dependent on the kindness of her second husband to bring up her children of the first marriage for her. It should be expected that where the second husband was neither the biological father nor a father as of right having paid dowry (which he could not do if the first dowry had not been refunded) he cannot take seriously the welfare of children who have their legal father somewhere and who, one day, will abuse his hospitality. And because a refund of dowry was the only traditional pen that could right-off a marriage, the refund was yet more difficult with the existence of the children. There is no case in point but traditionally what happened is that since the custody of the children was left with the woman's parents, a sensible husband did not claim a refund of his dowry but left it with his parents-in-law to go towards the maintenance of his children until they became big enough to return to him. And even if he claimed a refund of his dowry despite the children, then the elders assessed the animals per head of each child, expenses incurred by the woman's father during the marriage ceremonies, the number of animals that died and which were officially known to have died by both families, cattle for making the woman old, etc. In the end it would be found that the amount of dowry paid did not reach even near these figures and that in fact the husband should pay more before he could claim custody of the children and therefore a refund!
Just as much as a father had a right over his children while they were in the custody of the wife's parents, the wife also had as much right to visit her children whenever she wanted and to return to them anytime. It was the husband's duty to rebuild her house on her return. As was pointed out earlier it was a taboo to conduct any marriage ceremony of the children in the absence of a mother who was alive. She had to be called back to strengthen the procreative role on her children's wedding night! This rule was observed even if one of the spouse was dead.  

Divorce as practiced by the Luo elders today still follows the old trend because the traditional legal system exists outside the western imported legal system with its hierarchy of courts. Secondly in the writer's opinion the Luo attitude towards their customs, in particular in the family has not changed very much. Divorce is something which degrades the community as a whole. It lowers the status of both the woman and the man. It breeds resentment upon the children especially towards their parents. A divorced woman is no longer trusted by the community. She is subject to much scorn and even the second husband who marries her is well aware that the second marriage is but a temporary union since the woman may go back to her first husband and children (if any). Secondly men usually harbour great suspicions over divorced women, for marriage is a drama where all parties play the role of actors and actresses and therefore a whole blame cannot be heaped upon the husband alone. It is obvious that a union where there is no mutual trust and confidence will not last long.

A divorced woman's worth is like that of a girl who gets a baby outside marriage. She was in the old days not worthy of a fresh youngman's hand for marriage but was only acceptable in the polygamous institution. Her value - dowry-wise - is also lowered and it cannot be paid if the first dowry has not been refunded to the first husband. This even goes to show that she is not legally a wife to her second husband. A divorced husband is barred from participating in settlement of matrimonial disputes for how can he do so when he himself has failed
to solve his marital problems? Such a man, if he was the one mostly at fault derived no sympathy from his colleagues. His plans to another marriage could be frustrated by "Josem" i.e people who know him very well and are out to damage his reputation of chasing away wives.

The above prevalent attitudes go to show that divorce in the Luo Community is practically impossible even if granted by the western courts of law.

Earlier in the previous chapters the writer has shown the roles of the various institutions within the marriage institution itself. The same institutions are also important when considering the dissolution of a marriage. It was shown that the traditional schools played a very important role in shaping the attitudes of a Luo couple to-be and making them see marriage in the practical sense so that they were prepared to meet the difficulties with the most practicable approach. These helped in stabilizing the marriage so that a question of its dissolution often did not arise.

Even to-day when the traditional schools have disappeared a Luo couple are still taught by their respective families, parents in particular to be patient and tolerant with each other. They are taught to be as private as possible in their domestic affairs in order to avoid outsiders who will do nothing but ruin their life. They are often reminded that marriage is not an easy task. It calls for the display of craftsmanship and tactfulness in order to attain that old stage when one can proudly look back and say "ours was the toughest and the best union!"

And even in the question of divorce, the Luo couple are considered too young to handle this big problem. It is not only their concern but of the respective families as well. Hence a Luo couple are educated even at their very old stage, this continues even at death. The respective parents have very important duty towards their married children for by their marriage, the children have joined their parents into a mutual
friendship so that they are "Nyiwande" i.e. brothers and sisters. The man's parents should love their new daughter as much as they love their own son. This alone can help them to be impartial when there is a dispute between their children. The same applies to the woman's parents. The mother-in-law will always encourage her daughter-in-law to be as free with her as possible in order that she may be well versed with the daily conduct of her children's domestic affairs. She will always give advice and assistance to her daughter-in-law. And where the son is at fault, she can call him and reprimand him. It is only when the disputes are serious that the father-in-law will call a meeting between him, his wife, the two spouses and a grandmother if she is alive. The discussion will take place within the walls of the home and should not be leaked outside by any members of that family. When reconciliation at this initial stage becomes impossible, the woman may often report back to her parents who will often send her back to her husband with people to put pressure on the husband's parents to adopt different approaches to the disputes. The sending of the woman back to her husband by her parents has two aims. One is to instil on their daughter to learn to be mature and to manage her own affairs without too much interference by the parents for if ever there is anything Luos hate, is being blamed of having wrecked the family of their children! Secondly Luos fear litigation time and again on the same issue. Therefore they would rather that evidence has accumulated over a long period then only can they have strong reasons for confronting their children together. When the situation worsens despite the several trips made to and fro by the woman to her home and the methods adopted by her parents-in-law have failed, the woman may run back to her parents and refuse to go back to her husband's home till he comes to discuss the issues with her parents or if the woman is the one at fault, the husband may pack for her all her belongings and send her back to her parents with a view of returning shortly with the elders of his family to discuss the matter with his parents-in-law.
Here again, there are two stages. The first stage is where the husband together with some young but married man and at least one elder come to the wife's home to state why he has chased his wife back to her parents or to answer charges made against him by the wife when she voluntarily runs back to her parents. The meeting is between the husband, the people he came with, and the brothers-in-law of the husband or brothers of the wife. The woman's parents at this stage are present merely as witnesses, just as the parents of the husband are represented by one or two elders from the husband's home. The dialogue is therefore between the husband and his brothers-in-law.

Traditionally, Luos have great respect for a son-in-law. He is considered the true son of the woman's home. He is always treated to very special food even when he comes to discuss his domestic disputes with his wife. In other words he is not a criminal at sight, until his side of the case is heard. The traditional liquor - "Mbare" which is normally served after heavy meals is a sign that a serious discussion is about to ensue. The women sit on the floor near the door so that they can refill the liquor pot "Mbiru" and change the drinking straws "Oseke", also to run other errands. They, like the parents of the woman, are supposed to serve merely as witnesses. The mother-in-law always has her place near the fireplace "Kor ka Mach" while the father-in-law, brothers-in-law and daughter sit in a semi-circle on the left hand side. The husband and his people will occupy the semi-circle on the right hand side facing his parents and brothers-in-law. The woman's father will taste the liquor first as a sign of good faith. He will then introduce his son-in-law and praise the clan's name. He will state the nature of the dispute between his daughter and son-in-law as has been related to him by his daughter and the various people who represented him at the man's home. He will then leave it to the brothers of the woman to hear disputes afresh from the husband himself. They will be married men as well so that they are capable of giving good advice to a disputing couple.
It needs a tactful husband at this stage for often in the area of study, a rude son-in-law has been beaten physically. In particular, the Jokager clan are known all over Luo land to have once pulled a chair off the bottoms of their rude son-in-law as a sign to indicate that he was no better than the women seated on the floor! Also on a number of occasions they have invited such sons-in-law, treated them to good brew of liquor and on any indication by him that he is not prepared to have his problem solved for him, has been beaten mercilessly even by the woman. If the brothers-in-law find their sister at fault, she is often abused and ordered to go back to her husband. If she runs away because she has a lover, she is often beaten by her brothers and the lover warned if not beaten up too. The innocent husband is often advised to be more strict even beat the sister.

After the meeting, the woman often goes back to her husband's home escorted with food and other requirements plus a person who will stay with the couple and report back their conduct after the meeting. Only a stupid couple will go back so quickly to the woman's home with further disputes. When it happens that the parties, despite the reconciliation machinery as applied above are still unhappy with their marriage, the elders are forced to provide the alternative remedy which is separation of the parties. Divorce as was pointed out earlier is impossible after the riso ceremony which could only take place with the full payment of dowry. And even today when the ceremony is not observed by most people, payment of dowry is still of fundamental consequence hence separation as of old is much more common.

The meeting that takes place after the first one is much more serious and is made up of important dignitaries of the two clans. The meeting is often held outside the house but within the compound of the woman's home. Villagers, not necessarily relatives of the woman may be invited to hear the case. The sitting arrangements are as those of the first meeting. The disputing couple are given first priority of stating their case, both parents then follow and have to
justify their actions and methods of approach during the reconciliation stage. They also have to give in details how the marriage of the children came into existence, the amount of dowry paid, the relationship between the two families despite their children's disputes. But parents are not at this stage supposed to give their opinions on how the disputes should be finally determined. This is left for the elders for it would be inferred that old parents are most eager to see their children's family wrecked than the children themselves either because there is a promise of more dowry for the girl's father or that the parents of the man selfishly prefer their son's wealth to their own grandchildren. It has been emphasised that there is only one ground for divorce in customary law i.e. that the marriage has irreparably broken-down. Thus "grounds" such as those listed by Contran \(^9(a)\) and Gordon Wilson \(^9(b)\) are merely possible proofs of the above ground.

The most serious of them all to the Luos is denial of conjugal rights by either part. It is most serious in case of a man denying his wife the same for the consequences are many, for this will encourage the woman to be of loose-morals. If only to satisfy her sexual desire, Luos believe strongly that a married woman changes both physically and spiritually so that she no longer is a young girl whose mind is never preoccupied with sex most of the time. And so a polygamous man is under an obligation to satisfy all his wives.

A man is also under a duty to provide for his wife and children whether the woman is working for a salary or not or runs a prosperous business. Luos regard the woman's purse as her cooking pot so that the husband is only entitled to eat what he is served on the dish but not to go and look into the pot in order to find out that which is remaining.

Excessive chasticement of the woman is viewed very seriously particularly when the object used and the harm inflicted is great, like loosing a limb, teeth, eye, receiving severe burns, etc. But in the absence of these, the standard of proof is very high for chasticement of wives is an accepted machinery of discipline among the Luos. \(^10\)
Homo sexuality, incest and Sodomy were unheard of in the Luo Community but due to outside influences, they do take place. If at all these happen, such a man or woman is considered an out-cast by the society. It will only be fair that an injured party should be disassociated completely from such a union. And here in the writer's opinion, divorce can be possible for a relationship such as this bears a very strong stigma. Grounds such as sterility, and impotence are no grounds at all for as has been pointed out, there are remedies for them. Something like venereal disease is viewed as a family secret which should be discussed privately. Should the couple decide to take the matter before the elders, they will only be met with scorn and laughter for it shows how inconsiderate they are towards each other. But there have been cases where venereal disease has terminated a woman's procreative role. But even here it cannot be a ground for divorce.

It is upon the elders having listened to all arguments to decide that the reasons strongly show that the marriage has irreparably broken-down and that the parties need the relief sought. But there is no such thing as divorce by consent in Luo custom.

Where for instance there is strong evidence that a woman has on several occasions made attempts on the life of her husband, it would, in the writer's opinion be very wrong to force the couple to live with each other. The type of traditional medicines used were quite harmful. They were usually love portions, herbs curing drunkenness, etc. but to-day one cannot be surprised that a woman actually has used poison with intent to kill her husband. But even here it has to be remembered that the relationship must have developed such that the parties no longer value each other's life which is very rare considering the fact that if ever Luos fear taking a fellow being's life! Here again divorce in its modern context will be possible though the stage is yet to come. In this final stage a whole people's life ie. the couple, children, parents relatives depend on what the elders finally pronounce.
Normally the meeting is adjourned to give the elders time to come out with a sound judgement. They have a difficult task before them for they will forever be blamed for whatever misfortunes that may result from their judgement. When the meeting is resumed, before the elders can pronounce their findings they ask for the opinions of the two families. If separation is the elders' verdict then issues such as refund of dowry, custody of the children have got to be discussed further in details. And finally, stress is laid on the fact that the couple are free to re-unite anytime that it is convenient for them. The husband is warned that it is the woman's right where there are children to return to them and it is his duty to welcome her back as the head of the woman (women) he may eventually marry i.e. she is the MIKAYE.

The woman is warned not to talk ill of her husband merely because she is separated from him for as the Luos say "CHIEN OK YANY" i.e. "NEVER ABUSE THAT WHICH YOU HAVE TURNED YOUR BACK ON". This is so because of the strong bond between husband and wife - children! And so even death is no reason for divorce for when a man dies he has to be re-united to his wife whether living or dead. Her house will have to be rebuilt at the same spot where the original house stood and it is infront of this house that his dead body will be laid.

PART B. DIVORCE UNDER THE IMPORTED WESTERN HIERARCHY OF COURTS

Among the political and economic and other institutions we have inherited from our former rulers from the west is the system with a hierarchy of Courts. Today, African issues involving customary law are decided by the Magistrates Courts, initially called the Native Courts.

In theory these courts are supposed to apply African Customary law as involved by the parties disputing. But in practice as we shall see, the contrary is done.
Divorce of a Luo customary marriage falls under the jurisdiction of the magistrates' Courts at various district levels. The question to be asked is whether there is any need for having two systems of obtaining divorce? Answers have been provided to us in the form of arguments and criticisms that our own customary laws are inadequate in the modern society since it is uncertainable as it varies from place to place. It is not written and is in most cases repugnant to justice and morality. And in any case it is fast dying out since people are coming to accept the most adequate system - the English legal system. Our own approach to divorce is criticised as having no definite grounds that would be compared to the English grounds. And as a result of these inadequacies, the courts find it difficult to ascertain a precedent in Customary law cases which would serve as a guide.

A solution is found in Cotran's Restatement of Customary law which we are told is not a binding authority for customary law as such but merely a persuasive and a guide to Magistrates. Yet in practice the book is like gospel truth in every customary issues! What happens therefore is that for those Africans who have thoroughly removed themselves from their traditional ways of settling disputes, the imported Courts and their procedures are most appropriate machinery for here divorce is cheap to obtain since the intricate procedures as shown in the foregoing section need not be followed. For instance, one need not inform his relatives that he wishes to divorce his wife, he can always do so by having the court serve on them witnesses' surmons to appear in court on such and such a day. Reconciliation to such a man will be a tedious affair for he may be contemplating another marriage soon. Yet in a true Luo thinking, divorce is never anticipated in a Luo marriage; it is an accident that no one likes to encounter. Therefore there is no need for ready-made grounds for divorce. And if at all it occurs, each case will be decided on its merits and according to its peculiar circumstances. Having studied recorded cases in various district Magistrates' Courts, the writer discovered that divorce can be granted even if one of the spouses is innocent and does not wish to be divorced. In one case the magistrate came to
the conclusion that the one ground for divorce - that marriage had irreparably broken-down had been proved successfully by the husband when he showed that the conduct of his wife was bad and that she had refused to stay in their matrimonial house. Divorce was granted as prayed for by the husband. In the writer's opinion, very important facts had been left out by the Magistrate. In the first place the couple had stayed with each other for a period of twenty years as a married couple. They had six living children all sons who were all in school. It was a polygamous union and the wife was the second from last. Time factor was very important here because it should be expected that the longer people stay together, the maturer they become so that they learn to tolerate each other. Secondly a very strong bond is drawn between them in that they become very fond of each other and children strengthen this even more.

The wife in this case did not wish to be divorced by her husband. She cried, "I am old. I can not leave my husband. I have not sued the petitioner in the face of all the problems." She also alleged that the husband wanted to divorce all his wives starting with her because he (in his words) wanted to "start life afresh." What time does an old man of 55 years have to start life afresh? And yet because the husband's feelings were paramount, divorce was granted!

A woman's running away from her matrimonial home and going to stay with her parents should not be confused with the English ground of desertion. It may be so if the woman runs away with a lover and it is confirmed by the husband. Lady Summerskill had the following to say of compulsory divorce in England which is very true in Kenyan situation; "It opened the door to the divorce of the chronic sick-together with those who had become incompartment through no fault of their own."

The welfare principle has always been invoked in Customary divorce cases particularly in the custody of children. By this principle, a father who under customary law is as of right entitled to the custody of his children because he is their biological father and legally having fulfilled the formalities of paying dowry for his wife, is not necessarily the only one
entitled to such children, but the mother as well, depending on which party is capable of looking after the children properly. But stripe the principle off its cloak and you will find that people have come to regard divorce as a matter of convenience. It can easily be arranged between parties and therefore they can pursue their own selfish ends rather than the interests of their children. The woman for instance may envisage it as a means of boosting her purse if she gets the children's custody as the husband will be under an obligation to maintain her and the children. The man may see it as a means of marrying as many wives as possible without necessarily falling under the obligation that a polygamous union might have put him into under Customary law!

Even the African widows today have a remedy in court which enables them to do away with the levirite union. She can obtain divorce in Court if she is inherited against her will. Indeed it is very erroneous to say that the African widow is inherited against her will because the practice was and is that a widow is free to choose from her dead husband's male relatives who should inherit her. Consequently the important role played by the levirite institution is belittled and the whole concept that death does not constitute divorce in African Marriage becomes meaningless. It should be understood that widow inheritance does not constitute a fresh marriage contract but that it is a continuation of the earlier marriage so that the procreative role of a dead husband is carried on by his male relative. It should also be born in mind that these same courts that profess to apply customary law are not bound by the customary law they purport to apply. They are merely "guided by it". The District Magistrates' courts as it has been pointed out are the ones that have jurisdiction in all claims under customary law. The question arises as to whether the Luo traditional Court of elders is a "competent" court for the purposes of the magistrates Courts Acts 1967 and also whether its decrees on marriage issues are valid.
If we accept what Engel says to be true that "the western moral standards like all other standards are recognised in theory and on paper but simply ignored in practice!" then the imported courts do not serve any purpose as far as our family institutions are concerned and therefore they are best forgotted and a resort should be made to our traditional courts with their living foundations!
CONCLUSION

The writer has shown the pattern of the Luo family life. She has by laying emphasis on the important institutions affecting it also shown the Luo philosophy of life. The discussion has also shown that the pattern is undergoing changes as a result of outside influences which are becoming more acceptable thereby retarding the growth of our own customs and tradition. It is the acceptability of these influences that the writer is most concerned with in this part.

In the chapter concerning 'Divorce' the writer has shown that the word itself is not appropriate in a Luo marriage. To the Luos, there is no permanent dissolution of a marriage and even death does not create it. There is no divorce by consent under the traditional legal system. A very intricate procedure must be followed as shown before a couple can be separated under the traditional system. Very important issues like the existence of the children, refund of dowry, alternative remedies make divorce in its modern context impossible. Marriage and therefore Divorce is not an individual's affair under the traditional legal system. Yet because we have accepted the imported western legal system to operate alongside our own traditional legal system, it has been shown in the previous chapter that one has to bow-down for the other in case of conflicts and that the one which is always forced to bow-down is our own traditional system!

Divorce therefore under the western legal system with its hierarchy of courts has borrowed some assumptions which do not exist under the traditional legal system. It has been assumed that there are grounds for divorce under customary law that are analogous to the English grounds. Yet there is only one ground for divorce - that is that a marriage has irreparably broken-down! It has also been assumed that the institution of dowry no longer serves its purpose for the Africans therefore should also not be considered as the only effective means of dissolving a marriage.
Divorce has become cheap to obtain in the Western Courts for the complex procedures under customary law are best forgotten since these courts and statutes embody western values of a people totally different from us and who are not prepared to accept that we also have values suitable to our circumstances yet as Ogot says "All social institutions in Africa - the family, clan, religion and Kinship have traditions, living and significant traditions which embody the ideals and values of a culture...." 3

It is even denied that our own religion has any significance in the question of divorce because the section in the constitution which gives every person in Kenya the freedom of religion which includes the right "both in public and in private to manifest and propagate his religion or belief in worship, teaching, practice and observance" does not cover African customs and is therefore not "relevant to marriage or divorce in accordance with customary law as "these are not essentially religious in nature." 4 The mud is further slung at our practices when the commission on the law of marriage and divorce recommends that there be no divorce except if granted by a court of competent jurisdiction." 5.

Divorce is increasingly becoming an individual arrangement. The writer's question is: why at all the state intervenes and why can't it be like any other civil suit! And since it is so individual, principles like the welfare principle in the custody of children is like all other principles and concepts under the western 'legal system exploitative machineries.

The writer's understanding of modern divorce is that it severs completely any ties between a husband and wife so that cohabitation of the two cannot be resumed at all in future. The couple are thrown back to their status of bachelor-spinister so that they are free to contract fresh marriages. But of what value is this to a Luo couple who by their marriage a strong bond which even death cannot untie exists? It is very tragic that a Luo woman should be faced with a dilemma when she accepts the imported court as the best machinery to discuss her marital problems! Because divorce is now easy to obtain in the Court, the marriage institution is no longer the sacred institution.
It becomes a temporary get-together for the young generation. To this generation marriage has come to be Plato's idea in the Republic in which man and woman come together to procreate children as members of a community without any individual family life, a community in which no child will know its own father. The consequences of this attitude are of course many. The writer agrees with Lord Denning that "For the sake of civilization the future of the country depends on the way in which children are brought up. They are best brought up in the happiness and security of a sound family life. This in turn rests on the maintenance of the marriage institution."

The writer has repeatedly emphasised that marriage is the legal foundation of the family life which is a social unit of any given society and that the binding force that cemented it is the principle of indissolubility. Yet the modern State has abandoned this principle thereby prescribing law for divorce that bear far graver consequences that were foreseen and not permitted by our traditional elders.

And because of this today marriage looks like a castle built on sand which is being eaten away by the encroaching tide of divorce and only waits for the next big wave or two before it is washed away.

The western culture has alienated the Africans from their own traditional schools so that they contract marriages without the mature outlook to life, a gift that our fathers and mothers were fortunate to inherit which prevented the breakage of so many marriages!

And so even the elders of the community today like the courts of law do nothing but harm for they really know little of the marriages contracted by young people, they have very little say in the formalities of the marriage itself since we have adopted the English principle of consent between the individual persons to a marriage. Secondly the marriages today tend to be mixed marriages. Hence the elders really don't have any background which will enable them to come out with concrete findings. And all these are because we have accepted the Western values without necessarily modifying them to suit our local circumstances.
We have also instead of engaging the African personnel in the field of research of our customary laws with a view to reform, favoured foreign personnel who base our laws on the western understanding of a good law without taking into account the social background of the people to be governed by these laws! The same foreign researchers have come out with views that customary law and practices are fast-dying out and therefore they should not be codified as to do so would hinder national development.

Finally the writer's view is that people's attitudes do not change overnight and that any attempts to do so radically only helps in recoiling them back to their old traditions. The family in particular is a very important institution in the African life and it will be a long time before the various institutions within it come into disuse. And because of this the writer strongly feels that if the Courts today are to be the effective machinery in the handling of customary law issues, then it should comprise of judges who have keen knowledge and appreciation of the social setting of the customs. In other words they should have a sound grasp of the philosophy of the people they are trying. The test for good or bad law should not be in the form in which it appears in law books but in its actual functioning in society. For law to the Luos as stated by one man is "the enterprise of subjecting human conduct to the governance of rules with a view to enabling members of that society to realise the good life as perceived by that society". Reform of the law can also be effective only if it is carried out taking into account the people's social background. And since reform aims at providing a uniform law for the given community, it is in that community's interest that every individual should be an active participant in the reform. Hence every member of a given community, right from the rural, district up to national level should equally contribute to the improvement of their own laws. It should therefore not be a monopoly of lawyers to carry out reform of law. The writer also feels strongly that literature is the best machinery for the preservation of our customs and traditions for it will involve a lot of research in
order to write a good book and when writing one gets very involved, freely expressing his innermost feelings which is not possible if one were made to write under pressure. Whatever the outcome, it will be the true view of a people's life.
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<td>Abel Richards</td>
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FOOT-NOTES

GENERAL INTRODUCTION

1. The writer's parents bought land and moved to Musanda (Luo) Sub-Location, South Wanga Location, Kakamega District in Western Province.

2. This is a system of collective farming of each family's plots in turn. It is normally composed of two groups i.e. the group of old women and a group of youths. The family for whom the Wagur work are under an obligation to provide them with food and bathing facilities if necessary. Usually the breakfast-lunch is composed of porridge made with sour milk and sweet potatoes or maize and beans - 'Nyoyo'. And if one can afford meat or nicely prepared vegetables and huge ugali are made for lunch - proper. The giving of good is a sign of gratitude for the sweaty toil of the working group. It is an encouragement for the people themselves to render ready services anytime it is wanted by the particular family who hosted them so well.
3. Oginga Odinga - Not Yet Uhuru - Chapter I. Pg. 5


5. Oginga op cit at page 64.

6. Dwoko - Immediately after the pulling of a girl.

   Lupo - People from the husband's home follow the woman to her home with food and beer, but with a view of finding out why their 'wife' has not returned to her husband.

   Sepo - The woman is finally escorted by her parents and relatives back to her husband to stay there permanently. This happens only if quite a substantial amount of dowry has been paid. It represents the modern wedding. The woman is escorted by a jubilant group of singing women and men and with all gifts that her people can afford. A lot of feasting goes on at the husband's home for several days during which the new wife is not supposed to eat any vegetables but meat only. It is therefore the duty of the husband and her in-laws to slaughter the meat for her.

   Riso - This is the final and conclusively binding ceremony. It is subject to the condition that it can only be performed for the woman if the same has been done for her mother. It is conducted at the husband's home and the parents-in-law, brothers-in-laws and the husband, all join in welcoming the new wife as a member of their household and shower her with gifts. This ceremony takes place after a long period, for dowry must all have been paid. And so in some cases very old women undergo the ceremony before they die.

7. These are a group of women and young girls who follow a girl after one has been pulled into the man's home. They were present at the defloweration ceremony (i.e. the break-up of the girl's virginity) and returned with good news to the parents of the girl the same night singing all the way. Today occasionally one can see them passing-by, singing the old humorous songs but which are now offending to the Christian ears! A girl that was proved a virgin brought a lot of respect and fame to her parents. They were crowned by the village and smeared with ash as a symbol of honour and good upbringing.

8. It is the main Luo dish made from grounded maize or millet mixed with cassava. It is usually eaten with green vegetables, meat, fish or chicken which is a very special dish.
9. Chicken is very much valued by the Luos so that it is not often cooked for the family but is reserved for very special occasions like when there are visitors or important ceremonies such as marriage. A Luo visitor who is served with all dishes but in which chicken is excluded feels very much dishonoured!

CHAPTER ONE.

1 (a) The Judicature Act No. 16 of 1967 Sec. 3(2). Also The Magistrates Courts Act No.17 of 1967.

1 (b) Constitution No.5/1969 : Sec. 82(4)
Also Evidence Act Cap. 80

1 (c) Act No.16/1967 Sec. 3(2)

1 (d) Wasserman Journal of Commonwealth Political Studies (1973) Pages 98 - 120.


3. Sawyerr - Senior Lecturer, Faculty of Law, University of Ghana.

4. Sawyerr - Customary law in the High Court of Tanzania 6EALR 265 at page 267.


7. Sawyerr op cit - Introduction.

8. Judicature Act Sec. 3(2)


11. Sawyerr - Internal conflicts of law, in law and social change in East Africa Page 136.

12. Rex v Amkeyo (1917) 7EALR 14,16.

13. Sec.122 - Evidence Act (Cap.80)

14(a) Marriage Act Cap. 150 Sec. 35.


16. Oginga Odinga - Supra - Chapter 3 Page 59.


CHAPTER TWO

1. John S. Mbiti - Dr. of Philosophy at Makerere University.


5. Amulan Ojwang v Edward Ojok - monthly Bulletin of Judgement orders of High Court of Uganda, Jan.1971. See also Nathaniel Omondi v Chuma Nyafula (1972) KHD 91


7. Oginga Odinga - Supra - at page 63.

8. Mbiti J.S. Supra - Chapter 18, Page 216


CHAPTER THREE

1. It is a short hook-like thorn found in the bark of one specie of the cactii trees that grow in East Ugenya Location. The tree is known in Luo as "Ogongo".

2. ODERO - RESIDENT MAGISTRATE (RM) IN THE Civil Case No. 3 of 1973. In the Rm's Court at Kisumu.

3. Malinwoski as quoted by Whisson M.C. in the "Will of God and the wiles of Men - a paper which was prepared by the E.A. Institute of Social Research, Makerere University, and read at a conference held in Limuru (Kenya) in 1962 by the same author.

4. See No. 6 - General Introduction.


6. The respective parents are expected to have sexual intercourse at the same time with their wedded children on their first night together. And even if one spouse (of the old couple) is dead the remaining spouse will symbolically imitate the sexual act.


8. Kager are a large clan who are decendants of six ancestors that were brothers and sisters. They are the majority of Ugenya Luos. The name is self explanatory in that it refers to the fierceness of this clan not only during the tribal warfares but also generally in their way of life. They strictly adhere to clan rules, so that any offenders of the rules of the clan are promptly brought to justice.


In this case the plaintiff petitioned for divorce against her husband on the ground of excessive violence when beating her.
It was held that customarily the elders will arbitrate on the basis of visible damage done to the woman, if for example she has lost teeth, the husband will be expected to give her a heifer to compensate the loss.

11. Op cit No. 9(a)
12. Civil case No. 31/1975 D.M's Court at WINAM, Kisumu
15. Sec. 3(2) Judicature Act 1967.
16. Act No. 17 of 1967 Sections 2 – 10

CONCLUSIONS

4. Section 78 of the Constitution – as interpreted by the Commission on the Law of Marriage & Divorce at Chapter 2.
5. Recommendation No. 110 of the Commission.
7. Lon Fuller – Morality of Law at Page 96.